BRB No. 10-0103 BLA

JOHN DOUGLAS WEST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/21/2010
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Claim[1] of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

[1] In the caption of his Decision and Order, the administrative law judge incorrectly listed Arch on the Green, Incorporated, rather than Peabody Coal Company, as the employer in this case. Decision and Order at 1. As noted by the administrative law judge, the parties stipulated that Peabody Coal Company is the responsible operator. *Id*. at 3.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Claim (07-BLA-5747) of Administrative Law Judge Daniel F. Solomon on a subsequent claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725, and credited claimant with working at least twenty-four years in qualifying coal mine employment, based on the parties' stipulation. The administrative law judge found that, while the new evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), the new evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that the new evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), and (4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.[3]

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, *inter alia*, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, or that his death was due to pneumoconiosis, where the miner has established fifteen or more

[2] Claimant filed his initial application for benefits on November 25, 2002, which was finally denied on June 8, 2004 because he failed to establish the existence of pneumoconiosis or disability causation. Director's Exhibit 1. He filed his second application for benefits on July 10, 2006, which is presently pending. Director's Exhibit 3.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-four years of coal mine employment, that claimant established that he has a total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant failed to establish a total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3, 14-16, 24.

years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b).

By Order issued on June 18, 2010, the Board permitted supplemental briefing in this case to address the impact, if any, of the 2010 amendments on this claim. Claimant responds, contending that he is presumptively entitled to benefits under the amendment to Section 411(c)(4) because the instant claim was filed on July 10, 2006 and the parties stipulated that claimant worked at least twenty-four years in coal mine employment. Claimant also notes that the district director, in his prior determination that claimant was entitled to benefits, found qualifying pulmonary function study and arterial blood gas study values. Claimant additionally notes that Dr. Simpao diagnosed legal pneumoconiosis, even though the x-ray reading that he considered was negative for pneumoconiosis.

Employer responds, averring that it is unclear whether the amendment to Section 411(c)(4) applies to the instant case. Employer asserts that, even though claimant filed the instant claim after January 1, 2005 and alleged more than fifteen years of coal mine employment, the record demonstrates that claimant worked exclusively as a surface miner and that the conditions of his employment were not substantially similar to the conditions in an underground mine. Employer further asserts that, assuming claimant established invocation of the Section 411(c)(4) presumption, the administrative law judge's findings that the evidence failed to establish the existence of clinical and legal pneumoconiosis, if affirmed, would affirmatively establish rebuttal. Alternatively, employer asserts that, if the Board deems remand of this case necessary, the parties should be afforded an opportunity to develop pertinent evidence to respond to the changes in the law.

The Director responds, agreeing with claimant that the amendment to Section 411(c)(4) applies to this case, as the instant claim was filed on July 10, 2006 and was pending on March 23, 2010. The Director also notes that the administrative law judge accepted the parties' stipulation that claimant worked at least twenty-four years in coal mine employment. Hence, the Director contends that the case should be remanded for the administrative law judge to determine whether claimant's work as an above-ground welder occurred in conditions substantially similar to those in an underground mine. Further, the Director contends that, because this issue did not arise previously, the record should be reopened for the development of evidence. Additionally, the Director acknowledges that if, on remand, the administrative law judge invokes the Section 411(c)(4) presumption based on the Board's affirmance of his findings that claimant has established fifteen years in qualifying coal mine employment and total respiratory disability, then he must determine whether rebuttal has been established. However, the Director notes that if the Board vacates the administrative law judge's total disability finding, then the administrative law judge must consider whether claimant has a totally

disabling pulmonary impairment. In addition, the Director notes that the administrative law judge must consider whether employer rebutted the presumption by establishing that claimant does not have coal workers' pneumoconiosis or that the disease did not contribute to claimant's total respiratory disability. The Director also contends that the parties must be given the opportunity to proffer additional evidence relevant to rebuttal of the presumption in accordance with the evidentiary limitations set forth in 20 C.F.R. §725.414. Moreover, the Director notes that, if a party submits evidence exceeding the evidentiary limitations at Section 725.414, the party must establish good cause for allowing the excessive evidence into the record.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law,[4] they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, it must be established that the miner suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing one of these elements. 20 C.F.R. §725.309(d)(2), (3); *see generally Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

[4] The law of the United States Court of Appeals for the Sixth Circuit applies because claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant initially contends that the administrative law judge erred in finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant asserts that the administrative law judge erred in relying exclusively on the qualifications of the physicians providing the x-ray interpretations. Claimant argues that the administrative law judge impermissibly determined that the negative x-ray interpretations by Drs. Wiot and Spitz outweighed the positive x-ray interpretations by Drs. Ahmed and Alexander, as all four physicians possess equal radiological qualifications. Claimant asserts that the administrative law judge erred in relying on the x-ray readings of Drs. Wiot and Spitz because, in addition to being dually-qualified as Board-certified radiologists and B readers, they are professors of radiology. Claimant also argues that Dr. Baker's positive x-ray readings were entitled to greater weight because Dr. Baker is a Board-certified pulmonologist and he provided deposition testimony. Claimant's arguments lack merit.

At Section 718.202(a)(1), the administrative law judge considered the interpretations of the three new x-ray films dated July 24, 2006, January 23, 2007, and June 26, 2008.[5] The administrative law judge found that Dr. Alexander's positive interpretation of the July 24, 2006 x-ray film,[6] was outweighed by Dr. Spitz's negative interpretation of this film, based on Dr. Spitz's superior qualifications[7] and because Dr. Spitz's interpretation was bolstered by the negative interpretation of the same x-ray by Dr. Westerfield. Decision and Order at 18; Director's Exhibit 13; Claimant's Exhibit 5;

[5] Before evaluating the new x-ray evidence, the administrative law judge excluded Dr. Rasmussen's positive interpretation of a film dated July 24, 2006, Dr. Alexander's positive interpretation of a film dated June 26, 2008, and Dr. Alexander's rehabilitative report dated December 27, 2008 from the evidentiary record, as these exhibits exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. Decision and Order at 17. None of the parties has challenged the administrative law judge's exclusions; therefore, we affirm the administrative law judge's evidentiary rulings pursuant to Section 725.414. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

[6] The administrative law judge erroneously stated, "…Dr. Baker, a dually qualified [sic] reader, interpreted this film to be positive." Decision and Order at 18. This error, however, is harmless as Dr. Alexander, not Dr. Baker, interpreted the July 24, 2006 x-ray as positive and the administrative law judge correctly recognized that Dr. Alexander is dually-qualified as a Board-certified radiologist and a B reader. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Dr. Alexander is a dually-qualified radiologist, whereas Dr. Spitz is a dually-qualified radiologist and a professor of radiology at the University of Cincinnati College of Medicine. Dr. Westerfield is a B reader.

Employer's Exhibit 6. The administrative law judge also found that the positive interpretations by Drs. Ahmed and Alexander of the January 23, 2007 x-ray film were outweighed by Dr. Wiot's negative reading of this x-ray, based on Dr. Wiot's superior qualifications.[8] Decision and Order at 18; Claimant's Exhibits 1, 7; Employer's Exhibits 1, 4. Additionally, the administrative law judge found that, at best, the January 23, 2007 x-ray film was in equipoise. *Id.* Lastly, the administrative law judge found that Dr. Baker's positive interpretation of the June 26, 2008 x-ray film was outweighed by Dr. Wiot's negative interpretation of this x-ray, based on Dr. Wiot's superior qualifications.[9] Decision and Order at 18; Claimant's Exhibit 2; Employer's Exhibit 5. The administrative law judge therefore found that claimant failed to satisfy his burden of proving that the preponderance of the x-ray evidence established the existence of pneumoconiosis.[10] Decision and Order at 18.

Contrary to claimant's assertion, the administrative law judge properly considered the radiological expertise of the physicians in assessing the probative value of the conflicting interpretations of the new x-ray films. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Section 718.202(a)(1) provides that an administrative law judge must consider the radiological qualifications of the readers of x-rays that are in conflict. 20 C.F.R. §718.202(a)(1). In addition to considering the B reader and Board-certified radiologist status of a reader, as required by Section 718.201(a)(1), an administrative law judge may rely on a reader's academic qualifications in radiology and his involvement in the B reader program as bases for according greater weight to the readings rendered by that reader. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006)(*en banc*)(McGranery and Hall, JJ., concurring and dissenting); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). In this case, the administrative law judge properly accorded greater weight to the negative readings of Drs. Wiot and Spitz because of their superior qualifications, as they are dually-qualified radiologists and professors in radiology.[11] *Harris*, 23 BLR at 1-114; *Worhach*, 17 BLR

[8] Drs. Ahmed and Alexander are dually-qualified radiologists, whereas Dr. Wiot is a dually-qualified radiologist and a professor of radiology at the University of Cincinnati College of Medicine.

[9] Dr. Baker is a B reader, whereas Dr. Wiot is a dually-qualified radiologist and a professor of radiology.

[10] The administrative law judge stated, "[b]ased on the above determinations, I find that the weight of the x-ray evidence is at best is [sic] in equipoise, and most likely favors a negative finding." Decision and Order at 18.

[11] The administrative law judge noted that "Dr. Wiot also helped formulate the standards for the ILO classification scheme used to classify the existence of

at 1-108. Thus, we reject claimant's assertion that the administrative law judge erred in relying on the x-ray readings of Drs. Wiot and Spitz because, in addition to being dually-qualified radiologists, they are professors of radiology.

We also reject claimant's assertion that Dr. Baker's positive x-ray readings were entitled to greater weight because Dr. Baker is a Board-certified pulmonologist and he provided deposition testimony. The fact that Dr. Baker is Board-certified in pulmonary medicine is not relevant to the weighing of x-ray evidence at Section 718.202(a)(1), as this is not a radiological qualification. 20 C.F.R. §718.202(a)(1); *see Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (*en banc*); *see also Worhach*, 17 BLR at 1-108. Likewise, claimant has not provided any support for his assertion that Dr. Baker's participation in a deposition enhanced the credibility of his x-ray interpretation.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994).

Claimant next contends that the administrative law judge erred in finding that the new biopsy evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Specifically, claimant argues that Dr. Elrod's pathology report establishes the existence of legal pneumoconiosis because the doctor's microscopic examination of claimant's biopsy revealed, *inter alia*, "chronic bronchitic changes." Claimant's Petition for Review at 7. Claimant also argues that the administrative law judge mischaracterized Dr. Elrod's pathology report by finding that "there is no fibrotic reaction to the pigment," given that Dr. Elrod clearly referred to the presence of fibrosis. *Id*. Claimant's arguments lack merit.

In a May 10, 1997 pathological report, Dr. Elrod examined gross and microscopic samples of tissue that were removed as a result of a pneumonectomy of the upper and lower lobes of claimant's left lung. Claimant's Exhibit 4. The administrative law judge determined that, while Dr. Elrod identified "anthracotic pigmentation of sinus histiocytes," *id*., Dr. Elrod's finding, standing alone, was insufficient to affirmatively establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(2); Decision and Order at 18. While claimant is correct that Dr. Elrod's interpretation contains a finding of "mild pleural fibrosis," the doctor's finding is not tantamount to a diagnosis of clinical pneumoconiosis. Claimant's Exhibit 4. Section 718.201(a)(1) provides that "'[c]linical

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pneumoconiosis, and is one of the original 'C' readers, a designation assigned to only a few radiologists who have eminent familiarity with the ILO classification scheme." Decision and Order at 18.

pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and *the fibrotic reaction of the lung tissue to that deposition* caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) [emphasis added]. Dr. Elrod did not opine that there was a fibrotic reaction of claimant's lung tissue by a condition caused by coal dust exposure. Claimant's Exhibit 4. Consequently, we reject claimant's assertion that the administrative law judge mischaracterized Dr. Elrod's pathology report by indicating that Dr. Elrod did not observe conditions that were characteristic of clinical pneumoconiosis. We also reject claimant's assertion that Dr. Elrod's pathology report establishes the existence of legal pneumoconiosis. Section 718.201(a)(2) provides that "'[l]egal 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) [emphasis added]. Because Dr. Elrod did not indicate that claimant's "chronic bronchitic changes" arose of out coal mine employment, Dr. Elrod's finding, contrary to claimant's assertion, is insufficient to establish the existence of legal pneumoconiosis. Claimant's Exhibit 4.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new biopsy evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2).

Claimant further contends that the administrative law judge erred in finding that the new medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, claimant argues that the administrative law judge erred in discounting Dr. Baker's opinion. Claimant asserts that it was irrational for the administrative law judge to initially credit Dr. Baker's disability assessment on the basis that it was well-reasoned and documented, but subsequently reject Dr. Baker's diagnosis of pneumoconiosis on the basis that it was not well-reasoned and documented. Claimant also avers that the administrative law judge erred in discounting Dr. Baker's diagnosis of clinical pneumoconiosis because it was based on a positive x-ray interpretation that the administrative law judge found was contrary to the weight of the x-ray evidence.

The administrative law judge considered the opinions of Drs. Simpao and Baker, that claimant has clinical and legal pneumoconiosis,[12] and the opinions of Drs. Repsher

[12] In a report dated July 24, 2006, Dr. Simpao opined that claimant has coal workers' pneumoconiosis and a severe pulmonary impairment related to coal dust exposure. Director's Exhibit 13.

In a report dated July 8, 2008, Dr. Baker opined that claimant has coal workers' pneumoconiosis and a chronic disease of the lungs secondary to his coal mine

and Fino, that claimant does not have clinical or legal pneumoconiosis.[13] After noting the qualifications of the physicians,[14] the administrative law judge gave probative value to Dr. Repsher's opinion, based on the doctor's physical examination of claimant, his consideration of claimant's medical, occupational and smoking histories, and his consideration of the objective tests. Decision and Order at 21. In addition, the administrative law judge found that Dr. Fino's opinion was not as probative as that of Dr. Repsher because Fino's opinion was limited to a review of records. *Id*. Further, the administrative law judge gave less weight to Dr. Simpao's opinion because he found that it was not well-reasoned. *Id*. at 21-22. Lastly, the administrative law judge gave less weight to Dr. Baker's opinion because he found that it was not well-reasoned or well-documented. *Id*. at 21-23. The administrative law judge therefore found that the medical opinion evidence did not establish the existence of clinical or legal pneumoconiosis. *Id*. at 23.

Contrary to claimant's assertion, the administrative law judge reasonably discounted Dr. Baker's diagnosis of pneumoconiosis under Section 718.202(a)(4), even

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employment. Claimant's Exhibit 2. Dr. Baker noted "a moderate restrictive ventilatory defect…[that] is primarily due to his left lung resection." *Id*. Dr. Baker also noted that "this could be contributed to some extent by his pneumoconiosis but the most likely cause has been his pneumonectomy causing the moderate obstructive defect." *Id*. Dr. Baker further noted that "[claimant] does not have a significant degree of coal dust in his lung to cause a significant degree of impairment aside from having had the pneumonectomy." *Id*. During a deposition dated October 13, 2008, Dr. Baker opined that it was possible that claimant may have legal pneumoconiosis. *Id*. (Dr. Baker's Deposition at 40-41).

[13] In a report dated February 27, 2007, Dr. Repsher opined that claimant does not have clinical or legal pneumoconiosis. Employer's Exhibit 1.

In reports dated July 14, 2008 and October 27, 2008, Dr. Fino opined that claimant does not have coal workers' pneumoconiosis or any other condition related to coal dust exposure. Employer's Exhibits 3, 7.

[14] The administrative law judge found that Drs. Baker, Repsher, and Fino were the most qualified physicians because they were Board-certified pulmonologists, while "Dr. Simpao was not [Board-certified] and has no special credentials in the field of pulmonary medicine." Decision and Order at 21. Nevertheless, the administrative law judge noted that the opinions of Drs. Baker, Repsher, and Fino must be well-reasoned to warrant additional weight on the basis of their qualifications with regard to legal pneumoconiosis. *Id*.

though he had previously credited Dr. Baker's disability assessment under Section 718.204(b)(2)(iv). *See generally Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (existence of pneumoconiosis has no conclusive bearing on total disability); Decision and Order at 16, 22-23. Section 718.202(a)(4) and Section 718.203(b)(2)(iv) address entirely different elements of entitlement. *Compare* 20 C.F.R. §718.202(a)(4) *with* 20 C.F.R. §718.204(b)(2)(iv). Thus, we reject claimant's assertion that it was irrational for the administrative law judge to initially credit Dr. Baker's disability assessment on the basis that it was well-reasoned and documented, but subsequently reject Dr. Baker's diagnosis of pneumoconiosis on the basis that it was not well-reasoned and documented.

We also reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has legal pneumoconiosis because it was not well-reasoned or well-documented. Contrary to claimant's assertion, the administrative law judge properly found that Dr. Baker's diagnosis of legal pneumoconiosis was not well-reasoned because he found that it was "internally inconsistent, equivocal, and somewhat speculative."[15] Decision and Order at 22; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988) (physician's opinion was unreasoned because physician failed to explain changes in his conclusions between filing of his report and giving of his deposition testimony); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987). In addition, the administrative law judge properly found that Dr. Baker's diagnosis of obstructive airways disease and bronchitis was not persuasive because Dr. Baker did not discuss these conditions in his report, but only mentioned them during his subsequent deposition. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-

[15] The administrative law judge stated that, "[b]oth in his report and during his deposition, Dr. Baker acknowledged that he could not definitively diagnose legal pneumoconiosis." Decision and Order at 22. In particular, the administrative law judge noted, "[i]n his report, Dr. Baker stated that [c]laimant's chronic lung disease is 'based on the presence of clinical pneumoconiosis and *possible* levo [sic] pneumoconiosis to some degree.' CX 2 (emphasis added)." *Id*. The administrative law judge also noted that, "[d]uring his deposition, Dr. Baker maintained his diagnosis of 'possible' legal pneumoconiosis. *Id*. at 40." *Id*. In addition, the administrative law judge found that the opinion that Dr. Baker expressed in his report regarding the cause of claimant's restrictive airway disease was inconsistent with the opinion the doctor expressed during his subsequent deposition regarding the cause of this disease. *Id*. at 23. The administrative law judge noted that Dr. Baker stated that claimant's restrictive lung disease was primarily due to his lung resection. *Id*. However, the administrative law judge noted, "during his deposition Dr. Baker strengthened his diagnosis by stating that [c]laimant's pneumonectomy only had a minimal effect on his breathing and that his restrictive impairment *was* caused by both his pneumonectomy and pneumoconiosis." *Id*.

647-49 (6th Cir. 2003). Further, the administrative law judge properly found that Dr. Baker's opinion that claimant has legal pneumoconiosis was not well-documented.[16] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's opinion that claimant has legal pneumoconiosis.

Further, we hold that the administrative law judge properly discounted Dr. Baker's diagnosis of clinical pneumoconiosis because it was based on a positive reading of an x-ray that he found was outweighed by the negative reading of that x-ray by a physician with superior radiological credentials.[17] *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984); Decision and Order at 22. Thus, we reject claimant's assertion that the administrative law judge erred in discounting Dr. Baker's diagnosis of clinical pneumoconiosis.

As claimant raises no other specific challenge to the administrative law judge's weighing of the medical opinion evidence regarding the issue of pneumoconiosis, we affirm the administrative law judge's finding that the new medical opinion evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as supported by substantial evidence. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg*, 12 BLR at 1-79; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

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[16] The administrative law judge stated that Dr. Baker's opinion that claimant has an obstructive airway disease and bronchitis related to coal dust exposure was not well-documented. Decision and Order at 23. The administrative law judge noted that the pulmonary function study did not indicate any obstruction and the arterial blood gas study was within normal limits. *Id*. The administrative law judge also noted that Dr. Baker could not specify whether claimant has a restrictive or obstructive disease, or both, based on Dr. Baker's finding that the study revealed that claimant has some minimal impairment caused by him having difficulty eliminating carbon dioxide. *Id*. Further, the administrative law judge noted that "[w]hile Dr. Baker initially stated that [c]laimant experienced coughs and sputum production consistent with bronchitis, he later stated that [c]laimant did not experience coughing or sputum production of that nature, but did have issues with wheezing." *Id*.

[17] As previously noted, Dr. Baker, a B reader, read the June 26, 2008 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, while Dr. Wiot, a dually-qualified radiologist and a professor of radiology, read this x-ray as negative, Employer's Exhibit 5.

Finally, we address the impact of the recent amendments to the Act in this miner's claim. Based upon the parties' responses, we are persuaded that the administrative law judge's finding that the new evidence was insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) must be vacated and the case remanded to the administrative law judge. Consequently, we vacate the administrative law judge's denial of benefits in this claim. On remand, the administrative law judge must determine whether the new evidence establishes invocation of the Section 411(c)(4) presumption, thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge must consider whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, as claimant's claim was filed after January 1, 2005, the administrative law judge credited claimant with at least twenty-four years of coal mine employment, and he found that the evidence established a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4). If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption by establishing that claimant does not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. On remand, the administrative law judge must allow for the submission of additional evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is proffered, the proponent of this evidence must establish good cause for its admission. 20 C.F.R. §725.456(b)(1).

Accordingly, the Decision and Order - Denial of Claim of the administrative law judge is affirmed in part and vacated in part, and the case is remanded for further proceedings 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