BRB No. 02-0809 BLA

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| JACKIE W. CLENDENON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | DATE ISSUED: 10/06/2003 |
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| WESTMORELAND COAL COMPANY | ) | |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party–in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Natalie D. Brown (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (96-BLA-1194) of Administrative Law Judge Stuart A. Levin 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 case is before the Board for the third time.

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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

Claimant filed the instant claim on September 25, 1995. Director's Exhibit 1. In a Decision and Order dated October 14, 1997, the administrative law judge found claimant had twenty-seven years of qualifying coal mine employment, employer was the responsible operator, and the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Section 718.202(a)(4)(2000) and 718.203(2000). The administrative law judge also found the evidence established total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c)(2000), with benefits commencing September 1, 1995. By Decision and Order dated November 3, 1998, the Board affirmed the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2000). The Board vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), and that the evidence established total disability due to pneumoconiosis at Section 718.204(b)(2000). *Clendenon v. Westmoreland Coal Co.*, BRB No. 98-0226 BLA (Nov. 3, 1998)(unpub.).

On remand, the administrative law judge found the evidence of record established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), and the evidence established total disability due to pneumoconiosis at Section 718.204(b)(2000). Accordingly, the administrative law judge awarded benefits. By Decision and Order dated November 29, 2000, the Board again vacated the administrative law judge's findings that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4)(2000), and that the evidence established total disability due to pneumoconiosis at Section 718.204(b)(2000). The Board remanded the case to the administrative law judge for reconsideration of the evidence at Section 718.202(a)(4)(2000) and, if needed, reconsideration of the evidence at Section 718.204(b)(2000). *Clendenon v. Westmoreland Coal Co.*, BRB No. 00-0131 BLA (Nov. 29, 2000)(unpub.).

On remand, in a Decision and Order dated June 24, 2001, the administrative law judge credited the opinions of Drs. Parathaman and Forehand over the contrary opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan and, therefore, found the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and further found total respiratory disability due to pneumoconiosis established pursuant to Section 718.204(c).[2] Accordingly, the administrative law judge awarded benefits. On

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regulations.

[2]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

appeal, employer challenges the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer asserts, *inter alia*, that the administrative law judge's findings at Section 718.202(a)(4) are violative of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer also challenges the administrative law judge's finding that the evidence establishes that claimant's total respiratory disability is due to pneumoconiosis pursuant to Section 718.204(c), asserting that the administrative law judge's findings thereunder are also violative of the APA. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

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

Employer initially challenges the administrative law judge's finding that the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer contends that the administrative law judge erred in crediting the opinions of Drs. Paranthaman and Forehand over the contrary opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan. The record reflects that Dr. Parathaman opined that claimant's "pulmonary emphysema is primarily due to heavy cigarette smoking….If 27 years of coal mine employment is documented, it could have aggravated the condition significantly." Director's Exhibit 14 at 4. Dr. Forehand opined that claimant suffers from coal worker's pneumoconiosis and a chronic obstructive pulmonary impairment due, in part, to coal dust exposure. Claimant's Exhibits 1, 2. Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan each opined that claimant did not have coal workers' pneumoconiosis, and was totally disabled due to the effects of smoking, but not coal dust exposure. Director's Exhibit 30; Employer's Exhibits 3, 5, 8, 10, 11, 16-19, 23-25. Drs. Fino, Morgan, Castle and Tuteur opined that claimant's impairment is due to emphysema. Employer's Exhibits 3, 5, 8, 11, 18, 19, 23, 24.

Employer contends that the administrative law judge improperly discounted the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan because he incorrectly

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total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

found that all six doctors based their opinions that claimant did not have coal workers' pneumoconiosis "exclusively or primarily on the lack of evidence of fibrosis." *See* Decision and Order at 13. Employer asserts that the six doctors in question did not rely exclusively or primarily on a lack of evidence of fibrosis, but rather that the lack of evidence of fibrosis was one of several factors relied upon. Similarly, employer argues that the administrative law judge erred in crediting the opinions of Drs. Paranthaman and Forehand on the basis that they "adhered to the regulatory definition of pneumoconiosis,"[3] and implied that they would have found pneumoconiosis regardless of the presence of fibrosis. While Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan all stated that the absence of evidence of fibrosis was a factor in concluding that claimant did not have pneumoconiosis, none of the six physicians cited that factor as a primary or exclusive factor for his diagnosis. In fact, all of the doctors who found the absence of pneumoconiosis, except Dr. Morgan, cited the reversibility of the results of claimant's pulmonary function studies after the administration of bronchodilators as a key factor in finding that claimant did not have legal pneumoconiosis. Director's Exhibit 30; Employer's Exhibits 3, 8, 10, 11, 16-19, 23-25. Dr. Morgan stated that he relied on the fact that the results of the pulmonary function studies he reviewed were more consistent with emphysema in concluding that the cause of claimant's airways obstruction was not the inhalation of coal mine dust, and thus, that he did not have legal pneumoconiosis. Employer's Exhibit 5. Drs. Fino and Tuteur also cited extensive medical literature and studies that supported their opinions that coal dust exposure did not cause claimant's impairment. Employer's Exhibits 3, 18, 19, 24. Thus, the basis that the administrative law judge provided for discounting the contrary medical opinions at Section 718.202(a)(4) is factually inaccurate.

Employer next argues that the administrative law judge erred when he discounted the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan at Section 718.202(a)(4) on the basis that they did not adequately address whether claimant had legal pneumoconiosis. We agree. The administrative law judge stated that Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan "did not adequately address the conditions identified by Drs. Forehand and Paranthaman which fall within the regulatory definition." Decision and Order at 13-14. A review of the record indicates that all six of these doctors opined, *inter alia*, that claimant had a respiratory impairment due to cigarette smoking and unrelated to coal dust exposure. Director's Exhibit 30; Employer's Exhibits 3, 8, 10, 11, 16-19, 23-25. Therefore, contrary to the administrative law judge's finding, all six doctors considered and opined that claimant

[3]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).

did not have legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer next contends that the administrative law judge erred in failing to assign weight to the physicians' opinions at Section 718.202(a)(4), based upon their qualifications. We agree. The United States Court of Appeals for the Fourth Circuit has stated that the qualifications of experts are important indicators of reliability, and therefore, must be considered by the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). On remand, therefore, the administrative law judge must render a finding consistent with the holdings set forth in *Hicks* and *Akers*.[4]

In light of the foregoing, we vacate the administrative law judge's findings at Section 718.202(a)(4) and remand for further consideration consistent with the above instructions. If, on remand, the administrative law judge finds that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4), he must then weigh all of the relevant evidence at Section 718.202(a)(1)-(4) together, pursuant to *Island Creek Coal Co. v. Compton*, 211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next challenges the administrative law judge's finding that the evidence establishes total disability due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge credited the opinions of Drs. Forehand and Paranthaman over the contrary opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan. Decision and Order at 14. Employer initially contends that the administrative law judge erred when he found that "[n]either Dr. Sargent nor any other physician produced any evidence, other than their educated conclusions based on the smoking history and the presence of COPD, to establish that the cigarette smoking did cause the COPD in this case." *Id.* Employer contends that the administrative law judge's findings are not factually accurate. We agree. The record reflects that Dr. Fino relied upon various studies and reports, which he cited extensively, in support of his finding that claimant's disability was due to cigarette smoking and not due to pneumoconiosis. Employer's Exhibits 3, 18. Dr. Fino relied upon studies by Drs. Green, Chung, Snider, Lapp, Morgan, Parkes, Heppleton, Naeye, Ruckey and the U.S.

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[4] Employer additionally suggests several reasons why the opinions of Drs. Forehand and Paranthaman should have been discounted. Specifically, employer asserts that Drs. Forehand and Paranthaman based their respective opinions upon a single examination, and that they were poorly reasoned, poorly documented and contained unexplained conclusions. *Id.* These arguments are more appropriately made before the administrative law judge, and employer is free to do so on remand.

Surgeon General. *Id.* Further, Dr. Fino also stated that he relied, in part, upon the fact that there was significant improvement in claimant's pulmonary function studies following the administration of bronchodilators. *Id.* Dr. Castle cited the totality of "physiologic findings" and the reversibility of the pulmonary function studies to support his conclusion that claimant's disability was in no way related to coal mine employment or coal dust exposure. Employer's Exhibits 8, 11, 23. Dr. Tuteur cited the "totality of the medical data", as well as medical literature and studies by experts, in finding that claimant's disability was not caused in whole or in part by pneumoconiosis. Employer's Exhibit 19 at 4; Employer's Exhibit 24 at 18-29. Thus, the administrative law judge erred in discounting these medical opinions on the basis that the physicians failed to produce any evidence, other than their educated conclusions, to support their opinions. *See Johnson v. Califano,* 585 F. 2d 89 (4th Cir. 1978); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Moreover, the administrative law judge impermissibly rejected the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan because they provided their educated conclusions, based upon their interpretation of the medical data. Decision and Order at 14. The interpretation of medical data is properly performed by the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

Next, employer argues that, in considering the evidence at Section 718.204(c), the administrative law judge impermissibly discounted Dr. Sargent's opinion, that claimant's total disability is due to smoking and not coal dust exposure, because Dr. Sargent commented upon the infrequency with which miners with smoking histories similar to claimant's will develop significant lung disease. Employer's Exhibits 17, 25. The administrative law judge stated

> If applying the findings in the medical literature is a presumption, then the physicians' conclusions about the role of cigarette smoking is also a presumption. As Dr. Sargent testified, only 10 to 15 percent of individuals with a 30 to 40 pack year history of smoking cigarettes develop significant lung disease.

Decision and Order at 14. However, Dr. Sargent also testified that only three to five percent of coal miners with claimant's coal dust exposure history will develop a significant respiratory impairment as a result of coal dust exposure. Employer's Exhibit 25 at 27. On remand, the administrative law judge must consider Dr. Sargent's opinion in its entirety in addressing the issue of total disability due to pneumoconiosis. *See Tanner v. Freeman United Coal Mining Co.*, 10 BLR 1-85 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).

Employer additionally contends that the administrative law judge failed to consider that Dr. Paranthaman's disability causation opinion is equivocal. As stated earlier, Dr. Paranthaman opined that claimant's "pulmonary emphysema is primarily due to heavy cigarette smoking…If 27 years of coal mine employment is documented, it *could have* aggravated the condition significantly." Director's Exhibit 14 at 4 (emphasis added). While an administrative law judge need not discount opinions that are equivocal, he is required to take the qualified nature of the opinion into account. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Salisbury v. Ziegler Coal Co.*, 7 BLR 1-501 (1984). On remand, therefore, the administrative law judge must consider the equivocal nature of Dr. Paranthaman's opinion before determining what weight to accord it.

Employer next argues that the administrative law judge erred by failing to note that Dr. Forehand relied upon an erroneous smoking history in concluding that claimant's disability is due to pneumoconiosis. We disagree. Employer misstates that Dr. Forehand found a smoking history of forty-one years, when in fact Dr. Forehand found that claimant had a thirty year smoking history.[5] In his first report dated November 13, 1996, Dr. Forehand stated that: "[claimant] smoked about one pack of cigarettes daily for 30 years starting at age 18 and quitting about ten days ago." Claimant's Exhibit 1. In his supplemental report dated November 16, 1996, Dr. Forehand also relied upon a thirty year smoking history. Claimant's Exhibit 2. We reject, therefore, employer's contention that Dr. Forehand relied upon an incorrect smoking history.

At Section 718.204(c), employer next argues that the opinions of Drs. Forehand and Paranthaman are not as thorough and well supported as the opinions of Drs. Dahhan and Sargent, because Drs. Dahhan and Sargent each reviewed the entire record and also performed thorough physical examinations. We reject this contention. The record reflects that Drs. Forehand and Parathaman also performed thorough physical examinations.[6] Director's Exhibits 13, 14; Claimant's Exhibits 1, 2. Further, whether a

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[5]While the administrative law judge never rendered an explicit finding as to claimant's actual smoking history, he stated that claimant "acknowledged that he smoked cigarettes for approximately 30 years ending in 1986." Administrative Law Judge's Decision and Order dated October 14, 1997 at 3; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

[6]Dr. Forehand conducted a physical examination on November 13, 1996, which included the taking of claimant's coal mine employment and smoking histories, an x-ray, a pulmonary function study, a blood-gas study, and an EKG. Claimant's Exhibits 1, 2. Dr. Paranthaman conducted a physical examination on November 16, 1995, which

medical report is more thorough or better documented is a subjective determination to be made by the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

Employer also asserts that Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan have credentials that are superior to those of Drs. Forehand and Paranthaman, and thus, the administrative law judge erred by according the latter doctors' opinions greater weight. As discussed, *supra*, the administrative law judge must consider the qualifications of the physicians in evaluating the evidence at Section 718.204(c). *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-273-274.

In light of the foregoing, we also vacate the administrative law judge's finding that the evidence establishes total disability due to pneumoconiosis pursuant to Section 718.204(c), and remand this case for further findings. On remand, the administrative law judge must determine whether the evidence establishes that pneumoconiosis "is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c). *See also Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Finally, employer challenges the administrative law judge's determination that benefits commence on September 1, 1995, the month that claimant filed the instant claim. In his initial decision, the administrative law judge stated simply: "Since the month of onset of total disability cannot be established, benefits are payable beginning with the month during which the claim was filed." Decision and Order dated October 14, 1997 at 10. Employer asserts that since Dr. Paranthaman's opinion dated November 16, 1995, is the earliest opinion which concludes that claimant is totally disabled due to pneumoconiosis, claimant's benefits cannot not commence any earlier than November of 1995.

In determining the appropriate date from which benefits commence, the administrative law judge must consider all of the relevant evidence and assess the credibility of that evidence. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-81 (1989). Contrary to employer's argument, however, the appropriate date from which benefits commence is not necessarily established by the first medical opinion indicating that claimant is totally disabled due to pneumoconiosis. Rather, such evidence indicates only that the miner became totally disabled at some time prior to the date of such evidence. *See Rochester & Pittsburgh*

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included the taking of claimant's coal mine employment and smoking histories, an x-ray, a pulmonary function study, a blood-gas study, and an EKG. Director's Exhibits 13, 14.

*Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985). Inasmuch as the administrative law judge's determination as to the appropriate date from which benefits commence is necessarily dependent upon his weighing of the medical evidence in this case, we vacate the administrative law judge's finding that September 1, 1995 is the date from which benefits commence. On remand, the administrative law judge is instructed to reconsider this issue, if reached.

We note that this case has been before the administrative law judge following remand from the Board on two prior occasions. The Board has twice previously instructed the administrative law judge to accurately characterize the evidence at Sections 718.202(a)(4) and 718.204(c). Further, the Board instructed the administrative law judge to weigh the respective qualifications of all of the doctors at Sections 718.202(a)(4) and 718.204(c). The administrative law judge failed to adhere to the Board's instructions on both occasions. We hold therefore, that under the facts of this case, reassignment is appropriate. Cases that have maintained a "stalemated posture" because of a judge's intransigence require reassignment. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992). Given his failure to follow our previous instructions on remand, Judge Levin's continued participation in this case presents a significant risk to the fair administration of justice.

On remand, the administrative law judge to whom this case is reassigned must explain all of the findings rendered pursuant to Sections 718.202(a) and 718.204(c), consistent with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the Office of Administrative Law Judges for reassignment and for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

PETER A. GABAUER, Jr.
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's Decision and Order awarding benefits. I would affirm the administrative law judge's decision in all respects.

In his first decision in the instant case, the administrative law judge summarized all of the medical reports at length; he credited the opinions of Drs. Paranthaman and Forehand who attributed claimant's disabling respiratory impairment to a combination of cigarette smoking and coal mine employment. The administrative law judge found these opinions outweighed the opinions of Drs. Dahhan, Fino, Morgan, Castle, Sargent and Tuteur who attributed claimant's disabling respiratory impairment to smoking, alone. The administrative law judge explained that the former opinions were better supported by the evidence of record: the objective, qualifying studies, claimant's twenty-seven years of coal mine employment history ending in 1995, the onset of his breathing problems in 1990 or 1991, four or five years after his thirty-year smoking history had ended. (Decision and Order (1997) at 9).

When employer appealed the administrative law judge's decision to the Board, the Board held that because all of the medical opinions had similar bases, the administrative law judge had not adequately explained what distinguished the opinions of Drs. Paranthaman and Forehand from the other medical opinions of record. Board Decision and Order (1998) at 2. I believe that the Board erred in failing to consider the administrative law judge's decision as a whole. From the administrative law judge's accounts of the opinions of Drs. Dahhan, Fino, Morgan, Castle, Sargent and Tuteur it is

clear that they did not explain why claimant's twenty-seven year history of coal dust exposure had not aggravated his respiratory impairment. Thus, the administrative law judge properly accorded those opinions less weight which did not account for claimant's "extensive history [of] coal mine dust exposure…" (Decision and Order (1997) at 9). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213, 22 BLR 2-162, 2-177 (4th Cir. 2000) (ALJ may properly discount a medical opinion which is "conclusory and does not explain why coal dust exposure could not have… aggravated the emphysema." (citation omitted)).

It is also clear from the administrative law judge's analysis that he found more credible those opinions which diagnosed legal pneumoconiosis based in part on the timing and sequence of certain relevant events: claimant developed breathing problems while he was still working as a miner, but four or five years after he had discontinued smoking; his respiratory impairment increased to the point of total disability over the next four or five years, while he continued to be exposed to coal dust but not to the hazards of smoking. (Decision and Order (1997) at 9). One cannot say that it was irrational for the administrative law judge to infer from these facts that coal dust exposure aggravated claimant's respiratory impairment. The case at bar arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has declared: the findings of an administrative law judge

> may not be disregarded on the basis that other inferences might have been more reasonable. Deference must be given the fact-finder's inferences and credibility assessments, and we have emphasized the scope of review of ALJ findings is limited. *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

*Newport News Shipbuilding & Dry Dock Co. v. Cherry,* 326 F.3d 449, 452, 37 BRBS 6, 8 (CRT) (4th Cir. 2003). Because substantial evidence supported the administrative law judge's determination to discount those medical opinions which did not explain why claimant did not suffer from legal pneumoconiosis, and because substantial evidence supported the administrative law judge's determination to credit those medical opinions finding legal pneumoconiosis, which were consistent with claimant's extensive coal mine employment history and his chronology of significant, relevant facts showing that his breathing problems began four or five years after his smoking ceased but while mining continued, the Board erred in vacating the administrative law judge's decision. *See* 33 U.S.C. §921(b)(3). The Board's determination to vacate the administrative law judge's decision was "under all the facts and circumstances…clearly wrong," and it should be vacated. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992)(*en banc*). The administrative law judge's original decision awarding benefits should be reinstated,

*see Eggers v. Clinchfield Coal Co.*, 29 Fed. Appx. 144 (4th Cir. 2002) and that decision should be affirmed, *cf. Grigg v. Director, OWCP*, 28 F.3d 416, 420 n.7, 18 BLR 2-299, 2-308 n.7 (4th Cir. 1994).

When the Board remanded the case for the administrative law judge to explain why he had credited the opinions of Drs. Forehand and Paranthaman over the contrary opinions of record, the administrative law judge reiterated his explanation from his prior decision and added a long quotation from Dr. Forehand's letter in which the doctor set forth his analysis of claimant's condition. The doctor stated that he diagnosed "a severe, obstructive, ventilatory pattern (COPD) and exercise induced arterial hypoxemia (EIAH)" on the basis of claimant's qualifying blood gas studies and qualifying ventilatory studies, both before and after bronchodilator. Claimant's Exhibit 2 at 1 (Decision and Order (1999) at 3). The doctor stated:

> [R]ecent studies published in peer-review pulmonary medical journals have clearly established the relationship between coal dust exposure and 1) COPD and 2) EIAH. Despite proof that coal dust causes lung disease, some experts continue to maintain the converse…that cigarette smoking but not coal dust exposure causes COPD and EIAH. The only real basis of such an opinion is to ignore these most recent reports.

Claimant's Exhibit 2 at 1-2. (Decision and Order (1999) at 4).

Dr. Forehand had also observed that for six of claimant's twenty-seven years of coal mine employment he had worked underground, before coal dust standards were enforced; this fact, he stated, "underscores the importance of my considering coal dust exposure in the total explanation of [claimant's] disabling lung disease." Claimant's Exhibit 2 at 2. (Decision and Order (1998) at 4).

That Dr. Forehand correctly understood current medical literature is confirmed by the comments to the regulations. 65 Fed. Reg. 79,920, 79,938-79,939 (Dec. 20, 2000). As the Seventh Circuit observed in *Consolidation Coal Co. v. Director, OWCP [Stein],* 294 F.3d 885, 895, 22 BLR 2-411, 2-426-27 (7th Cir. 2002), "There is overwhelming scientific and medical evidence" supporting [the doctor's] opinion that exposure to coal dust can cause, aggravate, or contribute to obstructive lung disease. 65 Fed. Reg. at 79,944" (citations omitted). Furthermore, the administrative law judge provided a sound reason for crediting Dr. Forehand's opinion, as the Seventh Circuit declared regarding an administrative law judge's crediting of another doctor, "It was rational to give great weight to [the doctor's] views, particularly in light of his ….superior knowledge of cutting edge research" (citation omitted). *United Coal Mining Co. v. Summers*, 272 F.3d

473, 483, 22 BLR 2-265, 2-280-281. Thus, the administrative law judge again supported his determination to give greater weight to the opinions of Drs. Forehand and Paranthaman over the contrary opinions and he provided a compelling reason to rely principally on Dr. Forehand's opinion. *Id.* Yet again the Board insisted that the administrative law judge had not adequately explained his finding that the opinions of Drs. Forehand and Paranthaman were more credible than the contrary opinions of record. (Decision and Order (2000) at 2). Again, the Board failed to adhere to its statutory standard of review of factual determinations. *See Doss v. Director, OWCP*, 53 F.3d 654, 658, 69 BLR 2-183, 2-190 (4th Cir. 1995).

On second remand, the administrative law judge provided an exhaustive summary of the medical opinion evidence (Decision and Order (2000) at 3-12.) He repeated that he gave greater weight to the medical opinions of Drs. Forehand and Paranthaman because they were supported by the objective medical examination and test results but also, by claimant's history of breathing problems, starting after he stopped smoking, and his extensive history of coal mine employment. The administrative law judge further explained that he credited the opinions of Drs. Forehand and Paranthaman because they "adhere to the regulatory definition of pneumoconiosis." (Decision and Order (2002) at 13). He quoted the Fourth Circuit's statement that "'COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease *apart* from clinical pneumoconiosis.' *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996)," (emphasis added in Decision and Order (2002) at 13.) The administrative law judge also observed that the Department of Labor had stated in the comments to the regulations that it was appropriate to resolve by regulation the issue of whether coal mine dust exposure can cause COPD and the Department had done so in light of the current medical literature (Decision and Order (2002) at 13, citing 65 Fed. Reg. at 79,938.) The administrative law judge interpreted the opinions of Drs. Dahhan, Sargent, Tuteur, Castle, Fino and Morgan, finding that claimant did not have pneumoconiosis, as relying "exclusively or primarily on the lack of evidence of fibrosis." (Decision and Order (2002) at 13). In *Summers*, the Seventh Circuit affirmed the administrative law judge's decision to discredit Dr. Fino's opinion on exactly that basis. *Summers*, 272 F.3d at 483 and n.7, 22 BLR 2-281 and n.7.[7] Yet the majority asserts that the administrative law judge erred because "none of the six physicians cited that factor as a primary or exclusive factors for his diagnosis." In overruling the administrative law

[7] The court observed that "[d]uring a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions 'are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.' 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000)." *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

judge's interpretation of the medical opinions, the majority forgets that " a reviewing court has *no license* to 'set aside an inference merely because it finds the opposite conclusion more reasonable or because it questions the factual basis.' *Piney Mountain Coal Company v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999), quoting *Doss*, 53 F.3d at 659, 19 BLR 2-183 (emphasis added). Thus, the majority has failed to adhere to its statutory standard of review. The majority compounded this error when it agreed with employer that the administrative law judge should have assigned weight to the physicians' opinions based on their qualifications. The administrative law judge in the instant case did not overlook the doctors' credentials but was properly concerned more with the substance of the opinions. The law is clear that "[a]s trier of fact, the administrative law judge is not bound to accept the opinion or theory of any medical expert." *Underwood v. Elkay Mining, Inc.* 105 F.3d 946, 949, 21 BLR 2-25, 2-28 (4th Cir. 1997). For that reason, he cannot be required to assign weight to an opinion he deems deserving of little or no weight. In sum, substantial evidence supports the administrative law judge's determination that the medical opinions of Drs. Forehand and Parathaman establish the existence of legal pneumoconiosis and causation. Accordingly, the administrative law judge's Decision and Order awarding benefits should be affirmed.

REGINA C. McGRANERY
Administrative Appeals Judge