BRB No. 06-0158 BLA

AGNES E. SCHUTT (Widow of BENEDICT S. SCHUTT)	)	
Claimant-Respondent	)	
v.	)	
KNIFE RIVER COAL CORPORATION	)	DATE ISSUED: 10/31/2006
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 on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-1010) of Administrative Law Judge Thomas M. Burke awarding benefits 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). This case, involving a miner's claim filed on February 17, 1992 and a survivor's claim filed on September 25, 2000, is before the Board for the second time.

In the initial decision, the administrative law judge, after noting that employer stipulated that the miner was entitled to credit for at least twenty-eight years of coal mine employment, found, *inter alia*, that the x-ray evidence was insufficient to establish the

existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). However, the administrative law judge found that the autopsy evidence was sufficient to establish that the miner suffered from mild simple coal workers' pneumoconiosis, as well as mild to moderate emphysema arising, at least in part, from his coal mine employment. 20 C.F.R. §718.202(a)(2). The administrative law judge noted that these findings were supported by the miner's treatment records and the opinions of the miner's examining physicians. Consequently, the administrative law judge found that the miner suffered from both clinical pneumoconiosis (coal workers' pneumoconiosis) and legal pneumoconiosis (emphysema arising out of coal mine employment). The administrative law judge also found that claimant[1] was entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Although the administrative law judge found that the pulmonary function study evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),[2] he found that the arterial blood gas study and the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv).[3] The administrative law judge further found that the evidence was sufficient to establish that the miner's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge additionally found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge also awarded benefits in the survivor's claim.

By Decision and Order dated March 29, 2005, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(3), as unchallenged on appeal. *Schutt v. Knife River Coal Corp.*, BRB No. 04-0555 BLA (Mar. 29, 2005) (unpublished). The Board similarly affirmed the administrative law judge's findings that the evidence, while insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii), was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.* The Board also

[1]Claimant is the surviving spouse of the deceased miner who died on June 2, 1997. Director's Exhibit 77.

[2]The administrative law judge's decision contained citations to the prior version of the regulations. The prior applicable regulations cited by the administrative law judge were found at 20 C.F.R. §718.204(c) (2000).

[3]Because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge properly noted that claimant could not establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iii).

affirmed the administrative law judge's findings that the evidence was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(4). *Id.* The Board, however, vacated the administrative law judge's alternative finding that the evidence was sufficient to establish that the miner suffered from legal pneumoconiosis, *i.e.*, emphysema arising, at least in part, out of coal mine employment.[4] *Id.* The Board also vacated the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* In light of its decision to vacate the administrative law judge's finding that the miner, in addition to suffering from coal workers' pneumoconiosis, also suffered from emphysema arising out of coal dust exposure, the Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c) and 718.205(c). *Id.* The Board instructed the administrative law judge, on remand, to reweigh the medical opinion evidence after reassessing whether the miner suffered from any other chronic disease or impairment arising out of coal mine employment. *Id.*

On remand, the administrative law judge found that the evidence was sufficient to establish that the miner's emphysema was attributable to his coal mine employment. The administrative law judge also found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge further found that the evidence was sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge also found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, awarded benefits in the survivor's claim. On appeal, employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of "legal" pneumoconiosis, *i.e.*, emphysema related to the miner's coal mine employment. Employer also argues that the administrative law judge erred in finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith*,

[4]In vacating the administrative law judge's finding of "legal" pneumoconiosis, the Board agreed with employer's contention that the administrative law judge mischaracterized the opinions of Drs. Spagnolo and Naeye. *Schutt v. Knife River Coal Corp.*, BRB No. 04-0555 BLA (Mar. 29, 2005) (unpublished).

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Legal Pneumoconiosis at Sections 718.201 and 718.202

Employer argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of "legal" pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.*

The Department's Comments Regarding Revised Section 718.201

On remand, the administrative law judge, before reconsidering whether the evidence of record was sufficient to establish the existence of "legal" pneumoconiosis, first noted that it was proper to consider the Department of Labor's (the Department's) findings underlying the revised regulations. Consequently, the administrative law judge, in his Decision and Order on Remand, included a section entitled "Departmental Findings Regarding Cause of Centrilobular Emphysema." In this section, the administrative law judge stated that:

> In its comments, the Department noted that medical data supported a finding that "[c]entrilobular emphysema…was significantly more common among coal workers." 65 Fed. Reg. at 79941 (Dec. 20, 2000). Indeed the "severity of emphysema was related to the amount of dust in the lungs" and "[t]hese findings held even after controlling for age and smoking habits." 65 Fed. Reg. at 79941 (Dec. 20, 2000). In one study, which involved pathological review of the lungs of 450 coal miners, the authors of the study found "emphysematous changes in 72% of miners who smoked, 65% of ex-smokers, and 42% of non-smoking coal miners…" 65 Fed. Reg. at 79942 (Dec. 20, 2000).
>
> Consequently, while the cause of a particular miner's emphysema must be determined from the medical evidence in each particular claim, the probative value of a physician's opinion may be affected by views that are inconsistent with findings made by the Department during its rulemaking proceedings.

Decision and Order on Remand at 4.

We note that the Department included over eight pages of comments regarding revised Section 718.201. *See* 65 Fed. Reg. 79937-79945 (Dec. 20, 2000). The

Department found that there was "overwhelming scientific and medical evidence demonstrating that coal mine dust exposure *can* cause obstructive lung disease." 65 Fed. Reg. 79944. However, as employer notes, the Department did not anticipate that all obstructive lung disorders would be compensable.[5] It remains each claimant's burden to establish that the miner's own chronic obstructive pulmonary disease (including emphysema) arose out of his coal mine employment based on the particular facts of the case. A claimant is not entitled to a presumption that the miner's emphysema (centrilobular, centriacinar, or otherwise) arose out of his coal mine employment. Consequently, to the extent that the administrative law judge inferred that the Department's comments indicate that there is a presumption that the miner's centrilobular emphysema arose out his coal mine employment, the administrative law judge committed error.

The Administrative Law Judge's Finding on Remand at Sections 718.201 and 718.202

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[5]The Department commented that:

> [I]nstead of attempting to force the conclusion, as one commentator contends, that all obstructive lung disorders are compensable, or to require responsible operators to compensate miners for non-occupationally related diseases, the language of the proposed regulation makes plain that only "obstructive pulmonary disease arising out of coal mine employment" falls within the definition of pneumoconiosis.

65 Fed. Reg. 79938 (Dec. 20, 2000).

Moreover, in the preamble to the revised regulations, the Department stated that:

> The Department attempts to clarify that not all obstructive lung disease is pneumoconiosis. It remains the claimant's burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis. The Department has concluded, however, that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes "legal" pneumoconiosis.

65 Fed. Reg. 79923 (Dec. 20, 2000).

On remand, the administrative law judge noted that Drs. Naeye, Kleinerman, Spagnolo, Caffrey and Hutchins diagnosed centrilobular or centriacinar emphysema[6] and Dr. Dikman diagnosed pulmonary emphysema. Decision and Order on Remand at 4. The administrative law judge found that Dr. Dolan's opinion, that the miner's emphysema was attributable in part to his coal dust exposure, was the most persuasive opinion of record. *Id.* at 6. The administrative law judge noted that Dr. Dolan's opinion was supported by the report and observations of Dr. Dikman. *Id.* The administrative law judge also found that Dr. Dolan's opinion was well-documented because it was based on undisputed findings of emphysema in the miner's lungs on autopsy as well as a proper consideration of the miner's lengthy smoking and coal mining histories. *Id.* The administrative law judge further noted that Dr. Dolan clearly premised his opinion on a view that is consistent with the Department's findings during rulemaking, *i.e.*, coal dust exposure *may* cause the development of centrilobular emphysema. *Id.* The administrative law judge, therefore, found that the evidence was sufficient to establish the existence of legal pneumoconiosis, *i.e.*¸ emphysema related, at least in part, to coal mine employment. *Id.*

Employer's Contentions of Error at Sections 718.201 and 718.202

Employer contends that the administrative law judge committed numerous errors in finding the evidence sufficient to establish the existence of legal pneumoconiosis.

Employer initially argues that the administrative law judge erred in his consideration of the opinions of Drs. Kleinerman and Hutchins. Employer specifically argues that the opinions of Drs. Kleinerman and Hutchins "weigh against a finding that [the miner's] emphysema arose from coal mine exposure." Employer's Brief at 19. We disagree. Because neither Dr. Kleinerman nor Dr. Hutchins addressed the etiology of the miner's emphysema, *see* Director's Exhibits 69, 70, the administrative law judge properly found that their opinions are not probative on the issue of the cause of the miner's emphysema. Decision and Order on Remand at 4.

Employer next argues that the administrative law judge erred in his consideration of Dr. Caffrey's opinion.[7] Employer argues that the alj erred in requiring Dr. Caffrey to

[6]Centrilobular emphysema and centriacinar emphysema are interchangeable and refer to the same disease process. *See* Dorland's Illustrated Medical Dictionary 510 (25th ed. 1974).

[7]Dr. Caffrey reviewed the miner's autopsy slides and other medical evidence. In a report dated May 3, 1999, Dr. Caffrey diagnosed, *inter alia*, chronic bronchitis, centrilobular emphysema and focal interstitial fibrosis. Director's Exhibit 68. Dr.

explain why the miner's emphysema was not attributable to his coal mine employment. We disagree. The administrative law judge permissibly found that Dr. Caffrey's opinion was entitled to less weight because he did not adequately explain why the miner's emphysema was solely attributable to cigarette smoking, especially in light of the miner's lengthy coal dust exposure. *See generally Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (An administrative law judge may properly find a physician's opinion less probative where the physician does not adequately address the significance of all possible etiologies); Decision and Order on Remand at 4.

Employer next argues that the administrative law judge erred in his consideration of Dr. Naeye's opinion.[8] Employer contends that the administrative law judge erred in not crediting Dr. Naeye's opinion that the miner's emphysema is attributable to his cigarette smoking. In his initial decision, the administrative law judge relied on Dr. Naeye's opinion to support a finding that the miner's emphysema was due in part to his coal dust exposure. However, in its 2005 Decision and Order, the Board agreed with employer's argument that Dr. Naeye's statement, "that from people who have smoked, the smoking has about three times the role of mine dust exposure in terms of causing

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Caffrey stated that:

> The [miner] was a very heavy smoker for years, although apparently he did not smoke for a number of years prior to his death, but I believe the years of smoking cigarettes caused him pulmonary impairment, particularly chronic bronchitis and centrilobular emphysema.

Director's Exhibit 68.

[8]During an October 14, 2003 deposition, Dr. Naeye acknowledged that he diagnosed centrilobular emphysema. In response to an inquiry as to its cause, Dr. Naeye stated, in pertinent part:

> It has complex origins. Let me describe it as follows: In coal workers the issue was always if it's present did coal mine dust have a role, and in order to assess that, you have to look at smoking histories also, there is a lot of literature on this subject, and overall I would summarize it by saying that from people who have smoked, the smoking has about three times the role of mine dust exposure in terms of causing centrilobular emphysema. Its [sic] just been very well documented in a number of studies in bituminous miners in the United States.

Employer's Exhibit 10 at 23.

centrilobular emphysema," was merely a summary of the medical literature in general, and was mischaracterized by the administrative law judge as a medical opinion that coal dust played a role in the development of this specific miner's centrilobular emphysema. *Schutt*, slip op. at 7-8. Because Dr. Naeye's statement did not constitute affirmative evidence of a causal relationship between the miner's diagnosed centrilobular emphysema and his coal mine employment, the Board vacated the administrative law judge's finding that the miner suffered from centrilobular emphysema arising, at least in part, out of coal dust exposure. *Id.* at 8. The Board instructed the administrative law judge, on remand, to reconsider Dr. Naeye's opinion.

On remand, the administrative law judge found that Dr. Naeye failed to explain the basis for his conclusion that the miner's emphysema was attributable to smoking in this particular case. The administrative law judge, therefore, properly accorded less weight to Dr. Naeye's opinion, that the miner's emphysema was attributable to smoking, because it was not sufficiently reasoned.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 8.

Employer also contends that the administrative law judge erred in his consideration of Dr. Spagnolo's opinion. On remand, the administrative law judge accorded less weight to Dr. Spagnolo's opinion, that the miner's centrilobular emphysema was due to smoking, because (1) it was inconsistent with Dr. Naeye's general opinion regarding the causes of centrilobular emphysema; and (2) because it is inconsistent with the Department's findings. The administrative law judge failed to explain why Dr. Naeye's opinion regarding the causes of centrilobular emphysema is entitled to more weight than Dr. Spagnolo's opinion. Moreover, the administrative law judge failed to explain the basis for his conclusion that Dr. Spagnolo's opinion is inconsistent with Dr. Naeye's opinion. Dr. Naeye noted that the medical literature generally indicates that cigarette smoking has about three times the role of coal dust exposure in terms of causing centrilobular emphysema. Dr. Naeye did not opine that centrilobular emphysema, in any particular case, is attributable to coal dust exposure.

Additionally, Dr. Spagnolo's opinion, that the miner's centrilobular emphysema is attributable to cigarette smoking, is not inconsistent with the Department's findings that chronic obstructive pulmonary disease can be attributable to coal mine employment. Dr. Spagnolo did not opine that obstructive lung disease or emphysema cannot be caused by coal dust exposure. Dr. Spagnolo explained that centrilobular and focal emphysema are

[9]Employer notes that Dr. Naeye opined that the miner's degree of emphysema was insignificant. Employer's Brief at 22 (citing Employer's Exhibit 10 at 23-25). However, the issue at 20 C.F.R. §718.201 is not the severity of the miner's emphysema, but rather its etiology.

distinct entities and that while centrilobular emphysema is associated with cigarette smoking, focal emphysema is associated with coal workers' pneumoconiosis. Employer's Exhibit 11 at 82. Consequently, we hold that the administrative law judge erred in his consideration of Dr. Spagnolo's opinion.

Employer also argues that the administrative law judge erred in his consideration of the opinions of Drs. Dikman and Dolan. On remand, in addressing the etiology of the miner's emphysema, the administrative law judge found that "Dr. Dolan's opinion, as supported by the report and observations of Dr. Dikman, [was] the most persuasive."[10] Decision and Order on Remand at 6. The administrative law judge also found that "Dr. Dolan clearly premised his opinion on a view that is consistent with the Department's findings during rulemaking, *i.e.*, coal dust exposure *may* cause the development of centrilobular emphysema." *Id.*

We agree with employer that the administrative law judge erred in his consideration of Dr. Dolan's opinion. First, the administrative law judge failed to explain the significance of his finding that Dr. Dolan's opinion was supported by Dr. Dikman's report and observations. As the administrative law judge acknowledged, Dr. Dikman does not address the cause of the miner's emphysema.[11] *See* Decision and Order on Remand at 5-6; Claimant's Exhibit 2A.

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[10]Dr. Dolan reviewed the medical evidence of record. In a report dated September 20, 2003, Dr. Dolan noted that:

> Emphysema has repeatedly been demonstrated in coal miners at levels greater than those of controls. According to the section on respiratory disease in coal miners in Rom's Environmental and Occupational Medicine, studies indicate a causal relationship between emphysema and coal dust exposure with an ensuing potential for disability.

Claimant's Exhibit 1.

During a September 22, 2003 deposition, Dr. Dolan opined that the miner's coal dust inhalation was a contributing factor to his "extensive emphysema." Claimant's Exhibit 15A at 58.

[11]Dr. Dikman reviewed the miner's lung tissues and other medical evidence. In a report dated November 23, 1998, Dr. Dikman diagnosed, *inter alia*, pulmonary emphysema. Claimant's Exhibit 2A.

Second, the administrative law judge did not address Dr. Dolan's basis for attributing the miner's emphysema to his coal mine employment, noting that his opinion was consistent with the Department's comments that coal dust exposure *may* cause centrilobular emphysema. While the Department has recognized that obstructive lung disease[12] may be attributable to coal dust exposure, it has emphasized that "the revised definition does not alter the former regulations'….requirement that each miner bear the burden of proving that his obstructive lung disease did in fact arise out of coal mine employment, and not from another source." 65 Fed. Reg. 79938 (Dec. 20, 2000).

In this case, the administrative law judge merely noted that Dr. Dolan cited to a medical textbook that supports a causal relationship between emphysema and coal dust exposure. However, as the Board noted in the prior appeal in regard to Dr. Naeye's opinion, *see Schutt*, slip op. at 7, this is merely a summary of the medical literature in general and does not explain the doctor's basis for attributing the miner's emphysema, in this case, to his coal mine employment.

Based on the above-referenced errors, we vacate the administrative law judge's finding that the miner suffered from centrilobular emphysema arising, at least in part, out of coal mine employment. On remand, the administrative law judge is instructed to reconsider whether the relevant evidence is sufficient to establish the existence of legal pneumoconiosis, *i.e.*, whether the miner's centrilobular emphysema is attributable, at least in part, to his coal mine employment. 20 C.F.R. §718.201.

Causation at Sections 718.204(c) and 718.205(c)

Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c) and 718.205(c), that the medical evidence of record is sufficient to establish that the miner's totally disabling respiratory impairment and death were due to pneumoconiosis. In weighing the medical opinion evidence at 20 C.F.R. §§718.204(c) and 718.205(c), the administrative law judge accorded less weight to those physicians who, contrary to his own findings, did not diagnose both coal workers' pneumoconiosis and emphysema arising out of coal mine employment. Decision and Order on Remand at 8-9, 12. In light of our decision to vacate the administrative law judge's finding that, in addition to coal workers' pneumoconiosis, the miner also suffered from emphysema arising out of coal mine employment, we also vacate his findings regarding disability causation and death due to pneumoconiosis at 20 C.F.R. §§718.204(c) and 718.205(c), respectively, and instruct the administrative law judge to reweigh the medical opinion evidence after he has reconsidered whether the evidence is sufficient to establish the existence of "legal" pneumoconiosis.

[12]Emphysema is a form of obstructive lung disease.

Total Disability at Section 718.204(b)(2)(iv)

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge found that the opinions of Drs. Kriengkairut and Dolan were the "most well-documented and well-reasoned with regard to the nature of the miner's disability." Decision and Order on Remand at 6. The administrative law judge, therefore, found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 8.

Employer contends that Dr. Kriengkairut did not state that there was a pulmonary disability present.[13] We agree. Although Dr. Kriengkairut diagnosed dyspnea on exertion, he did not make an assessment regarding the extent of the miner's respiratory impairment. Although the administrative law judge noted that Dr. Kriengkairut's testing of the miner's cardiovascular system revealed a normal response to exercise, he failed to address the significance of the fact that Dr. Kriengkairut noted that the miner stopped the exercise portion of his arterial blood gas study due to increasing dyspnea. *See* Director's Exhibit 78. The administrative law judge also stated that Dr. Kriengkairut "reasonably concluded that the miner's disability was of a respiratory, not cardiac origin." Decision and Order on Remand at 7. Dr. Kriengkairut, however, did not make such an explicit

[13]Dr. Kriengkairut examined the miner on February 7, 1995. In a report dated February 14, 1995, Dr. Kriengkairut diagnosed "dyspnea on exertion, with deterioration in pulmonary function, especially DLCO (carbon monoxide diffusing capacity) and pulmonary gas exchange, seen on blood gas at rest and during activity, suggestive of deterioration in restrictive lung disease." Director's Exhibit 78. Although Dr. Kriengkairut noted that the miner's obstructive component did not appear to be severe, he noted that the miner "might need oxygen during activity or in the long run, maybe at rest." *Id.*

Dr. Kriengkairut reexamined the miner on July 13, 1995. Director's Exhibit 78. In a report dated July 13, 1995, Dr. Kriengkairut diagnosed "[d]yspnea on exertion predominately [due] to underlying pneumoconiosis/pulmonary asbestosis and less predominantly from COPD and smoking." *Id.* Dr. Kriengkairut further stated:

> [The miner's] underlying obstructive airways disease is not severe and should be under control at this time. The dyspnea on exertion is more due to underlying restrictive lung disease, and there is not much we can do about it at this point except for control of COPD and heart failure.

Director's Exhibit 78.

statement. Moreover, the administrative law judge failed to address the fact that Dr. Kriengkairut, in his July 13, 1995 report, diagnosed atherosclerotic heart disease, a diagnosis that he failed to render four months earlier in his February 14, 1995 report. *See* Director's Exhibit 78. Thus, the administrative law judge erred in finding that Dr. Kriengkairut's opinion supports a finding of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer also accurately notes that the administrative law judge, in relying upon Dr. Dolan's opinion, failed to address the contrary opinions of Drs. Spagnolo and Repsher. *See* Employer's Brief at 34-39. Dr. Spagnolo reviewed the medical evidence. In a report dated March 17, 1997, Dr. Spagnolo opined that the miner was not totally and permanently disabled. Employer's Exhibit 1. Dr. Spagnolo, however, diagnosed "serious underlying cardiac disease" and noted that the miner's chest pain may be related to limited coronary blood flow. *Id.* Dr. Spagnolo opined that the miner's coronary artery disease might prevent him from doing moderate work.[14] *Id.*

During the October 21, 2003 hearing, Dr. Repsher characterized the miner's pulmonary impairment as mild. Transcript at 83. Dr. Repsher further testified that the miner's chest x-rays began to show evidence of congestive heart failure as early as 1994. *Id.* at 85. Using the AMA Guides for Evaluation of Permanent Impairment and Disability, Dr. Repsher testified that the miner's exercise arterial blood gas studies showed a Class III impairment from a cardiac standpoint. *Id.* at 88. Dr. Repsher explained that the studies did not reveal a Class III or IV impairment from a pulmonary standpoint because "you cannot use the pulmonary section of the AMA guides for someone who has severe heart disease and is in heart failure." *Id.* In such an instance, Dr. Repsher explained that one uses the heart section of the guides.[15] *Id.* at 89.

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[14]During his October 16, 2003 deposition, Dr. Spagnolo explained that heart failure develops over a number of years. Employer's Exhibit 11 at 17. Dr. Spagnolo testified that, by 1995, it was "clinically well apparent that [the miner] had heart disease" and was having "recurrent episodes of heart failure." *Id.* at 16-17. Dr. Spagnolo noted that, by 1997, there was evidence of severe left ventricular heart failure. *Id.* at 18. Dr. Spagnolo explained that the miner's severe biventricular heart failure can result in "all kinds of impairment of lung function because of the inability of the left heart to pump." *Id.* at 27-28. Dr. Spagnolo further noted that the miner's heart disease and obesity could each cause marked changes in lung function and blood gases. *Id.* at 28-29.

[15]Dr. Repsher further testified that:

> [The miner] has an apparent obstructive and restrictive impairment. The restrictive impairment came after he went into congestive heart failure. It

The administrative law judge erred on remand in failing to address the conflicting medical opinions of Drs. Spagnolo and Repsher. Because the administrative law judge failed to adequately address all of the relevant evidence, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge, in considering whether the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), should consider and weigh all of the conflicting evidence of record.

In summary, on remand, the administrative law judge is instructed to reconsider whether the evidence is sufficient to establish the existence of "legal" pneumoconiosis. *See* 20 C.F.R. §§718.201 and 718.202. The administrative law judge is also instructed to reconsider whether the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Finally, the administrative law judge, on remand, is instructed to reconsider whether the evidence is sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and whether the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[16]

> wasn't an impairment due to lung disease. It was an impairment due to the heart affecting the lungs.

Transcript at 101.

[16]Employer requests that the case be remanded to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge