BRB No. 02-0203 BLA

RUTH ENDICOTT (Widow of AUXIER ENDICOTT) Claimant-Respondent v. MARTIKI COAL CORPORATION and MAPCO, INCORPORATED Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits for Miner and Survivor of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Jeffery Hinkle (Hinkle, Keenan, & Childers, PSC), Inez, Kentucky, for claimant.

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

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

SMITH, Administrative Appeals Judge:

Employer appeals the administrative law judge=s Decision and Order on Remand Awarding Benefits for Miner and Survivor on claims 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 miner=s claim has been before the Board twice previously, and this is the second time the survivor=s claim is being considered by the Board.[2] The procedural history of these claims is as follows. The miner filed an application for benefits on November 29, 1985, which was deemed abandoned and was administratively closed. Director's Exhibit 53. On November 6, 1987, the miner filed a new application for benefits. Director's Exhibit 53. Administrative Law Judge Peter McC. Giesey issued his Decision and Order Denying Benefits on April 2, 1992. Director's Exhibit 53. Judge Giesey noted that the case before him involved a duplicate claim. Judge Giesey found the existence of pneumoconiosis established based on his finding that the x-ray evidence presented a reasonable doubt, which he resolved in favor of the miner. He further found that the miner=s pneumoconiosis arose out of his coal mine employment. However, Judge Giesey found the evidence insufficient to establish disability due to pneumoconiosis, and denied benefits. 1992 Decision and Order; Director's Exhibit 53.

On the miner=s appeal, the Board affirmed Judge Giesey=s finding that total disability was not established under 20 C.F.R. '718.204(c) (2000), and affirmed the denial of benefits. In view of its affirmance of the denial of benefits, the Board held that it was unnecessary to address Judge Giesey=s findings at 20 C.F.R. '718.202(a)(1) (2000), and his failure to consider whether a material change in conditions was established. *Endicott v. Martiki Coal Corp.*, BRB No. 92-1508 BLA (Sept. 20, 1993)(unpub.); Director's Exhibit 53.

On June 30, 1995, the miner filed another application for benefits. Director's Exhibit 1. A claims examiner denied benefits on February 21, 1996, noting that the instant claim constituted a duplicate claim, and advising the miner that he must establish a material change in conditions. Director's Exhibit 31. On May 26, 1996, a claims examiner denied benefits, again noting that the claim was a duplicate claim. Director's Exhibit 32. On November 21, 1996, the district director issued a Proposed Decision and Order Denying Request for Modification. The district director noted that the miner had requested modification on September 19, 1996, but the district director found no basis for modification established. Director's Exhibit 33. On March 24, 1997, the district director issued a Proposed Decision and Order Denying Request for Modification. The district director noted that the miner had requested modification on February 13, 1997, and found no basis for modification established. Director's Exhibit 34. In a letter dated April 24, 1997, claimant stated that he wished to Areopen@ his claim. Director's Exhibit 41. On July 16, 1997, the case was transferred to the Office of

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is Ruth Endicott, the widow of Auxier Endicott, the miner, who died on February 6, 1998. *See* Director's Exhibit 55. Claimant is pursuing both the miner=s claim and her survivor=s claim.

Administrative Law Judges. Director's Exhibit 54. The miner died on February 6, 1998. Director's Exhibit 55.

Claimant filed her application for survivor=s benefits on May 8, 1998. Director's Exhibit 55. On December 16, 1998, the claims were forwarded to the Office of Administrative Law Judges. Director's Exhibit 56.

On August 18, 1999, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), issued his Decision and Order Award of Benefits for Miner and Survivor. The administrative law judge reviewed the procedural history of the case and, based upon a stipulation of the parties, credited the miner with ten years of coal mine employment. The administrative law judge noted that the miner=s claim was a modification of his third claim. The administrative law judge found the evidence sufficient to establish a material change in conditions and all of the elements of entitlement, and awarded benefits on the miner=s claim. The administrative law judge also found the evidence sufficient to establish that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c) (2000), and awarded benefits on the survivor=s claim. 1999 Decision and Order.

On employer=s appeal, the Board vacated the administrative law judge=s finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1) (2000). The administrative law judge was instructed to consider whether the existence of pneumoconiosis was established at 20 C.F.R. '718.202(a)(1)-(4) (2000). In view of this holding, the Board vacated the administrative law judge=s finding that the miner=s pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. '718.203(b) (2000), and the administrative law judge=s findings that the miner=s disability and death were due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b) (2000) and 20 C.F.R. '718.205(c) (2000). However, the Board affirmed the administrative law judge=s finding of total respiratory disability at Section 718.204(c) (2000). *Endicott v. Martiki Coal Corp.*, BRB No. 99-1238 BLA (Nov. 30, 2000)(unpub.).

On remand, the administrative law judge declined to re-evaluate the x-ray evidence. The administrative law judge then determined that the evidence establishes that the miner=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. '718.204(c),3 and that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c). Accordingly, benefits were awarded on both the miner=s claim and the survivor=s claim. 2001 Decision and Order.

On appeal, employer asserts that the administrative law judge erred when he failed to comply with the Board=s instruction to make findings regarding the existence of pneumoconiosis. Turning to the administrative law judge=s weighing of the medical opinion evidence, employer challenges the administrative law judge=s analysis of the physicians= qualifications and alleges that the administrative law judge erred by mechanically crediting the treating physician=s opinion. Employer also maintains that the

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[3] The provision pertaining to total disability, previously set out at 20 C.F.R. '718.204(c), is now found 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).

administrative law judge erred by failing to provide valid rationales for discrediting the evidence submitted by employer. Claimant responds, urging affirmance of the administrative law judge=s awards of benefits. Employer filed a reply brief challenging claimant=s response brief, and reasserting the points it made in its brief in support of the appeal. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

As an initial matter, we consider employer=s assertion that the administrative law judge erred by failing to comply with the Board=s instruction to consider the existence of pneumoconiosis on remand. In our Decision and Order issued on November 30, 2000, we vacated the administrative law judge=s finding at Section 718.202(a)(1) (2000), and remanded the case for further consideration of this subsection, as well as Section 718.202(a)(2)-(4), if reached. *Endicott*, 2000 slip op. at 4. On remand, the administrative law judge stated:

Despite the directive of the Board that I reevaluate the x-ray evidence, in accordance with the duplicate claim standard of

> the Sixth Circuit, which controls in this case, I need not address the evidence regarding the existence of pneumoconiosis because that was not one of the elements of entitlement previously found against the miner. Judge Giesey found Mr. Endicott had established the existence of pneumoconiosis pursuant to the x-ray evidence. When I addressed the x-ray evidence in my August 18, 1999 decision, I was working under the modification standard of '725.310, which the Board has said was unnecessary. The Board affirmed my finding of total disability pursuant to '718.204(c). Therefore, Mr. Endicott did establish a material change in conditions. Consequently, my discussion will begin with whether all the relevant medical evidence of record establishes that Mr. Endicott=s total disability was due to pneumoconiosis.

2001 Decision and Order at 3.4

The initial finding of pneumoconiosis, rendered by Judge Giesey in 1992, was based on his finding that the x-ray evidence Agives rise to a reasonable doubt,@ which Judge Giesey resolved in claimant=s favor. *See* 1992 Decision and Order at 3. The Board did not need to reach employer=s request to address Judge Giesey=s existence of pneumoconiosis finding when the 1992 Decision and

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[4] While the administrative law judge is correct that he did not need to discuss the x-ray evidence for purposes of determining whether there is a basis for modification pursuant to 20 C.F.R. '725.310 (2000), or a material change in conditions pursuant to 20 C.F.R. '725.309 (2000), he did need to discuss the x-ray evidence in his consideration of the merits of entitlement.

Order was reviewed because Judge Giesey=s denial of benefits was affirmed on other grounds. *See Endicott,* 1993 slip op. at 2, n.1.

It is well established that a tribunal must apply the law in effect at that time that it renders its decision, unless doing so would result in manifest injustice or there is legislative history or a statutory mandate to the contrary. *See Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996). The current regulations no longer include a statement providing claimants with the benefit of reasonable doubt. *See* 20 C.F.R. '718.3; *see also* 65 Fed. Reg. 79925-27. Moreover, the United States Supreme Court held in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), that the true doubt rule is inapplicable in the adjudication of black lung claims, and that, therefore, claimant must establish each element of entitlement by a preponderance of the evidence.

In the instant case, failure to apply the intervening case law enunciated in *Ondecko*, would result in manifest injustice, *i.e.*, if benefits were to be awarded based on outdated law, claimant would receive benefits to which she is not entitled and employer would be required to pay such benefits. *See generally McMahon, supra*. We, therefore, vacate the administrative law judge=s determination that the existence of pneumoconiosis has been established. Consequently, we must also vacate the administrative law judge=s award of benefits on both the miner=s and the survivor=s claims and remand the case to the administrative law judge to comply with the Board=s Decision and Order issued on November 30, 2000. On remand, the administrative law judge must consider all of the relevant evidence of record and determine whether it is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a)(1)-(4).

We now consider the other issues raised by employer on appeal. Employer asserts that the administrative law judge erred in his analysis of the qualifications of the physicians. Specifically, employer contends that the administrative law judge treated all of the physicians as if they have the same qualifications, and asserts that the administrative law judge misstated the qualifications of Dr. Younes.

When the Board remanded this case, the administrative law judge was instructed to consider the physicians= qualifications in weighing the evidence. *Endicott*, 2000 slip op. at 4; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In so doing, the administrative law judge erred in finding that Dr. Younes has credentials comparable to those of the other physicians. *See* 2001 Decision and Order at 4. The administrative law judge must base his opinion on the evidence contained in the record, *see* 20 C.F.R. '725.477(b); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The record in this case does not contain documentation regarding the qualifications of Dr. Younes. Accordingly, we vacate the administrative law judge=s finding that the miner=s disability is due to pneumoconiosis. On remand, the administrative law judge must re-evaluate the evidence pursuant to Section 718.204(c). If the administrative law judge intends to take judicial notice of the qualifications of physicians, he may do so, provided it is done in accordance with the general principles concerning judicial notice. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990). We hold, however, that the administrative law judge permissibly considered the qualifications of the other physicians who provided opinions

regarding disability causation.5

Turning to the administrative law judge=s analysis at Section 718.205(c), we note that the administrative law judge has not specifically considered the credentials of the physicians, nor has he addressed the fact that Drs. Kleinerman and Caffrey, the pathologists, reviewed biopsy evidence as a part of their review of the medical evidence. 2001 Decision and Order at 5; Employer's Exhibits 4, 5. On remand, the administrative law judge must consider the qualifications of the physicians as a factor in his weighing of the evidence at Section 718.205(c). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Staton*, *supra*; *Woodward*, *supra*.

Employer also asserts that the administrative law judge generally erred by mechanically crediting the opinion of the treating physician. We disagree. The administrative law judge properly found Dr. Caruso=s opinion to be reasoned and documented and permissibly determined that Dr. Caruso was claimant=s treating physician. 2001 Decision and Order at 4, 5; Director's Exhibit 55; Claimant's Exhibit 1. It was, therefore, proper for the administrative law judge to defer to Dr. Caruso=s opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993).

Employer further challenges the administrative law judge=s finding that Dr. Younes=s opinion Abolsters@ Dr. Caruso=s opinion that the miner=s disability was due to pneumoconiosis. Employer specifically challenges Dr. Younes=s diagnosis of coal workers' pneumoconiosis and asserts that Dr. Younes=s diagnosis of legal pneumoconiosis cannot bolster Dr. Caruso=s diagnosis of clinical pneumoconiosis. Contrary to employer=s assertion, we hold that it was rational for the administrative law judge to rely on Dr. Younes=s opinion, Director's Exhibit 18, as a reasoned and documented medical opinion. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In addition, we reject employer=s assertion that Dr. Younes=s diagnosis of disability due to legal pneumoconiosis cannot be considered supportive of Dr. Caruso=s diagnosis of disability due to clinical pneumoconiosis. Dr. Younes diagnosed coal workers' pneumoconiosis, which is clinical pneumoconiosis, and he diagnosed chronic bronchitis, which he stated was secondarily due to occupational lung exposure, Director's Exhibit 18, which may constitute legal pneumoconiosis, *see* 20 C.F.R. ' 718.201. Therefore, we hold that employer=s assertion is not supported by the evidence.

Employer also challenges the administrative law judge=s discrediting of its evidence without providing Avalid rationales.@ Employer's Brief at 31. Employer asserts that the administrative law judge erred by mechanically discrediting the opinions

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[5] The record indicates that Dr. Caffrey is Board-certified in Anatomical Pathology and Clinical Pathology. Employer's Exhibit 4. Dr. Kleinerman is Board-certified in Pathologic Anatomy and Clinical Pathology. Employer's Exhibit 5. Drs. Caruso, Branscomb and Lane are all Board-certified in Internal Medicine. Director's Exhibit 55; Claimant's Exhibit 1. Drs. Broudy and Fino are Board-certified in Internal Medicine and Pulmonary Dieases. Director's Exhibits 12, 55.

of Drs. Fino, Caffrey, Branscomb and Kleinerman because these physicians never examined the miner and because their opinions were prepared in anticipation of litigation. Further, employer asserts that the administrative law judge erred by inconsistently discrediting the medical opinions employer developed for litigation, but not the medical opinions developed by claimant for litigation purposes.

In finding the evidence sufficient to establish that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c), the administrative law judge stated:

> While the opinions of Drs. Fino, Caffrey, Branscomb, and Kleinerman are entitled to some weight, I do not find them more persuasive than Dr. Caruso=s opinion. These physicians never physically examined Mr. Endicott.....An autopsy was not performed, thus the pathologists, Drs. Caffrey and Kleinerman, were not presented with the opportunity to flex their expertise in this area. Furthermore, the opinion of these four physicians that Aspergillosis, a bacterial lung disease, was the root of Mr. Endicott=s pulmonary condition leading to his death, is contradicted by Dr. Sundaram=s hospital notes ruling out the reactivation of Aspergillosis as a cause of Mr. Endicott=s final symptoms. Dr. Sundaram=s report was unbiased-developed solely in his capacity as a treating physician during the miner=s hospitalization. He, unlike Drs. Fino, Caffrey, Branscomb, and Kleinerman, was not issuing an opinion in exchange for payment. Consequently, I find that Mrs. Endicott has established that pneumoconiosis hastened her husband=s death.

Decision and Order on Remand at 5-6.

The administrative law judge must consider all of the relevant evidence, *see Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989), and the Board has held that the party who pays the physician for his opinion is irrelevant, *see Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Moreover, the Board has held that evidence prepared in anticipation of litigation may properly be credited by the administrative law judge. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Consequently, we hold that the administrative law judge erred by considering whether the physicians were paid for providing medical opinions, and whether the medical opinions were developed for treatment or for litigation purposes.[6] *See Melnick, supra*; *Brown, supra*.

Further, employer challenges the administrative law judge=s discrediting of the opinions of Drs. Branscomb, Fino, Broudy and Caffrey regarding disability causation pursuant to Section 718.204(c), because these physicians did not diagnose pneumoconiosis.

[6] In view of this holding, we need not address employer=s assertion regarding the different treatment accorded by the administrative law judge to the medical opinions developed by claimant and employer in anticipation of litigation.

In his analysis of the cause of the miner=s disability, the administrative law judge stated that he accorded very little weight to the opinions of Drs. Broudy, Fino, Branscomb and Caffrey because these physicians Adid not diagnose pneumoconiosis.@7 2001 Decision and Order at 4-5. Although we vacate the administrative law judge=s disability causation analysis on other grounds, we reject employer=s assertion that this is an improper basis for discrediting these opinions. The administrative law judge may properly accord less weight to a physician=s opinion when the administrative law judge finds that an underlying premise of the medical opinion is erroneous. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *cf. Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002).

Turning to the administrative law judge=s finding that the miner=s death was due to pneumoconiosis pursuant to Section 718.205(c), employer asserts that the administrative law judge misconstrued Dr. Sundaram=s opinion.8 While Dr. Sundaram=s opinion

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[7] Drs. Broudy, Fino, Branscomb and Caffrey all opined that the miner did not have coal workers= pneumoconiosis, and stated that the miner did not have an occupationally caused lung disease. *See* Director's Exhibits 17, 53, 55; Employer's Exhibits 1, 3, 4, 6.

[8] In a consultation report dated January 30, 1998, Dr. Sundaram stated:

IMPRESSION:
1. Progressive weight loss with dense infiltrate over both upper lobes more so on the left. Rule out reactivation Aspergillosis, rule out tuberculosis, rule out malignancy.
2. Rheumatoid arthritis, Caplan=s syndrome.
3. Anemia.

Director's Exhibit 55. In his discussion of this opinion, Dr. Sundaram stated:
At present he lost weight significantly and is unclear he has developed reactivation of the Aspergillosis or has developed scar carcinoma besides tuberculosis unable to cough up satisfactory sputum being debilitated will schedule bronchoscope examination and adequately sampling to guide further therapy.

Director's Exhibit 55. The record also contains Dr. Sundaram=s operative procedure notes dated January 30, 1998. The preoperative diagnosis provided is:

1. Rule out bronchogenic carcinoma
2. Rule out tuberculosis

does not address the cause of the miner=s death, the administrative law judge considered Dr. Sundaram=s reports regarding the miner=s condition toward the end of his life, in determining the weight to accord to other medical opinions which address the cause of the miner=s death.

In finding the evidence sufficient to establish that the miner=s death was due to pneumoconiosis, the administrative law judge accorded greatest weight to the opinion of Dr. Caruso. The administrative law judge found that:

> the opinion of [Drs. Fino, Caffrey, Branscomb and Kleinerman] that Aspergillosis, a bacterial lung disease, was the root of Mr. Endicott=s pulmonary condition leading to his death, is contradicted by Dr. Sundaram=s hospital notes ruling out the reactivation of Aspergillosis as a cause of Mr. Endicott=s final symptoms.

2001 Decision and Order at 5.

Employer asserts that, contrary to the administrative law judge=s statement, Dr. Sundaram did not find that the miner no longer had Aspergillosis. Inasmuch as Dr. Sundaram=s use of the term Arule out@ in his medical opinion is subject to differing interpretations, on remand, the administrative law judge must fully explain his construction of Dr. Sundaram=s use of this term and consequent opinion.

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3. Rule out reactivation of Aspergillosis

Director's Exhibit 55.

Accordingly, the administrative law judge=s Decision and Order on Remand Awarding Benefits for Miner and Survivor, is vacated and this case is remanded to the administrative law judge for further consideration of the evidence at Sections 718.202(a), 718.204(c) and 718.205(c), consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in the majority=s opinion except insofar as it faults the administrative law judge=s consideration of Dr. Sundaram=s opinion: first, for finding Dr. Sundaram=s hospital notes more reliable than the reports of consulting physicians, Drs. Fino, Branscomb, Caffrey and Kleinerman; and second, for construing Dr. Sundaram=s opinion as ruling out Aspergillosis.

The administrative law judge explained that ADr. Sundaram=s report was unbiased-developed solely in his capacity as a treating physician during the miner=s hospitalization,@ unlike the other doctors= reports which were provided Ain exchange for payment.@ Decision and Order on Remand at 5-6. The majority=s holding that the administrative law judge erred in considering whether the medical opinions were developed for treatment or for litigation purposes contravenes both established law and common sense. Every medical opinion in a case file was developed either for treatment or for litigation. Furthermore, the law is clear that an administrative law judge is authorized to give Acontrolling weight@ to the opinion of a treating physician in appropriate cases. 20 C.F.R. '718.104(d)(5). The case at bar arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has declared Athat opinions of treating physicians are entitled to greater weight than those of non-treating physicians.@ *Tussey v. Island Creek Coal Co.*, 982 F.2d 1042, 17 BLR 2-16 (6th Cir. 1993); *accord Peabody Coal Co. v. Groves*, 277 F.3d 829, 834-835, 22 BLR 2-320, 2-326 (6th Cir. 2002).

In preferring an opinion developed in the course of treatment over an opinion developed in the course of litigation, the

administrative law judge was explaining one of the obvious rationales for giving greater weight to a treating physician=s opinion. It is perfectly reasonable to conclude, when confronted with conflicting opinions, that one can be confident that the treating physician=s opinion reflects his best judgment because his patient=s life depends upon it; the same cannot be said of the opinion of a consultant for whom a fee, not a life, is at stake.

Administrative law judges have been admonished to Aconsider whether an opinion was, to any degree, the product of bias in favor of the party retaining the expert and paying the fee;@ they are further admonished to disregard those opinions Ainfluenced more by the identity of [the doctor=s] employer.@ *Underwood v. Elkay Mining, Inc.*, 105 F3d. 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *accord Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 n.7, 22 BLR 2-162, 2-172 n.7 (4th Cir. 2000); *see Richardson v. Perales*, 402 U.S. 389 (1971) (holding that because the Social Security Administration operates as an adjudicator, and not as an advocate or an adversary, the medical experts it hires to examine claimants are unbiased; the court thereby suggests inferentially that one may reasonably suspect that a medical expert hired by an advocate or adversary may be biased.) In sum, the administrative law judge=s determination to credit Dr. Sundaram=s opinion over those of consultants is sound under law and reason.

Employer=s contention that the administrative law judge should have discounted some of Dr. Caruso=s opinions because they, too, were developed for litigation is specious. Those opinions had the indicia of veracity because they were consistent in all significant respects with his earlier opinions developed for treatment. Furthermore, the administrative law judge did not state that he distrusted all opinions developed for ligation, he said that when forced to choose between conflicting medical opinions, he would impose more confidence in an opinion developed in the course of treatment than an opinion developed in the course of litigation. Employer=s allegation that the administrative law judge is biased is without any support in the record.

Employer=s contention that the administrative law judge misinterpreted Dr. Sundaram=s opinion is, likewise, unsupported by the record. The majority correctly recognized that Dr. Sundaram=s Ause of the term >rule out= in his medical opinion is subject to differing interpretations....@ (Decision and Order at 11). The majority quoted from the administrative law judge=s decision, finding that the opinions of four doctors, attributing the miner=s death to Aspergillosis, were Acontradicted by Dr. Sundaram=s hospital notes ruling out the reactivation of Aspergillosis...@ (2000 Decision and Order at 5), yet the majority remands the case for the administrative law judge to explain his construction of Arule out.@ The administrative law judge could not have written more clearly that he interpreted Dr. Sundaram=s opinion as having ruled out Aspergillosis. Since the majority has acknowledged that the term is susceptible to differing interpretations and the administrative law judge has stated his interpretation, the Board has exceeded its authority in remanding the case. The Board should follow the Sixth Circuit=s example, when it declared, AWe recognize that the record may permit an alternative conclusion, but we also respect and defer to the ALJ=s authority in the finding of facts.@ *Groves*, 277 F.3d at 836, 22 BLR at 2-331; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989)(holding that the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge).

Accordingly, the Board should affirm the administrative law judge=s determination to credit Dr. Sundaram=s opinion over those of consulting physicians and the Board should affirm the administrative law judge=s construction of Dr. Sundaram=s opinion as a

proper exercise of his discretion.

REGINA C. McGRANERY
Administrative Appeals Judge