BRB No. 04-0154 BLA

GLEN R. LAXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG BEAR MINING COMPANY	)	DATE ISSUED: 11/16/2004
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL, and BOGGS, Administrative Appeal Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (03-BLA-5053) of Administrative Law Judge Michael P. Lesniak 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). Claimant filed an application for benefits on January 26, 2001. Director's Exhibit 2. In a Notice of Claim dated April 5. 2001, the district director

named Big Bear Mining Company (employer) as a potentially liable operator. Director's Exhibit 15. Employer controverted the claim and filed a motion to add Vision Coal Company (Vision Coal) as a potentially liable operator because Vision Coal was the most recent operator to employ claimant for a cumulative period of not less than one year. Director's Exhibits 16, 17. The district director subsequently issued a Schedule for the Submission of Additional Evidence, which informed the parties of the evidentiary limitations imposed by the regulations. Director's Exhibit 19. On August 22, 2002, the district director issued a Proposed Decision and Order Awarding Benefits, identifying employer as the responsible operator. Director's Exhibit 25. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on April 24, 2003. Director's Exhibits 26, 30. The administrative law judge subsequently issued a Decision and Order Awarding Benefits on September 30, 2003. The administrative law judge found that employer was the properly designated responsible operator. Decision and Order at 12. The administrative law judge also ruled that Employer's Exhibit 10 was excluded from evidence because employer failed to provide any persuasive reason why additional x-ray readings in excess of the evidentiary limitations should be admitted. Decision and Order at 3, n.3. The administrative law judge further found that claimant established that he was totally disabled due to pneumoconiosis arising out of coal mine employment. Decision and Order 14-22. Accordingly, benefits were awarded.

Employer appeals, alleging that the administrative law judge erred in identifying employer as the responsible operator because the district director failed to fully investigate the ability of Vision Coal and its corporate officers to assume payment of claimant's benefits. Employer also challenges the administrative law judge's findings that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b)(2) and 718.204(c). Employer further contends that the administrative law judge erred by failing to admit and consider all the exhibits it offered at the hearing. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, arguing that employer was properly designated as the responsible operator for this claim because Vision Coal did not meet the definition of a potentially liable operator since it is no longer in business, was not insured on the date of claimant's last coal mine employment, and is not capable of assuming liability for the payment of benefits as required by 20 C.F.R. §725.494(e). The Director also argues that 20 C.F.R. §725.414 is a valid regulation limiting the evidence that the parties may introduce, and therefore that the administrative law judge did not err by refusing to admit all of employer's evidence into the record.

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).

Responsible Operator

Employer challenges its designation as the responsible operator, arguing that claimant's last coal mine employment was with Vision Coal. Employer further relies on the former regulations to argue that the district director erred by dismissing Vision Coal as a potentially liable operator without first investigating the financial ability of Vision's corporate officers to assume liability for the payment of benefits.

Employer's arguments are without merit. In order to meet the regulatory definition of "a potentially liable operator," an operator must have employed the miner for a cumulative period of not less than one year and must also have the financial ability to assume liability for the payment of benefits. 20 C.F.R. §725.494(c) and (e). If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i). If the most recent operator demonstrates an inability to pay benefits, and there is no successor operator, then liability is assessed against the potentially liable operator that next most recently employed the miner. 20 C.F.R. § 725.495(a)(2)(ii) and (iii).

In this case, the record reflects that claimant last worked in coal mining for Vision Coal from September 1985 to October 1988. Claimant previously worked for employer from October 1978 to February 1984 and then from April 1984 to September 1984. In accordance with Section 725.494, the district director properly investigated claimant's most recent employer, Vision Coal, and found that the company was involuntarily dissolved by court order on May 15, 1990 and that it was thus no longer in business when claimant filed for benefits. Further, the district director found that Vision Coal did not have federal black lung insurance after June 28, 1987. Director's Exhibit 14. Because Vision Coal was not financially capable of assuming liability for benefits, the district director correctly determined that it was not a potentially liable operator as defined in Section 725.494. The district director determined that employer met the requirements of Section 725.494 and that it is was the next most recent operator to employ the miner for a cumulative period of not less than one year. In the Proposed Decision and Order Awarding Benefits, the district director provided the requisite explanation as to why employer was designated as the responsible operator, namely that Vision Coal was no longer insured and could not assume responsibility for the payment of benefits, that employer was the next operator to employ claimant for a cumulative period of not less than one year, and that employer was self-insured and therefore financially capable of

paying benefits.[1] Consequently, based on the facts of this case, we affirm the administrative law judge's finding that the district director correctly dismissed Vision Coal as a potentially liable operator and identified employer as the responsible operator, despite claimant's more recent employment with Vision Coal, since Vision Coal was found by the district director to be incapable of assuming liability for the payment of benefits, and since the district director's actions were in accordance with the regulations. Decision and Order at 12-13.

Furthermore, we reject employer's contention that the district director erred in dismissing Vision Coal as a potentially liable operator without first investigating the financial ability of Vision Coal's corporate officers to assume responsibility for the payment of benefits. Employer specifically alleges that the Director failed to make a diligent search concerning the assets of the corporate officers, and that such an investigation is required by 20 C.F.R. §725.495 (2000).[2] Employer's Brief at 8. As noted by the administrative law judge, however, Section 725.495 allows, but does not require the Director to hold certain corporate officers personally liable for debts of a corporation that has failed to secure the appropriate black lung insurance.[3] *See* Decision and Order at 12; Director's Brief at 8. The district director has discretion to proceed against the corporate officers if it finds that the corporate officers are financially viable.[4]

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[1] The regulations provide that "[i]n any case referred to the Office of Administrative Law Judges… in which the operator finally designated the responsible operator… is not the operator that most recently employed the miner, the record shall contain a statement from the district director explaining the reasons for such designation." 20 C.F.R. §725.495(d). If the reasons include the most recent operator's failure to meet the conditions at Section 725.494(e), that it be financially capable of assuming liability for benefits, the district director must include in the record a statement that the Office of Workers' Compensation Programs has searched its files pursuant to 20 C.F.R. Part 726 and has no record of insurance or self-authorization to insure for that operator. *Id*.

[2] The administrative law judge noted that employer agreed at the hearing that it was properly designated the responsible operator under the "regulations and case law as it appears right now" and that counsel for employer preserved the issue for appellate purposes in case the law would change. Decision and Order at 12.

[3] Section 725.495 must be read in conjunction with section 725.491(b). *See* 20 C.F.R. §§725.491(b) and 725.495.

[4] Contrary to employer's argument, the regulation at 20 C.F.R. §725.495(c)(2) places the burden on the designated responsible operator to demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits. That

See 20 C.F.R. § 725.491(b); Decision and Order at 12. To set forth a prima facie case that the most recent operator is incapable of paying benefits, the district director need only include within the record a statement that the Office of Workers' Compensation Programs has searched its files and found no record of insurance coverage or authorization to self-insure for that operator. 20 C.F.R. §725.495(d). In this case, the district director explained why Vision Coal is incapable of assuming liability for benefits, namely because it was dissolved by court order in 1990. Notwithstanding, we note that the district director attempted to contact Vision Coal's corporate officers at their last known addresses to obtain financial information regarding their ability to pay benefits but the letters were returned by the postal service as non-deliverable, with no forwarding address. Director's Exhibits 21, 24. Because employer was the next to last operator to have employed the miner for a cumulative period of not less than one year, and since employer has not demonstrated: 1) that it is not financially capable of paying benefits; and 2) it is not the potentially liable operator that most recently employed the miner under Section 725.495(c), we affirm as supported by substantial evidence, the administrative law judge's finding that employer is the responsible operator in this case.

Evidentiary Limitations

We next address employer's contention that the administrative law judge erred in limiting the evidence under 20 C.F.R. §725.414(a)(3)(i) and (ii). Employer argues that evidence proffered at Employer's Exhibit 10, including x-ray readings, was relevant to and probative of the issues in the case *sub judice* and should have been considered. Employer further challenges the validity of Section 725.414(a)(3). Employer cites to, *inter alia*, the Act's provision that all relevant evidence shall be considered, 30 U.S.C. §923(b), and to the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).[5]

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regulation specifically states that, "The designated responsible operator may satisfy its burden by presenting evidence that the owner, if the more recent employer is a sole proprietorship; the partners, if the more recent employer is a partnership; or the president, secretary, and treasurer, if the more recent employer is a corporation that failed to secure the payment of benefits… possesses assets sufficient to secure the payment of benefits." 20 C.F.R. §725.495(c)(2). Employer provided names of the corporate officers for Vision Coal but did not present evidence that those corporate officers possessed sufficient assets to secure the payment of benefits. *See* Director's Brief at 7.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's last coal mine employment occurred in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 2, 3.

Employer's contentions lack merit. The Department of Labor relied upon other language in Section 923(b) which incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence...." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997). Additionally, the Department of Labor relied upon Section 556(d) of the Administrative Procedure Act (APA), which empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), 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); 62 Fed. Reg. at 3359. These statutory provisions were cited by the United States Court of Appeals for the District of Columbia Circuit when it upheld 20 C.F.R. §725.414 as a valid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Assn v. Chao*, 160 F. Supp 2d 47 (D.D.C. 2001).

Further, in *Underwood*, which was issued prior to the recent regulatory revisions, the Fourth Circuit set a standard for administrative law judges to apply in exercising their discretion to exclude unduly repetitious evidence under Section 556(d) of the APA, while considering all relevant evidence under Section 923(b) of the Act. The Fourth Circuit held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Because the issue in *Underwood* concerned case-by-case rulings by administrative law judges under Section 556(d) of the APA, the Fourth Circuit did not decide the issue of the Department of Labor's authority to impose limits on the admission of evidence in black lung claims. Subsequent to *Underwood*, the Department of Labor exercised its authority to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. §556(d), and replaced the ad hoc determinations of administrative law judges with a bright-line rule in 20 C.F.R. §725.414, including a "good cause" exception at Section 725.456(b)(1). In *Underwood*, the Fourth Circuit recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary ...." *Underwood*, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). Based on the foregoing, we reject employer's assertion of error on the administrative law judge's part in excluding certain evidence from the record in the instant case pursuant to 20 C.F.R. §725.414. *See Dempsey v. Sewell Coal Co.*, BLR , BRB Nos. 03-0615 BLA, 03-0615 BLA-A (Jun. 28, 2004) (*en banc*).

Existence of Pneumoconioisis

With regard to the merits of the claim, employer argues that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis at 20

C.F.R. §718.202(a)(1). Contrary to employer's contention, the administrative law judge rationally found that claimant established the existence of pneumoconiosis based on the x-ray evidence since there was a majority of positive readings rendered by physicians who held superior qualifications as Board-certified radiologists and B-readers.[6] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Employer's Exhibits 3, 6; Claimant's Exhibits 2, 4; Decision and Order at 5. We also reject employer's contention that certain of its experts' negative x-ray readings should have received greater weight based on their status as professors of radiology. Although the administrative may defer to the x-ray interpretations by readers who are professors of radiology, he is not required to do so. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003). Because the administrative law judge's finding that claimant established the existence of pneumoconiosis is based on a quantitative and qualitative analysis of the x-ray evidence, *see Adkins*, 958 F.2d at 49, 16 BLR at 2-61, we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).[7] Decision and Order at 15.

[6] The administrative law judge considered the eleven interpretations of four x-rays dated March 20, 2001, May 20, 2002, January 9, 2003 and February 3, 2003. Of these eleven interpretations, there were five positive and four negative readings made by physicians who were dually qualified as Board-certified radiologists and B-readers. There was also one positive reading by a B-reader and one negative reading by a B-reader. Decision and Order at 15.

[7] Employer argues that the administrative law judge should have admitted into the record additional readings proffered by employer of the February 3, 2003 x-ray. Employer's Brief at 19-20. Employer asserts that "[claimant] offered two readings of this film, presumably one rebuttal reading and one reading for his case-in-chief." Employer's Brief at 20. Employer maintains that the additional readings it proffered were relevant and that the administrative law judge had a duty under the regulations to accept at least one of the readings offered by employer as rebuttal to claimant's case in chief. *Id*. Contrary to employer's contention, claimant identified in his pre-hearing statement, that he was submitting Dr. Gaziano's positive reading of the March 20, 2001 x-ray and Dr. Patel's positive reading of the January 9, 2003 x-ray as the two x-rays in support of its case pursuant to 20 C.F.R. §725.414. Director's Exhibit 12, Claimant's Exhibit 2. Thus, employer's contention that it is entitled to rebuttal readings of the February 3, 2003 x-ray is without merit. Moreover, we note that employer did not raise an objection before the administrative law judge as to the admission of Claimant's Exhibit 4, which included the two positive readings of the February 3, 2003 x-ray by dually qualified Board-certified radiologists and B-readers. Further, employer specifically acknowledged on the Joint

Employer next alleges error in the administrative law judge's weighing of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer argues that in crediting Dr. Rasmussen's opinion that claimant has pneumoconiosis, the administrative law judge erroneously discounted the respective qualifications of the physicians, that he selectively analyzed the medical opinion evidence, and that he improperly substituted his opinion for those of the medical experts.

We disagree. The administrative law judge properly considered the relative qualifications of the physicians[8] and permissibly determined that Dr. Rasmussen was at least as qualified as employer's physicians in rendering an opinion on the existence of pneumoconiosis based on his experience treating miners. *See Underwood*, 105 F.3d at 946, 21 BLR at 2-23; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Further, contrary to employer's argument, the administrative law judge provided a valid reason for assigning less probative weight to Dr. Crissali's opinion that claimant did not have pneumoconiosis. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). Specifically, the administrative law judge permissibly questioned why Dr. Crisalli's opined that there was insufficient objective evidence to support a diagnosis of pneumoconiosis when, at the time Dr. Crisalli prepared his report, there was only one reading of the most recent x-ray, and that reading was positive for pneumoconiosis.[9] *Collins v. J&T Steel*, 21 BLR 1-181, 189 (1999); Decision and Order at 18.

Evidence Summary and at the hearing, that the x-ray readings contained at Employer's Exhibits 2 and 10 were in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. The administrative law judge thus properly excluded that evidence from consideration.

[8] The administrative law judge noted that while Drs. Crisalli and Hippensteel were Board-certified in both internal medicine and pulmonary disease, Dr. Rasmussen was also Board-certified in internal medicine and had "performed pulmonary examinations on more an 40,000 miners" and had "published original research on the effects of pneumoconiosis on 6 to 7 occasions from 1968 to 1990." Claimant's Exhibit 2; Employer's Exhibits 1, 6; Decision and Order at 16. The administrative law judge further found that since the qualifications of Drs. Gaziano and D'Brot were not part of the record, their opinions had less probative value. Director's Exhibit 8; Claimant's Exhibit 1; Decision and Order at 17.

[9] At the time Dr. Crissali prepared his July 2, 2002 report, he had before him a positive reading of the May 20, 2002 x-ray by Dr. Willis, a B-reader. Employer's Exhibit 1.

In weighing Dr. Hippensteel's opinion at Section 718.202(a)(4), the administrative law judge correctly noted that Dr. Hippensteel's diagnosis that claimant did not have pneumoconiosis was based in part on his negative x-ray reading of the February 3, 2003 x-ray. The administrative law judge found, however, that since Dr. Hippensteel was a B-reader, his negative x-ray reading was outweighed by a positive reading of that same x-ray by a more qualified Board-certified radiologist and B-reader. Decision and Order at 18; Claimant's Exhibit 4; Employer's Exhibit 6. Further, the administrative law judge did not, as employer contends, substitute his judgment for that of Dr. Hippensteel in addressing the issue of legal pneumoconiosis. The administrative law judge rationally found that Dr. Hippensteel's opinion that "smoking was the more potent cause of obstructive lung disease than is coal workers' pneumoconiosis," did not eliminate the possibility that coal mine dust exposure caused some of the obstruction demonstrated in claimant's condition. Decision and Order at 18. Furthermore, the administrative law judge reasonably questioned whether Dr. Hippensteel's opinion "regarding the type of obstruction caused by smoking (variable) and pneumoconiosis (more fixed)" was consistent with the regulatory definition of pneumoconiosis, which encompasses chronic bronchitis and asthma. *See* 20 C.F.R. §718.201; Employer's Exhibit 6, 11; Decision and Order at 18.

In contrast, the administrative law judge permissibly credited Dr. Rasmussen's opinion that claimant's respiratory impairment was due to both smoking and coal dust exposure as better reasoned and better supported by the objective evidence.[10] *See Underwood,* 105 F.3d at 951, 21 BLR at 2-31-32; *Anderson v. Valley Camp Coal Co.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order at 17-18. We thus affirm the administrative law judge's determination that claimant established the existence of pneumoconiosis based on the medical opinion evidence at Section 718.202(a)(4).[11]

[10] Although the administrative law judge noted that Dr. Gaziano's credentials were not of record, he was not obliged, as employer argues, to reject on this basis the physician's opinion that claimant had pneumoconiosis. The administrative law judge reasonably found that Dr. Gaziano's opinion corroborated Dr. Rasmussen's opinion at 20 C.F.R. §718.202(a)(4). *See generally Lafferty v. Cannelton Industries Inc.*, 12 BLR 1-190 (1989); Decision and Order at 18; Employer's Brief at 27.

[11] The administrative law judge was particularly persuaded by Dr. Rasmussen's deposition testimony explaining that coal mine dust exposure and smoking caused similar lung tissue destruction, and that in claimant's case, the obstructive impairment could be equally attributable to coal dust exposure and smoking. Decision and Order at 17, n.9. The administrative law judge noted that, while it was Dr. Rasmussen's opinion that only ten to fifteen percent of miners with twenty years of coal mine dust experience developed pneumoconiosis, Dr. Rasmussen also opined that claimant's diagnosis of pneumoconiosis

Based on the foregoing, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis based on a weighing of all of the relevant evidence together at 20 C.F.R. §718.202(a) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Decision and Order at 19.

Total Respiratory or Pulmonary Disability

Employer contends that the administrative law judge erred in weighing the medical opinion evidence relevant to whether claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer argues that the administrative law judge failed to fully consider the opinions of Drs. Crisalli and Hippensteel, who opined that claimant was not totally disabled from returning to his usual coal mine work.

We disagree. The administrative law judge, permissibly credited Dr. Rasmussen's opinion that claimant was totally disabled as better reasoned and better supported by the qualifying arterial blood gas study evidence, along with the results of a diffusion capacity test showing moderate loss of lung function. *See Clark*, 12 BLR at 1-149; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Claimant's Exhibits 2, 3; Decision and Order at 20. The administrative law judge also acted within his discretion in crediting Dr. Rasmussen's opinion because the physician more fully discussed the physical and exertional requirements of claimant's usual coal mine job as a heavy equipment operator and mechanic in rendering his opinion that claimant was totally disabled from returning to his usual coal mine work due to his respiratory condition. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); Decision and Order at 20. We therefore affirm, as supported by substantial evidence, the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), as well as his conclusion that claimant established total disability based on a weighing of the totality of the relevant evidence at 20 C.F.R. §718.204(b)(2). Decision and Order at 20.

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was justified by a history of twenty-two to twenty-seven years of coal mine employment, the presence of x-ray changes consistent with pneumoconiosis, and the test results showing a severe reduction in diffusion capacity compared to obstruction, which Dr. Rasmussen opined was more consistent with combined impairment from smoking and coal dust exposure. *Id.*

Disability Causation

Lastly, employer argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Employer specifically alleges that the administrative law judge selectively analyzed the opinions of Drs. Crisalli and Hippensteel by failing to consider their conclusions that claimant's whole man impairment was due to sources other than coal workers' pneumoconiosis or coal dust exposure. Employer's Brief at 29.

Employer's argument has no merit. In this case, because the administrative law judge found the existence of clinical and legal pneumoconiosis established by medical opinion and x-ray evidence, he permissibly assigned little weight to the opinions of Drs. Crisalli and Hippensteel who opined that claimant's disability was due to conditions other than coal mine employment, but who also opined that claimant did not have pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109; 19 BLR 2-70 (4th Cir. 1995); Employer's Exhibits 1, 6, 11, 12; Decision and Order at 21. The administrative law judge specifically found that Dr. Crisalli's assumption of the existence of pneumoconiosis was insufficient to cure this defect in his opinion. S*ee Scott*, 289 F.3d at 270; 22 BLR at 2-384; *Toler*, 43 F.3d at 115, 19 BLR at 2-83. He further noted that Dr. Hippensteel testified that if pneumoconiosis was present he "could at least say it was a participant in the impairment." Decision and Order at 12, n.11. As the administrative law judge's finding that claimant established total disability due to pneumoconiosis is rational, supported by substantial evidence, and in accordance with the law, we affirm the administrative law judge's determination at 20 C.F.R. §718.204(c). Decision and Order at 21, n.11. We therefore also affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge