BRB No. 00-1070 BLA

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| FERNE L. TROUP<br>(Executrix of the Estate of<br>DELBERT D. TROUP)<br><br>Claimant-Respondent<br><br>v.<br><br>READING ANTHRACITE COAL COMPANY<br><br>and<br><br>OLD REPUBLIC INSURANCE COMPANY<br><br>Employer/Carrier-<br>Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS'<br>COMPENSATION PROGRAMS, UNITED<br>STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

David H. Rattigan (Williamson, Friedberg & Jones), Pottsville, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (91-BLA-0601) of Administrative Law Judge Paul H. Teitler 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).[1] The instant case, involving a duplicate claim filed on

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9,

January 31, 1990,[2] is before the Board for the fourth time. In the initial decision, the administrative law judge, after crediting the miner with forty-nine years of coal mine employment, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge further found that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b) (2000). Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3) (2000), the administrative law judge found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). The administrative law judge also found that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

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2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]The relevant procedural history of the instant case is as follows: The miner initially filed a claim for benefits with the Social Security Administration (SSA) on June 25, 1973. Director's Exhibit 46. The SSA denied the claim on January 18, 1974 and June 13, 1979. *Id.* The Department of Labor denied the claim on September 11, 1981. *Id.* There is no evidence that the miner took any further action in regard to his 1973 claim.

The miner filed a second claim on January 31, 1990. Director's Exhibit 1.

By Decision and Order dated December 27, 1994, the Board, after noting that the administrative law judge had not addressed whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), held that the newly submitted evidence was sufficient to establish a material change in conditions pursuant to the then-applicable standard set out in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992). *Troup v. Reading Anthracite Coal Co.*, BRB No. 92-2015 BLA (Dec. 27, 1994) (unpublished). The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) (2000) and remanded the case for further consideration. *Id.* Although the Board affirmed the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), the Board vacated the administrative law judge's finding that the pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) (2000). *Id.* The Board also held that the administrative law judge erred in failing to consider the contrary probative evidence in determining whether the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.* The Board, therefore, remanded the case to the administrative law judge for further consideration.[3] *Id.*

On remand, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated March 29, 1996, the Board rejected employer's assertion that remand was required for consideration of whether the miner established a material change in conditions under the newly enunciated standard set out in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). *Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996) (unpublished). The Board also rejected employer's contentions of error regarding the administrative law judge's weighing of the evidence under 20 C.F.R. §§718.202(a)(4) (2000) and 718.204(c) (2000). *Id.* The Board reaffirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) (2000) based

[3]The Board also affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.203(b) (2000) and 718.204(b) (2000). *Troup v. Reading Anthracite Coal Co.*, BRB No. 92-2015 BLA (Dec. 27, 1994) (unpublished).

upon the law of the case doctrine. *Id.* The Board, therefore, affirmed the administrative law judge's award of benefits. *Id.*

Employer subsequently filed a motion for reconsideration with the Board. By Decision and Order on Reconsideration dated January 16, 1997, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for consideration of whether the evidence was sufficient to establish a material change in conditions pursuant to the standard set out in *Swarrow*. *Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Jan. 16, 1997) (Decision and Order on Recon.) (unpublished).

The administrative law judge, in a Decision and Order on Remand dated September 10, 1997, denied employer's motion to reopen the record.[4] Although the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000), the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). The administrative law judge, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). In his consideration of the merits of the miner's 1990 claim, the administrative law judge addressed all of the evidence of record and found that the miner was entitled to benefits.[5]

[4]By Order dated July 2, 1997, the administrative law judge had earlier denied employer's motion to consolidate the miner's claim with claimant's recently filed survivor's claim.

[5]The administrative law judge subsequently issued an Errata on October 9, 1997. The administrative law judge had mistakenly indicated that claimant had sought to reopen the record. The administrative law judge clarified that employer, not claimant, had sought a reopening of the record.

Employer filed an appeal with the Board.[6] By Decision and Order dated November 15, 1999, the Board rejected employer's contention that the one-element standard set out in *Swarrow* was invalid. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*). The Board also rejected employer's assertion that the administrative law judge's refusal to reopen the record on remand was an abuse of discretion which violated fundamental fairness and employer's right to due process. *Id.* In regard to employer's contentions regarding the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000), 718.204(c)(2) and (c)(4) (2000) and 718.204(b) (2000), the Board held that the law of the case doctrine was controlling. *Id.* The Board, however, agreed with employer that it was necessary to remand the case to the administrative law judge to weigh the evidence concerning the existence of pneumoconiosis in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). The Board, explained that:

> In *Williams*, the Third Circuit held that an administrative law judge must weigh all types of relevant evidence together at Section 718.202(a)(1)-(4) to determine whether claimant suffers from pneumoconiosis. In the instant case, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(3), but found it sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). However, an examination of the administrative law judge's decision reveals that the administrative law judge did not weigh all of the relevant evidence together to determine whether claimant has established the existence of pneumoconiosis in accordance with *Williams*. Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a), and remand the case to the administrative law judge for further consideration of the evidence in compliance with the requirement established in *Williams* that all types of relevant evidence must be weighed together to determine whether claimant suffers from

[6]After employer filed its appeal with the Board, claimant filed a "Notice and Suggestion of Death of Claimant" with the Board. Claimant requested that the Board change the caption in the case to reflect Ferne L. Troup as the Executrix of the Estate of Delbert D. Troup (the miner) who died on October 13, 1996. By Order dated February 3, 1998, the Board granted claimant's request and changed the caption of the case to identify Ferne L. Troup, the executrix of the Estate of Delbert D. Troup, as claimant. *Troup v. Reading Anthracite Coal Co.*, BRB No. 98-1043 BLA (Feb. 3, 1998) (Order) (unpublished).

pneumoconiosis.

*Troup*, 22 BLR at 1-22.

The Board further vacated the administrative law judge's finding that claimant established a material change in conditions at Section 725.309. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*). The Board further instructed the administrative law judge that should he find a material change in conditions established, he must consider whether the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a) on the merits. *Id.* The Board finally vacated the administrative law judge's finding of total disability at 20 C.F.R. §718.204(c) (2000). *Id.*

On remand, the administrative law judge declined employer's request to reopen the record for the submission of additional evidence. The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge, therefore, found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[7] In his consideration of the merits of claimant's 1990 claim, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. 718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in refusing to reopen the record on remand. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000), 718.202(a) (2000) and 718.204(b) and (c) (2000).[8] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

[7]Although Section 725.309 has been revised, these revisions only apply to claims filed after January 19, 2001.

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer initially contends that the administrative law judge erred in refusing to reopen the record on remand. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). An administrative law judge is also afforded discretion in dealing with matters of fairness and judicial efficiency. *See Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984).

When this case was most recently remanded,[9] employer sought to admit evidence developed in connection with the survivor's claim.[10] Employer indicated that it was requesting a reopening of the record "because failure to do so could result in an award of benefits without considering all of the relevant and probative evidence." Employer's Remand Brief at 12. After reviewing employer's proffer of evidence, the administrative law judge found that the new evidence did not persuade him that a contrary result would obtain. 2000 Decision and Order on Remand at 3. The administrative law judge further found that the documentary evidence currently in the record was sufficient and that further development of the evidence was not warranted. *Id.* Having concluded that the interests of justice would

[9]This is not the first time that employer has attempted to supplement the record. In its previous appeal to the Board, employer asserted that the administrative law judge had erred by refusing to reopen the record in order to permit it to supplement the record in light of *Swarrow*. The Board rejected employer's contention, holding that *Swarrow* did not compel a reopening of the record in order to satisfy due process and fundamental fairness. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*).

[10]Although the proffered evidence is not found in the record, employer characterizes the evidence as consisting of "treatment notes, hospital records, pulmonary function studies and x-rays that are more current than any of the evidence currently in the record." Employer's Remand Brief at 12. Employer notes that the evidence is from 1994 to 1996. *Id.* Employer further notes that pulmonary function studies from 1994 are non-qualifying and reveal values consistent with the valid non-qualifying pulmonary function studies conducted in 1990. *Id.* at 13. Employer also alleges that the treatment notes reveal that the miner was not being treated for any pulmonary problems, but for serious heart problems which eventually led to his death. *Id.*

not be served by further evidentiary development, the administrative law judge declined to reopen the record. *Id.* at 3-4. Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in refusing to reopen the record on remand. *Clark*, *supra*.

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Section 725.309 provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309 (2000). The United States Court of Appeals for the Third Circuit has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Swarrow*, *supra*. Claimant's prior 1973 claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 46. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must establish the existence of pneumoconiosis.

The Third Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Williams*, *supra*; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

Although the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000), he found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). In weighing the evidence together in accordance with *Williams*, the administrative law judge stated that:

> Having considered the record evidence as a whole on this issue, I find that Claimant has established the existence of coal workers' pneumoconiosis at Section 718.202(a). Although the x-ray evidence as a whole was found not to demonstrate the existence of the disease, I find that the x-rays do not significantly detract from the probative weight of the credited medical opinion evidence of pneumoconiosis, as that disease is broadly defined under the Act and regulations. The medical opinion of Dr. Karlavage is reasoned, satisfies the requirement that it be based on "objective medical evidence," *see Compton*, 211 F.3d 203, 2000 U.S.App. LEXIS 8606 at *20, and more persuasively establishes that the Miner suffered from a "respiratory or

> pulmonary impairment significantly related to or substantially aggravated by" the Miner's coal dust exposure. *See Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985) (chronic obstructive pulmonary disease meets statutory definition whether or not technical pneumoconiosis). I also again find that Dr. Cable's medical opinion is consistent with Dr. Karlavage's diagnosis of pneumoconiosis.

2000 Decision and Order on Remand at 6.

The administrative law judge further explained that:

> Certainly, the fact that there are no biopsy findings of pneumoconiosis is not conclusive evidence that the miner did not have the disease. Similarly, the x-ray evidence may not necessarily prove that a miner did not have a respiratory or pulmonary impairment significantly related to, of [sic] substantially aggravated by, a miner's coal mine dust exposure. 20 C.F.R. §718.201. The Secretary's regulations provide for medical opinion evidence that shows the presence of the disease "notwithstanding a negative x-ray." 20 C.F.R. §718.202(a)(4). Nevertheless, all relevant evidence must be considered, and, further, I must gauge the probative value of a medical opinion in light of its own documentation....and to see whether the "biopsy and x-ray evidence as a whole" lends weight to, or detracts from, "the determinations of those physicians who [have found that the Miner had] pneumoconiosis."

2000 Decision and Order on Remand at 6 n.4 (case citations omitted).

Employer argues that the administrative law judge, in his consideration of the newly submitted medical opinion evidence, failed to explain why Dr. Levinson's opinion that claimant did not suffer from pneumoconiosis was not as persuasive as the contrary opinions of Drs. Karlavage and Cable. In its most recent decision, the Board noted that it had previously affirmed the administrative law judge's crediting and weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) (2000). *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*). The Board's previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990)*; Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis.[11] 20 C.F.R. §718.202(a)(4).

[11]While the Board affirmed the administrative law judge's determination that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000), we did not hold that the

medical opinion evidence, when weighed against the x-ray evidence of record, would be sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The Board remanded the case to the administrative law judge for this determination.

Employer, however, argues that the administrative law judge erred in his weighing of the x-ray and medical opinion evidence together as required by *Williams*. We agree. The administrative law judge found that the opinions of Drs. Cable and Karlavage that the miner suffered from pneumoconiosis were not undermined by the negative x-ray evidence. 2000 Decision and Order on Remand at 6. The administrative law judge noted that negative x-ray evidence does not necessarily undermine a finding of legal pneumoconiosis (a chronic lung disease or impairment and its sequelae arising out of coal mine employment). *See* 20 C.F.R. §718.201(a)(2).[12] The administrative law judge, however, failed to recognize that Drs. Cable and Karlavage diagnosed clinical pneumoconiosis, *i.e.*, a disease recognized by the medical community as pneumoconiosis.[13] *See* 20 C.F.R. §718.201(a)(1). In this case, Drs. Cable and Karlavage each specifically diagnosed "coal workers' pneumoconiosis."[14] Director's Exhibits 13, 32. Moreover, Drs. Cable and Karlavage apparently based their respective diagnoses of pneumoconiosis on a positive x-ray interpretation, specifically Dr. Conrad's interpretation of an x-ray taken on February 28, 1990. *Id.* Dr. Conrad, a Board-certified radiologist,[15] interpreted the miner's February 28, 1990 x-ray as positive for pneumoconiosis. Director's Exhibit 16. Although two physicians dually qualified as B readers and Board-certified radiologists, Drs. Pitman and Marshall, also interpreted this x-ray as positive for pneumoconiosis, Director's

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[12]Section 718.201(a)(2) provides that:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

[13]"Legal pneumoconiosis" includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

[14]Although Dr. Cable also diagnosed chronic obstructive pulmonary disease, Dr. Cable attributed this disease to the miner's prior smoking and did not indicate that it was caused by his coal dust exposure. Director's Exhibit 13.

[15]Contrary to the administrative law judge's characterization, the record does not reveal that Dr. Conrad was a B reader at the time that he interpreted the miner's February 28, 1990 x-ray.

Exhibits 15, 34, two equally qualified physicians, Drs. Wheeler and Sundheim, interpreted the x-ray as negative for pneumoconiosis.[16] Director's Exhibit 41; Employer's Exhibit 2. More importantly, the administrative law judge found that weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis, a finding that has been affirmed by the Board.[17] *See Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996) (unpublished). Inasmuch as the diagnoses of pneumoconiosis made by Drs. Cable and Karlavage were based in substantial part on positive x-ray evidence, the administrative law judge erred in not addressing whether the x-ray evidence calls into question the reliability of their opinions.[18] *See generally Arnoni v. Director, OWCP*, 6 BLR 1-423

[16]Dr. Laucks, a physician whose radiological qualifications are not found in the record, also interpreted the miner's February 28, 1990 x-ray as negative for pneumoconiosis. Director's Exhibit 39. Contrary to the administrative law judge's characterization, the record does not reveal that Dr. Laucks was a Board-certified radiologist or a B reader at the time that he interpreted the miner's February 28, 1990 x-ray.

[17]In his 1995 Decision and Order, the administrative law judge noted that the miner's two most recent x-rays, taken on February 29, 1990 and April 19, 1990, had been interpreted by physicians with comparable qualifications who made "equally probative but conflicting findings." 1995 Decision and Order on Remand at 4. The administrative law judge, therefore, found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* The Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1) (2000) as unchallenged on appeal. *Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996) (unpublished).

[18]Our dissenting colleague contends that because the Board previously held that the administrative law judge properly credited the opinions of Drs. Karlavage and Cable despite their reliance on positive x-ray readings, *see Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996) (unpublished), this constitutes the law of the case and should govern the Board's determination. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). We note that the law of the case doctrine is discretionary. *See Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988). Moreover, the Board has held that it will adhere to its initial decision when a case is on its second appeal unless there has been a change in the underlying factual situation; intervening controlling authority demonstrates the initial decision was erroneous; or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989). In its 1999 Decision and Order, the Board held that the administrative law judge failed to weigh all of the relevant evidence together to determine whether claimant had established the

(1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983).

We, therefore, vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis and remand the case to the administrative law judge for further consideration of the newly submitted evidence at Section 718.202(a) in accordance with *Williams.* Consequently, we vacate the administrative law judge's finding that claimant established a material change in conditions at Section 725.309 (2000). *See Williams, supra*; *see also Swarrow, supra*. On remand, the administrative law judge must weigh the evidence submitted subsequent to the denial of the initial claim to determine whether it establishes a material change in conditions pursuant to Section 725.309 (2000) and *Swarrow*.

The administrative law judge also addressed the merits of the miner's 1990 claim. Employer argues that the administrative law judge erred in finding the evidence of record sufficient to establish the existence of pneumoconiosis. In his consideration of whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000), the administrative law judge stated:

> The negative x-ray evidence in the record does not undermine Dr. Karlavage's diagnosis. The fact that Claimant has not proven pneumoconiosis on the basis of chest x-ray evidence does not detract from a medical opinion diagnosis of pneumoconiosis. *See R & H Buildings*, *Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998) (citing study showing that 25 percent of miners with pneumoconiosis had negative x-rays).

2000 Decision and Order on Remand at 8.

As discussed, *supra*, the administrative law judge erred in not addressing

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existence of pneumoconiosis as required by *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*). In light of *Williams*, it was incumbent upon the administrative law judge to address the effect of the x-ray evidence on the opinions of Drs. Karlavage and Cable.

whether the x-ray evidence calls into question the reliability of Dr. Karlavage's diagnosis of clinical pneumoconiosis. Moreover, the administrative law judge erred *to the extent* that he relied upon the results of the study set out in *R & H Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998) because this study is not a part of the record in this case. *See generally Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). We, therefore, vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a).

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish total disability. Employer argues that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish total disability. In its most recent decision, the Board noted that it had previously affirmed the administrative law judge's crediting and weighing of the medical opinion evidence at 20 C.F.R. §718.204(c)(4) (2000). *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*). We hold that the Board's previous holding on this issue constitutes the law of the case and governs our determination. *See Brinkley, supra; Bridges, supra*. We, therefore, decline to address employer's contentions of error in regard to the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability. 20 C.F.R. §718.204(b)(2)((iv).

Employer also argues that the administrative law judge erred in finding that the evidence as a whole was sufficient to establish total disability pursuant to C.F.R. §718.204(c) (2000). The administrative law judge found that, despite the non-qualifying pulmonary function and arterial blood gas studies, Dr. Karlavage's opinion was sufficient to establish that claimant suffered from a totally disabling respiratory impairment. 2000 Decision and Order on Remand at 10-11. Employer contends that the administrative law judge failed to address the significance of the fact that Dr. Karlavage's opinion was based in part upon a potentially invalid study. We disagree. In his most recent decision, the administrative law judge could not have discussed this issue more plainly. After observing that the pulmonary function study evidence and blood gas study evidence did not demonstrate total disability, the administrative law judge explained:

> I place greater reliance on the medical assessment of Dr. Karlavage, who found the [m]iner to be totally disabled due to coal workers' pneumoconiosis. I consider Dr. Karlavage's opinion to be adequately reasoned, *notwithstanding the invalidation of his pulmonary function study*, because his assessment is based on factors beyond the results of his clinical testing, *see generally Fuller v. Gibralter Coal Corp.*, 6 BLR 1-1291 (1984), and support a finding of total respiratory disability pursuant to Section 718.204(c)(4). *Compare Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). He has recorded that the [m]iner has demonstrated respiratory symptoms on the basis

> of multiple examinations, and explicitly outlined limitations on the [m]iner's pulmonary or respiratory capabilities based on respiratory complaints, symptoms and patient history. He noted symptoms of wheezing, enlarged chest, and hyper resonance.

2000 Decision and Order on Remand at 9 (emphasis added).

The record thus belies employer's contention that the administrative law judge did not discuss the validity of Dr. Karlavage's opinion on total disability in light of the fact that it was based in part upon an invalid pulmonary function study. Furthermore, in its decision issued more than five years ago, the Board expressly rejected employer's argument that Dr. Karlavage's reliance in part on an invalid pulmonary function study rendered his opinion unreliable. The Board held that:

> We reject, as we did previously, employer's contention that Dr. Karlavage's opinion is inherently unreliable. Employer's Brief at 13, 17-18; *Troup*, slip op. at 4-5; *see Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990). Unlike the medical opinion in *Siwiec*, which was based solely on an invalid pulmonary function study, Dr. Karlavage's opinion was based on physical examinations, medical and coal mine employment histories, claimant's symptoms, objective testing, and an x-ray. Director's Exhibit 32. In the same vein, we reject employer's argument that Dr. Karlavage's opinion was not credible because it was based on "questionable evidence." Employer's Brief at 13. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

*See Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 29, 1996)(unpublished), slip op. at 3.

Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability. *See* 20 C.F.R. §718.204(b).

Employer also challenges that administrative law judge's finding that the evidence is sufficient to establish that the miner's total disability is due to pneumoconiosis. The Board's previous holding on this issue constitutes the law of the case and governs our determination herein. *See Brinkley*, *supra*; *Bridges*, *supra*. Consequently, we reaffirm the administrative law judge's finding that the miner's total disability is due to pneumoconiosis. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand

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

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it affirms the administrative law judge's decision. I dissent from the majority's determination to vacate the administrative law judge's decision and to remand the case for reconsideration of the evidence on the existence of pneumoconiosis at 20 C.F.R. §718.202. I would affirm the award of benefits.

I disagree with the majority's determination that the administrative law judge erred in weighing the medical evidence to determine the existence of pneumoconiosis at 20 C.F.R. §718.202(a) pursuant to *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). An analysis of the majority's opinion reveals that its holding is premised on four errors, two of which are contained in the majority's statement: "Inasmuch as the diagnoses of pneumoconiosis made by Drs. Cable and Karlavage were based in substantial part on positive x-ray evidence, the administrative law judge erred in not addressing whether the x-ray evidence calls into question the reliability of their opinions." (Citation omitted.) The third error is implicit in the majority decision: that the x-ray evidence was conclusively negative. Finally, the majority supports its decision to remand with its misinterpretation of the administrative law judge's decision. In sum, the majority's criticism of the administrative law judge's decision is baseless.

First, in asserting that the diagnoses of pneumoconiosis by Drs. Cable and Karlavage

"were based in substantial part on positive x-ray evidence...", the majority disregards the evidence as well as the prior decisions by the administrative law judge and the Board, which all make clear that a positive x-ray reading was only one of several factors supporting each doctor's diagnosis. In its 1996 decision, the Board rejected employer's argument that the positive x-ray interpretation supporting each diagnosis significantly undermined its credibility. The Board declared: "Dr. Karlavage's opinion was based on physical examinations, medical claimant's symptoms, objective testing and an x-ray," Director's Exhibit 32 at 3; "Dr. Cable examined claimant, took medical and work histories, administered objective tests, and considered an x-ray reading." Director's Exhibit 13 at 4. *Troup v. Reading Anthracite Coal Co.*, BRB No. 95-1856 BLA (Mar. 20, 1996)(unpublished), slip op. at 3-4.

The majority attempts to shore up its assertion that Drs. Karlavage and Cable relied "in substantial part on positive x-ray interpretations with reference to their diagnosis of "coal workers' pneumoconiosis," which is clinical pneumoconiosis under 20 C.F.R. §718.201(a)(1). Even employer, however, does not subscribe to this analysis: in its 1995 Petition for Review to the Board, employer asserted: "No one reading [Dr. Karlavage's]... report can know what weight he gave the x-ray evidence...." 1995 Petition for Review at 13.

Furthermore, it is ludicrous to suggest that a doctor is diagnosing only clinical pneumoconiosis and not legal pneumoconiosis when his opinion makes clear that he relied on several factors other than x-ray in making his diagnosis. Doctors' opinions are not legal documents. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-214 (3d Cir. 1997). In the past, common sense has been applied to uphold the administrative law judge's findings that these opinions are probative evidence of the existence of pneumoconiosis at Section 718.202(a)(4). Thus, the majority is flatly wrong in asserting that these opinions were based "in substantial part" on positive x-ray readings.

Second, the majority's assertion that the administrative law judge erred in weighing together the x-ray and medical opinion evidence under *Williams*, without first revisiting the issue of the credibility of the medical opinions is irrational. The administrative law judge cited the Board's prior decisions upholding his weighing of the medical opinion evidence. 2000 Decision and Order on Remand at 5. The record is clear that the Board has twice upheld the administrative law judge's crediting of the medical opinions of Drs. Karlavage and Cable, specifically in spite of their reliance in part on a positive x-ray reading. *See Id.* at 3-4; *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 21-22 (1999)(*en banc*). In 1999, when the Board, *en banc*, considered employer's various attacks on the credibility of the opinions of Drs. Karlavage and Cable to establish the existence of pneumoconiosis, including their partial reliance on a positive x-ray interpretation, the Board declared not only that the law of the case doctrine applied to reject employer's contentions, but the Board went on to explain that employer had not suggested that a basis exists to find an exception to application

of the law of the case doctrine. *Troup*, 22 BLR at 1-22. That is still true.

Although the majority acknowledges that the Board has previously upheld the administrative law judge's determination that these medical opinions constitute substantial evidence of pneumoconiosis, the majority refuses to apply the law of the case doctrine to this finding because under *Williams,* the administrative law judge must weigh together the x-ray and medical opinion evidence. This determination is irrational because a *Williams* analysis does not alter the validity of the prior determination. Furthermore, under *Williams*, the administrative law judge must still consider the specific opinions, weigh them together with the x-ray evidence and explain his ultimate determination. The administrative law judge in the case at bar fully discussed the relevant evidence, his analysis of its weight and his determination that pneumoconiosis was established. 2000 Decision and Order on Remand at 5-7. The majority's determination that the case must be remanded for the administrative law judge to reconsider a determination which has twice been affirmed in the last five years defies both reason and the interest of justice.

The third error in the majority opinion is not stated explicitly. The majority opinion suggests that the x-ray evidence was conclusively negative for pneumoconiosis and that an opinion diagnosing pneumoconiosis would be in direct conflict with the x-ray evidence. On the contrary, the administrative law judge carefully analyzed the x-ray evidence, containing both positive and negative interpretations. He concluded that claimant had failed to demonstrate the existence of pneumoconiosis by a preponderance of the evidence, which is far different from the majority's implication that the x-ray evidence demonstrated that claimant did not have pneumoconiosis. The administrative law judge observed that negative x-ray evidence does not demonstrate the absence of pneumoconiosis and that the regulations provide for a medical opinion diagnosing pneumoconiosis, "notwithstanding a negative x-ray." 20 C.F.R. §718.202(a)(4); 2000 ALJ Decision and Order on Remand at 6 n.4. Yet the administrative law judge recognized his obligation to "gauge the probative value of a medical opinion in light of its own documentation..." (citation omitted) and to determine in this case whether the x-ray evidence as a whole detracted from the medical opinions diagnosing pneumoconiosis, as the Third Circuit instructed in *Williams. Id.* After carefully discussing each item of evidence bearing on the issue of the existence of pneumoconiosis, the administrative law judge weighed together all relevant evidence:

> Finally, I find that Claimant has established the existence of pneumoconiosis on the basis of all relevant evidence at Section 718.202(a). My analyses with respect to the evidence admitted in connection with the duplicate claim, and the medical opinion evidence at Section 718.202(a)(4), as well as my reasoning set forth in the prior decisions, as affirmed by the Board, apply with equal force to the review of the overall relevant evidence of record. I accord primary weight to the diagnosis of pneumoconiosis and the medical

> opinion of Dr. Karlavage. The other evidence of record, specifically the negative x-ray evidence, the conflicting medical opinions of Dr. Levinson, the less detailed and probative diagnoses from Drs. Cable and Munir, as well as the evidence from the former claim, do not undermine Dr. Karlavage's conclusions. He acknowledged the Miner's cigarette smoking history, referred to clinical studies, and reviewed of [sic] symptoms and patient history derived from his multiple examinations of the Miner. Dr. Karlavage has more credibly accounted for the Miner's lengthy coal mine employment history in rendering an opinion that the Miner was afflicted with coal workers' pneumoconiosis. *See Peabody Coal Co. v. Hill*.
>
> The negative x-ray evidence in the record does not undermine Dr. Karlavage's diagnosis. The fact that Claimant has not proven pneumoconiosis on the basis of chest x-ray evidence does not detract from a medical opinion diagnosis of pneumoconiosis. *See R & H Steel Buildings*, *Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998) (citing study showing that 25 percent of miners with pneumoconiosis had negative x-rays).
>
> Upon evaluating the record evidence as a whole at Section 718.202(a), I find that Claimant has established by a preponderance of the evidence that the Miner suffered from pneumoconiosis. *Williams; Compton.*

2000 Decision and Order on Remand at 8.

After properly evaluating all of the evidence the administrative law judge concluded that claimant had established the existence of pneumoconiosis with medical opinions and that their probative value was not undermined by the x-ray evidence.

The fourth error underlying the majority decision is its absurd construction of the administrative law judge's decision as relying on evidence outside the record with the reference to "*R&H Steel Buildings, Inc. v. Director OWCP*, 146 F.3d 514 (7th Cir. 1998)(citing study showing that 25 percent of miners with pneumoconiosis had negative x-rays.)" 2000 Decision and Order on Remand at 8. The administrative law judge referred to the study to illustrate the indisputable point that a negative x-ray is not proof of the absence of pneumoconiosis . The administrative law judge could just as well have cited the statute: "no claim for benefits under this part shall be denied solely on the basis of the result of a chest roentgenogram." 30 U.S.C. §923(b). In fact, the study which the administrative law judge cited was contained in a Senate Report which the Supreme Court cited in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 31 n.34, 3 BLR 2-36, 2-55 n.34 (1976); when the Court upheld the validity of that statutory provision against an attack by operators that it constituted a denial of due process. The Seventh Circuit later cited the study cited in *Usery*

and the administrative law judge cited the Seventh Circuit's decision. It is clear that the cited study was a proper subject for judicial notice by the Supreme Court, the Seventh Circuit and the administrative law judge, *see* Fed. R. Evid. 201, and that the administrative law judge's reference to the study was entirely proper. Thus, the majority's determination that the administrative law judge erred "to the extent that he relied upon the results of the study..." means that the administrative law judge erred only to the extent that the majority misconstrued his opinion.

In sum, the majority's decision to remand the case for the administrative law judge to reconsider the issue of the existence of pneumoconiosis is wrong. The decision is premised on an erroneous factual assumption, that the disputed medical opinions were based in substantial part on a positive x-ray reading. The decision is also based on an irrational legal assumption, that the law of the case doctrine does not apply to a determination of the credibility of medical opinion evidence at Section 718.202(a)(4), when an administrative law judge must engage in a *Williams* analysis, even though the *Williams* analysis does not affect the validity of the prior determination and a *Williams* analysis requires the administrative law judge to consider specifically all relevant evidence. The majority decision was also based in part on a false implication, that the x-ray evidence was conclusively negative. Finally, the majority decision is supported by a bizarre legal conclusion, that the administrative law judge relied on evidence outside the record. It is regrettable that the majority has rewarded employer's prolonging litigation in this case by resurrecting issues long dead and adopting a distorted interpretation of both the record and the administrative law judge's decision. The administrative law judge's decision is clear, thorough and legally sound. It should be affirmed.

REGINA C. McGRANERY
Administrative Appeals Judge