BRB No. 99-1335 BLA

WILLIAM E. WALSH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
READING ANTHRACITE COMPANY, INCORPORATED	)	
	)	
	)	
and	)	
	)	DATE ISSUED:_____
OLD REPUBLIC INSURANCE 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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0258) of Administrative Law Judge Robert D. Kaplan 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). Initially, the administrative law judge, applying the regulations at 20 C.F.R. Part 718, credited the miner with twenty years of coal mine employment pursuant to the parties' stipulation. Director's Exhibit 110 at 3. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) and insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Director's Exhibit 110 at 5-10. Accordingly, benefits were denied on November 30, 1992. Director's Exhibit 110 at 11.

Claimant appealed this denial to the Benefits Review Board on December 28, 1992 and subsequently filed a Motion to Remand so that he could pursue modification proceedings. Director's Exhibits 111, 118. The Board granted claimant's request and forwarded this case to the district director on March 30, 1994. Director's Exhibit 119. The district director denied claimant's request for modification on December 12, 1994. Director's Exhibit 123. Claimant requested a hearing, and the claim was transferred to the Office of Administrative Law Judges. Director's Exhibit 128.

On modification, the administrative law judge assumed that claimant had established a change in conditions and found that claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310(a). Director's Exhibit 140 at 3, 5-6. The administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1), but that claimant failed to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204. Director's Exhibit 140 at 4-7. Accordingly, the administrative law judge denied benefits on July 29, 1996. Director's Exhibit 140 at 7. On June 24, 1997, claimant again requested modification, which the district director denied, and claimant requested a formal hearing. Director's Exhibits 141, 150, 152.

On second modification, the administrative law judge found a change in conditions pursuant to Section 725.310(a) based on his finding that the new evidence is sufficient to

[1]Claimant is William E. Walsh, the miner, who filed his claim for benefits on April 8, 1991. Director's Exhibit 1.

establish total respiratory disability pursuant to Section 718.204(c). Decision and Order at 6. Considering all of the evidence of record, the administrative law judge found the existence of pneumoconiosis, citing *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Decision and Order at 9. Additionally, the administrative law judge found that the miner's pneumoconiosis arose out of his coal mine employment and that his total disability was due to pneumoconiosis. Decision and Order at 10. Accordingly, benefits were awarded, commencing May 1998.

On appeal, employer contends that the administrative law judge abused his discretion in failing to consider the opinion of Dr. Levinson. Employer's Brief at 13-17. Employer also asserts that the administrative law judge erred in finding a change in conditions pursuant to Section 725.310(a) by finding total respiratory disability based on Dr. Kraynak's opinion, which employer contends is unreasoned and unsupported by reliable medical evidence. Employer's Brief at 17-23. Lastly, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established at Section 718.202(a) and total disability due to pneumoconiosis established at Section 718.204(b). Employer's Brief at 23-28. The Director, Office of Workers' Compensation Programs (the Director), responds that he disagrees with employer's assertion that "a pre-existing totally disabling heart disease precludes claimant from receiving benefits under the Act." Director's Brief at 1. Employer has filed a reply brief. Claimant filed a cross-appeal, which the Board dismissed on February 11, 2000.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends, citing *Strozier v. U.S. Pipe & Foundry Co.*, 2 BLR 1-87 (1979), that the administrative law judge erred in excluding Dr. Levinson's report from the record. Employer's Brief at 13-17. The relevant facts regarding employer's submission of Dr. Levinson's report are as follows. At the December 30, 1998 hearing, employer objected to a pulmonary function study, dated June 18, 1998, proffered by claimant. Hearing Transcript at 12. Employer objected to the admission of this pulmonary function study because it never received the original which it needed to obtain a reading of the study from its physician. Hearing Transcript at 12. In support of its position, employer referred to a Motion to Enlarge

[2]We affirm the administrative law judge's findings pursuant to Section 718.203(b) and regarding the date of entitlement to benefits inasmuch as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

which it submitted on August 7, 1998 and in which it requested sixty days to perform a physical examination on claimant and to get a reading of the June 18, 1998 pulmonary function study. Hearing Transcript at 12-16. The basis for employer's motion was that it never received the original of the June 1998 study and, therefore, could not submit evidence by the administrative law judge's discovery cutoff date, August 21, 1998. Hearing Transcript at 14. Upon hearing that employer filed a Motion to Enlarge, the administrative law judge handed employer the original of the pulmonary function study and granted employer sixty days following the hearing to review the June 1998 pulmonary function study and to get an examination of claimant by Dr. Levinson. Hearing Transcript at 16-17. In light of the foregoing, employer withdrew its objection to the June 1998 study. Hearing Transcript at 17.

Claimant, however, objected to the administrative law judge allowing employer another chance to submit an examination by Dr. Levinson. Hearing Transcript at 18. Claimant's counsel stated that claimant was scheduled for an examination on August 7, 1998. *Id.* Prior to that date, employer contacted claimant's counsel to cancel the examination and stated that a new examination would be rescheduled, but claimant's counsel never heard from employer about rescheduling the examination. *Id.* Employer responded that it did not attempt to reschedule the examination because the administrative law judge issued an order ending discovery and employer, therefore, had to formally request an enlargement of time. *Id.* Employer stated it would have rescheduled claimant's examination when employer received notice of the administrative law judge's ruling on its Motion to Enlarge. Hearing Transcript at 22. The administrative law judge questioned why employer did not follow up with him for a response on the Motion to Enlarge when employer received the Notice of Hearing. Hearing Transcript at 23-25. Nonetheless, the administrative law judge concluded that since he "should have made it more clear that the production of evidence deadline was extended" and had not done so in the Notice of Hearing, he would allow employer an opportunity to obtain an examination of claimant. Hearing Transcript at 26-27. In light of claimant's objection, the administrative law judge allowed both sides the opportunity to submit a new examination within sixty days from the date of the hearing, which was on March 1, 1999. Hearing Transcript at 27-31. The administrative law judge also allowed thirty additional days for each side to review the other side's new examination reports. Hearing Transcript at 31.

On March 10, 1999, claimant's counsel sent a letter to the administrative law judge stating that counsel was unaware of any reports or a request for an enlargement of time submitted by employer. Claimant's Exhibit 21. Therefore, claimant requested that the administrative law judge close the record and set a briefing schedule. *Id.* Thereafter, employer submitted Dr. Levinson's March 14, 1999 report to the administrative law judge on March 16, 1999. On March 17, 1999, employer sent a letter to the administrative law judge requesting an extension of time in which to submit Dr. Levinson's report (Employer's Exhibit 6) because this report had not yet been received by employer. By letter dated March 18, 1999, claimant objected to the late submission of Dr. Levinson's report and moved to

strike the examination and testing contained in that report. On March 23, 1999, the administrative law judge admitted Dr. Levinson's opinion into the record and denied claimant's objection to its admission. The administrative law judge issued an order closing the record on June 7, 1999 and setting a briefing schedule.

On June 15, 1999, employer submitted an interpretation of the August 11, 1998 x-ray. Claimant objected to this x-ray interpretation and renewed his objection to Dr. Levinson's report in a letter dated June 30, 1999. The administrative law judge issued an Order Sustaining Objection to Employer's Evidence on July 20, 1999. Administrative Law Judge's Exhibit 1. In his order, the administrative law judge stated:

> I regret to say that my orders of March 23 that allowed Employer to file EX 6 belatedly were precipitously issued. I failed to take into consideration the facts that (1) the parties were allowed sixty days from December 30, 1998 - i.e., until March 1, 1999 - to submit their evidence of a new examination, and (2) Employer submitted EX 6 more than two weeks beyond the deadline and did not file a motion for an extension of time until the day after EX 6 was submitted. Further, Employer has failed to provide any explanation regarding why it did not file a timely request for an extension of the sixty-day filing deadline. Finally, Employer's contention that Claimant was not prejudiced because he received the same reports that Employer possesses is, simply, disingenuous.

Administrative Law Judge's Exhibit 1. Therefore, the administrative law judge found claimant's objection to these documents to be "meritorious" and excluded from the record Dr. Levinson's examination of claimant and the reports of the laboratory studies and x-ray performed on that date. *Id.* Employer, subsequently, requested reconsideration of the

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[3]Additionally, claimant moved to strike the readings of the August 11, 1998 x-ray by Drs. Scott and Wheeler (Employer's Exhibit 7) submitted by employer on April 9, 1999 and the readings of the same x-ray by Drs. Duncan, Laucks, and Soble (Employer's Exhibit 8) submitted by employer on May 20, 1999. The basis for claimant's motion was that there was no indication that the administrative law judge intended to extend the record for these other submissions. The administrative law judge did not address claimant's motion in his July 20, 1999 order, but indicated in his Decision and Order that Employer's Exhibits 7 and 8 were admitted into the record. Decision and Order at 3 n.3. However, the administrative law judge also noted in his Decision and Order that he would only consider Employer's Exhibit 7 because at the hearing he permitted the parties to submit no more than three interpretations of each x-ray, Hearing Transcript at 9-11. Decision and Order at 8. The administrative law judge further noted that employer, in keeping with this restriction, only relied on Employer's Exhibit 7 in its post-hearing brief. *Id.*

administrative law judge's order. On August 23, 1999, the administrative law judge denied employer's request to have Dr. Levinson's report included in the record. Administrative Law Judge's Exhibit 2. The administrative law judge stated that employer again has failed to "explain why it failed to file a request for an extension of time until well after the expiration of the deadline." *Id.*

On appeal, employer cites *Strozier* in support of its position that the administrative law judge abused his discretion in failing to admit Dr. Levinson's report because, as was similarly the case in *Strozier*, the evidence is clearly relevant and claimant was not surprised by employer's submission of this evidence. Employer's Brief at 13-15. In *Strozier*, the evidence which the hearing officer excluded from the record was the medical evidence upon which the United States Department of Labor [DOL] based its interim payment of benefits to claimant. The Board held that the hearing officer erred in failing to admit this evidence because it was extremely probative and the parties were not surprised by it because they were aware of the evidence prior to the hearing. *Strozier, supra*. The Board stated that other compelling circumstances in this case included the fact that DOL was the sole holder of the evidence and that claimant's attorney was previously told that the evidence had been sent to the hearing officer. *Id.* Employer's reliance on *Strozier* is misplaced inasmuch as the facts of that case are extremely different than those in the present case and, therefore, we hold that *Strozier* does not support a challenge to the administrative law judge's actions in this case.

Employer next asserts that the administrative law judge's interpretation of the schedule for admission of evidence which he gave at the hearing changed over time and was less than a model of clarity. Employer's Brief at 15-16. At the hearing, the administrative law judge allowed both sides to submit a new examination within sixty days from the date of the hearing, which was March 1, 1999, and allowed thirty additional days (until March 30, 1999) for each side to submit rebuttal evidence. Hearing Transcript at 27-31. Employer, however, asserts that at the hearing the administrative law judge did not specify any evidence needed to be submitted to him prior to the ninety day deadline. Employer's Brief at 15. Therefore, employer argues, the administrative law judge's interpretation of his oral order changed when he issued his July 20, 1999 order because he then required Dr. Levinson's report to be submitted within sixty days. *Id.* In other words, employer contends that while it did not timely submit Dr. Levinson's report to claimant's counsel, it timely submitted the report into the record within the ninety day deadline, and, therefore, the administrative law judge should have admitted it. Employer's Brief at 16.

Employer's assertion is clearly without merit for the following reasons. First, if employer's counsel thought the administrative law judge's order was ambiguous at the hearing, or thereafter, he should have asked the administrative law judge to clarify it. Second, if employer perceived that Dr. Levinson's report was timely if submitted by March 30, 1999, employer would not have requested a thirty day extension to submit this report in a letter dated March 17, 1999. Third, if employer took the position that it understood the

deadline for timely submission of evidence to be March 30, 1999, not March 1, 1999, it is unclear why employer did not assert this position prior to its appeal to the Board.

Employer additionally contends, citing *Pendleton v. U.S. Steel Corp.*, 6 BLR 1-815 (1984), that it provided a good excuse for not complying with the sixty day provision of the administrative law judge's order by representing that it had not received the physician's report by that date. Employer's Brief at 16-17. Employer's assertion is unpersuasive. In *Pendleton*, claimant submitted a report only two days after the record closed. In this case, employer waited over two weeks to submit Dr. Levinson's report and failed to contact the administrative law judge or claimant's counsel to inform them of the reason for the delay prior to that time.

Lastly, employer asserts the administrative law judge erred when he reconsidered his previous decision to admit Dr. Levinson's report almost three months after his original order making it a part of the record because 20 C.F.R. §725.479 provides that "motions for reconsideration be considered within thirty days" of the date of the original decision. Employer's Brief at 17. Because Section 725.479 appears to be applicable only to final decisions and orders and because the administrative law judge retained jurisdiction over this case by not yet issuing his final decision and order, we reject employer's contention.

Thus, given the facts of this case and because "an administrative law judge is afforded broad discretion in dealing with procedural matters," *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *see also Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985), we reject employer's assertions and hold that the administrative law judge's determination to exclude Dr. Levinson's report and diagnostic tests was rational, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), and not an abuse of his discretion.

Pursuant to Section 725.310(a), employer asserts, citing *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (1997), that the administrative law judge erred in failing to determine whether the newly submitted evidence, compared with the old evidence, was sufficient to demonstrate that claimant's condition actually worsened subsequent to the denial of modification in July 1996. Employer's Brief at 17-19. The administrative law judge found that the new evidence of record establishes total respiratory disability pursuant to Section 718.204(c) based on Dr. Kraynak's 1998 opinion. Decision and Order at 6. Because claimant had not previously established total respiratory disability, the administrative law judge found a change in conditions established subsequent to the prior denial. *Id.* We reject employer's contention that the administrative law judge, in essence, relied upon an inappropriate *presumption*, namely that the mere submission of new evidence which establishes an element of entitlement previously adjudicated against claimant proves that claimant's condition has changed (worsened) since the denial of benefits. In finding that the newly submitted evidence was more probative than the evidence considered in the prior

claim due to the progressive nature of pneumoconiosis, Decision an Order at 10, and that this evidence was sufficient to establish an element of entitlement previously adjudicated against claimant, the administrative law judge implicitly determined that the newly submitted evidence demonstrated that claimant's condition had changed. Thus, employer is not correct in asserting that the administrative law judge relied upon an improper presumption in finding that claimant established one of the prerequisites for modification under Section 725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990); *see also Keating v. Director, OWCP*, 71 F.3d 1118, 20 BLR 2-53 (3d Cir. 1995).

Employer next asserts that the administrative law judge erred in relying on Dr. Kraynak's opinion to find a change in conditions and total respiratory disability due to pneumoconiosis because this physician's opinion is unreasoned and undocumented. Employer's Brief at 19-23, 26-27. Pursuant to Section 725.310 and Section 718.204(c), the administrative law judge noted that Dr. Kraynak testified at his 1998 deposition that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. Decision and Order at 6. The administrative law judge further noted that:

> Dr. Kraynak testified that he had been treating Claimant, and that Claimant reported symptoms of shortness of breath, productive cough, and difficulty walking due to shortness of breath. The physician's positive clinical findings were cyanotic lips and scattered wheezes. Dr. Kraynak also referred to Claimant's coal mine employment history and several of the current qualifying ventilatory studies.

Id. The administrative law judge stated that it would be incorrect to discredit Dr. Kraynak's report solely because he relied on invalid pulmonary function studies. Decision and Order at 6. The administrative law judge further stated that "in addition to pulmonary function studies, Dr. Kraynak relied on his clinical findings and Claimant's symptoms, which are supportive of his opinion." *Id.* Therefore, the administrative law judge found Dr. Kraynak's opinion that claimant is totally disabled to be "reasoned." *Id.* Because no current evidence contradicts Dr. Kraynak's opinion, the administrative law judge concluded that this new evidence establishes total disability and, therefore, a change in conditions. *Id.* In considering whether the evidence as a whole establishes total disability, the administrative law judge noted the progressive nature of pneumoconiosis, stated that he considered the evidence prior to his 1996 Decision and Order to be "of limited value in determining whether claimant is disabled at this time," and concluded that "based on the current evidence as discussed above," claimant is totally disabled. Decision and Order at 10.

Pursuant to Section 718.204(b), the administrative law judge stated that Dr. Kraynak's May 1998 opinion that claimant is totally disabled by pneumoconiosis "is uncontradicted by any contemporaneous evidence of record" and that Dr. Kraynak took the miner's coronary

condition into consideration in rendering his opinion. Decision and Order at 10. Accordingly, as the administrative law judge found Dr. Kraynak's opinion to be "reasoned" and "unrefuted by any current evidence," he concluded that claimant established total respiratory disability due to pneumoconiosis based on Dr. Kraynak's opinion. *Id.*

Employer contends, citing *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990) and *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997), that Dr. Kraynak's opinion is insufficient as a matter of law to support a finding of total respiratory disability inasmuch as this physician based his conclusions solely on pulmonary function studies found to be invalid by the administrative law judge. Employer's Brief at 20-23. Specifically, employer asserts while Dr. Kraynak claims his conclusions are based on more than the invalid pulmonary function studies, he does not "specify or explain how any of his clinical findings or other evidence" support his finding of total disability due to pneumoconiosis. Employer's Brief at 21-22, 26. Employer further asserts that claimant's symptoms of shortness of breath, increased AP diameter, scattered wheezes, and cyanotic lips are non-specific and, without more elaboration, do not necessarily establish total respiratory disability. Employer's Brief at 20, 22-23.

Dr. Kraynak testified that he had been treating Claimant, and that Claimant reported symptoms of shortness of breath, productive cough, and difficulty walking a distance of one-half block or up several steps due to shortness of breath. Claimant's Exhibit 2 at 5. Dr. Kraynak further stated that the miner's positive clinical findings were cyanotic lips and scattered wheezes and that claimant's complaints of exertional dyspnea, shortness of breath, and walking and climbing steps have gotten worse over the past few years. Claimant's Exhibit 2 at 5, 10. Dr. Kraynak also testified that he based his findings on his "continuing care and treatment of [claimant], his occupational, social, medical and complaint histories, [his] own physical examinations," and his past and current medical records and diagnostic testing. Claimant's Exhibit 2 at 7-8.

Given Dr. Kraynak's testimony and the administrative law judge's discussion, we vacate the administrative law judge's findings at Section 725.310 and Section 718.204 and remand this case for the administrative law judge to elaborate on why he found Dr. Kraynak's opinion to be reasoned and supportive of total disability due to pneumoconiosis, in light of Dr. Kraynak's invalid pulmonary function studies. *See Lango, supra*; *Siwiec, supra*. On remand, we instruct the administrative law judge to explain his rationale for finding that Dr. Kraynak's clinical findings support his conclusion that claimant is totally disabled due to pneumoconiosis. *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Additionally, employer contends that the administrative law judge erred in relying on Dr. Kraynak's opinion to find that claimant's total respiratory disability was due to his

pneumoconiosis inasmuch as Dr. Kraynak was unaware that the miner's heart condition was totally disabling and such evidence that a miner was totally disabled by a non-respiratory condition removes him from coverage pursuant to the Black Lung Act. Employer's Brief at 26-28. Employer cites *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) to support its position. Employer's Brief at 27-28.

Dr. Kraynak testified that claimant has had no continuing complaints or symptoms of his heart attack since October 1990 and that claimant's heart condition is stable and plays no significant role in his disability. Claimant's Exhibit 2 at 8, 15. Dr. Greco, who is treating the miner for his heart condition, opined that claimant's major debility is from his diminished pulmonary capacity stemming from his underlying coal workers' pneumoconiosis rather than significant limitation from his asymptomatic coronary disease. Claimant's Exhibit 4.

The administrative law judge reasonably, *see Tackett, supra*; *Calfee, supra*, considered the new evidence most probative regarding the issue of total disability given the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Freeman United Coal Mining Co. v. Hilliard*, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995). Because this new evidence, as discussed above, does not provide any support for employer's assertion that claimant was also disabled by a heart condition, the cases cited by employer which preclude coverage of the Act to miners who are totally disabled by a non-respiratory condition are inapplicable to this case. Accordingly, we reject this specific contention made by employer with regard to Section 718.204(b), but remand for further findings at Section 718.204(b) pursuant to our discussion above, *see* discussion, *supra*.

Pursuant to Section 718.202(a), employer contends that the administrative law judge erred in finding the evidence established the existence of pneumoconiosis. Employer's Brief at 23-26. Employer first contends that in weighing the x-ray evidence, the administrative law judge failed to consider all of the physicians' qualifications, *i.e.* that both Drs. Wheeler and Scott are professors of radiology and published numerous articles, and that the administrative law judge erroneously relied on numerical superiority. Employer's Brief at 23-25.

The administrative law judge noted that he previously found the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) in his 1996 Decision and Order. Decision and Order at 7. However, the administrative law judge states, as employer

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[4]In its Reply Brief, employer points to a 1991 letter and outpatient notes by Dr. Madigan, indicating that claimant is disabled from his heart condition, Director's Exhibit 133, as support for its proposition that claimant should be precluded from receiving benefits. Employer's Reply Brief at 2.

points out, that he must reconsider together all the medical evidence relevant to pneumoconiosis in light of *Williams*. *Id.* The administrative law judge noted that the new evidence consists of three positive and three negative interpretations of a 1998 x-ray. Decision and Order at 8. Drs. Smith, Ahmed, and Cappiello found the 1998 x-ray to be positive whereas Drs. Goodman, Scott, and Wheeler found it to be negative. Claimant's Exhibits 6, 9, 11; Employer's Exhibits 5, 7. All of the six physicians who read the 1998 x-ray are B-readers and Board-certified radiologists, except Dr. Goodman. *Id.* Dr. Goodman, who interpreted the film as negative, is a B-reader, but not a Board-certified radiologist. Employer's Exhibit 5. Accordingly, the administrative law judge accorded Dr. Goodman's reading less weight and found the 1998 x-ray positive for pneumoconiosis. Decision and Order at 8.

We reject employer's contentions. As directed by the regulations, the administrative law judge properly considered the status of Drs. Wheeler and Scott as B-readers and Board-certified radiologists and was not required to defer to other factors relevant to these physicians' level of radiological competence. *See* 20 C.F.R. §718.102(c); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)*; Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Additionally, by considering the radiological qualifications of the readers, the administrative law judge did not rely solely on numerical superiority in finding the 1998 x-ray to be positive for pneumoconiosis. Decision and Order at 8; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

Pursuant to Section 718.202(a)(4), the administrative law judge found that "the current opinions of Drs. Kraynak and Greco are essentially unrefuted by any current physician's opinion." Decision and Order at 9. Therefore, in weighing all the relevant evidence

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[5]As discussed in footnote 3, the administrative law judge stated that he would not consider the three additional negative x-ray interpretations found at Employer's Exhibit 8 because he ruled at the hearing that "the parties [were] permitted to submit no more than three interpretations of each X-ray. Decision and Order at 8.

[6]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-16 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

regarding pneumoconiosis together, the administrative law judge found "the preponderance of the positive X-ray evidence found in the 1996 Decision and Order and the positive 1998 X-ray, together with the current opinions of Drs. Kraynak and Greco, establishes the presence of pneumoconiosis." Decision and Order at 9. Employer contends that the administrative law judge erred in crediting the opinions of Drs. Kraynak and Greco because neither physician explained his diagnosis. Employer's Brief at 25-26.

Dr. Kraynak testified that he based his finding of coal workers' pneumoconiosis on his continuing care and treatment of claimant, medical and vocational histories, and his physical examinations and diagnostic tests of claimant. Claimant's Exhibit 2 at 7-8. Dr. Greco stated that he has treated claimant since June 1992, but does not cite to any objective evidence to specifically support his finding of pneumoconiosis. Claimant's Exhibit 4. Contrary to employer's contentions, it was not unreasonable, *see Tackett, supra*; *Calfee, supra*, for the administrative law judge to find the existence of pneumoconiosis supported by the current opinions of Drs. Kraynak and Greco inasmuch as both physicians are treating claimant, *see Lango, supra*; *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *see also Berta v. Peabody Coal Co.*, 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), and Dr. Kraynak's testimony that he based his diagnosis of pneumoconiosis on his clinical findings and diagnostic tests of claimant, which would include positive x-ray evidence, Claimant's Exhibit 2 at 5-9, supports his finding of pneumoconiosis, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Therefore, we affirm the administrative law judge's finding that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a), *see Williams, supra*; *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge