BRB No. 14-0019 BLA

SHIRLEY J. ADDISON, o/b/o JERRY K. ADDISON (deceased)	)	
Claimant-Respondent	)	
v.	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: 10/06/2014
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 Granting Benefits on Living Miner's Claim of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Benefits on Living Miner's Claim (2012-BLA-05615) of Administrative Law Judge Stephen R. Henley rendered on a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Based on the March 15, 2011 filing date of the claim,[1] the administrative law judge adjudicated this case under 20 C.F.R. Part

[1] The miner filed an initial claim on August 30, 2004, which was denied by the district director, in a Proposed Decision and Order issued on June 7, 2005, based on his finding that the miner failed to establish a totally disabling respiratory impairment. Director's Exhibit 1. No further action was taken on that claim.

718, and credited the miner with 11.17 years of coal mine employment, based on a stipulation of the parties. Because claimant[2] failed to establish that the miner had at least fifteen years of qualifying coal mine employment, the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis, as set forth at amended Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). Addressing the merits of the claim, the administrative law judge found that, in light of employer's concession to the existence of a totally disabling respiratory impairment, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge then found that the evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b).[4] Moreover, the administrative law judge found the evidence sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in finding that the x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Employer also contends that the administrative law judge erred in his consideration of the CT scan evidence pursuant to 20 C.F.R. §718.107(d).

[2] Claimant, the widow of the miner, who died on February 14, 2013, is pursuing the miner's subsequent claim. Claimant filed a survivor's claim on April 2, 2013. That claim, however, is not before the Board.

[3] In 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Additionally, employer contends that the administrative law judge erred in finding the medical evidence sufficient to establish disability causation pursuant to Section 718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response to employer's appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the amended Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled, and that his total disability was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the eight readings of the three x-ray films dated January 12, 2009, February 23, 2011 and May 20, 2011.[7] Decision and Order at 11-12; Director's Exhibits 13, 14, 16-18. The January 12, 2009 x-ray was interpreted as positive for pneumoconiosis by Dr. Miller, who was dually-qualified as a Board-certified radiologist and B reader, but as negative for pneumoconiosis by Dr. Scott, who was also a dually-qualified radiologist. Director's Exhibits 16, 18. The February 23, 2011 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a dually-qualified radiologist, but as negative for pneumoconiosis by

[5] We affirm, as unchallenged by the parties on appeal, the administrative law judge's decision to credit the miner with 11.17 years of coal mine employment and his findings that claimant established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and, therefore, that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[7] The record also contains the positive reading of the January 24, 2004 x-ray, which was associated with the miner's prior claim. Director's Exhibit 1.

Dr. Scott, a dually-qualified radiologist. Decision and Order at 12; Director's Exhibits 16, 18. The May 20, 2011 x-ray was read as positive for pneumoconiosis by Dr. Miller, a dually-qualified radiologist, and Dr. Forehand, a B reader, but as negative for pneumoconiosis by Dr. Scott, a dually-qualified radiologist. Decision and Order at 12; Director's Exhibits 13, 16, 17.

Weighing the x-ray evidence of record, the administrative law judge rationally found that the January 12, 2009 x-ray evidence was in equipoise on the issue of clinical pneumoconiosis, finding that Drs. Miller and Scott were equally qualified radiologists. Decision and Order at 12. Similarly, the administrative law judge found that the February 23, 2011 x-ray evidence was in equipoise, as Drs. Alexander and Scott were equally qualified radiologists. *Id*. The administrative law judge found, however, that the May 20, 2011 x-ray evidence was positive for pneumoconiosis, as it was read as positive by both Dr. Miller and Dr. Forehand, and as negative by only Dr. Scott. *Id*. Consequently, the administrative law judge concluded that the preponderance of the x-ray evidence supported a finding of clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Employer contends, however, that it was error for the administrative law judge to rely solely on the numerical superiority of the positive readings in finding that the x-ray evidence established the existence of clinical pneumoconiosis. Employer also questions the propriety of the administrative law judge's reliance on the two positive readings of the May 20, 2011 x-ray in light of the evidentiary limitations. Employer contends that the evidentiary limitations, set forth in the 2001 regulations, unfairly benefit claimant in this case, as she was, in effect, allowed two readings of the May 20, 2011 x-ray, *i.e.*, the x-ray reading conducted as part of the miner's Department of Labor (DOL)-sponsored examination, and the rereading of that x-ray, while employer was allowed to submit only one reading of the May 20, 2011 x-ray. Employer's Brief at 4-5.

We reject employer's contention that the administrative law judge relied solely on the numerical superiority of the x-ray readings to evaluate the x-ray evidence. Contrary to employer's contention, the administrative law judge properly considered the weight of the positive x-ray readings in light of the readers' qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Moreover, we reject employer's suggestion that the evidentiary limitations set forth in the 2001 regulations act to, in effect, benefit claimant at the expense of employer, as they allowed two readings of the May 20, 2011 x-ray. Evidence obtained as part of the DOL-sponsored evaluation of the miner is not evidence obtained by the claimant. *See* 20 C.F.R. §§725.406, 725.414. Consequently, we affirm the administrative law judge's finding that the x-ray evidence of record established the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.107(d), the administrative law judge weighed the CT scan evidence, initially stating that, when considering the "other evidence" of record, such as CT scans, the parties are permitted to introduce only one reading of such evidence, *citing Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc) (J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc). Decision and Order at 14. The administrative law judge noted that Dr. Castle testified in his deposition that CT scans are widely accepted in the medical community as diagnostic of all types of lung diseases. 20 C.F.R. §718.107(b); Decision and Order at 14; Employer's Exhibit 5. The administrative law judge observed that the diagnostic value of CT scans depends upon their evaluation by qualified experts in interpreting this kind of test. *Id*. He then stated that the only CT scan reading available in connection with this claim was Dr. Fino's reading of the June 27, 2012 CT scan, wherein Dr. Fino, a B reader, interpreted the CT scan as negative for pneumoconiosis.[8] Decision and Order at 14; Employer's Exhibit 3. Consequently, the administrative law judge found that the CT scan evidence did not support a finding of either clinical or legal pneumoconiosis. Decision and Order at 14. The administrative law judge did not consider Dr. Fino's negative interpretation of the August 20, 2008 CT scan, or the negative interpretation of a March 8, 2012 CT scan by Dr. Castle, a B reader. Director's Exhibit 17; Employer's Exhibit 4.

Employer challenges the administrative law judge's consideration of the CT scan evidence. Employer contends that the administrative law judge erred in stating that "[t]he parties are entitled to introduce only one reading of the 'other evidence' such as CT scans," and for that reason the administrative law judge erred in considering only one of the three CT scan reports submitted by employer as part of its affirmative case.[9] Employer's Brief at 5, *quoting* Decision and Order at 14. Employer insists that the case must be remanded for the administrative law judge to consider all of the relevant CT scan evidence of record. Employer's Brief at 5. We disagree.

[8] Dr. Fino opined that the June 27, 2012 CT scan showed extensive bullous emphysema and bilateral lower lobe lung compression that simulated irregular opacities but was, in fact, severe bullous emphysema. Employer's Exhibit 3. Dr. Fino further opined that there were no changes consistent with a coal mine dust associated occupational lung disease. *Id*.

[9] On its evidence summary form, employer stated that it was submitting the reading of the June 27, 2012 CT scan by Dr. Fino, Employer's Exhibit 3, the reading of the August 20, 2008 CT scan by Dr. Fino, Director's Exhibit 17, and the reading of the March 8, 2012 CT scan by Dr. Castle, Employer's Exhibit 4.

Although the administrative law judge erred in considering only one of the three CT scans employer submitted in its affirmative case, this error is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). Employer concedes that "the error might appear harmless," because the administrative law judge found the CT scan insufficient to support a finding of clinical or legal pneumoconiosis. Employer's Brief at 5-6. Nonetheless, employer contends that the administrative law judge's failure to consider the two other negative CT scan readings requires remand because this error "may have affected the ALJ's decision making." *Id.* That argument is insufficient to justify vacating the administrative law judge's decision because employer bears the "burden of showing that the [ALJ's] error was harmful…." *Shinseki*, 556 U.S. at 409. This case is analogous to *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1027, 24 BLR 2-297, 2-319 (10th Cir. 2010), in which the United States Court of Appeals for the Tenth Circuit held that an administrative law judge's erroneous exclusion of a treatment report referencing a positive x-ray interpretation was harmless because claimant was unable to show how it prejudiced his case in light of all the medical evidence of record. Consequently, because employer has not provided a specific explanation of how the administrative law judge's error could have made a difference, we decline to remand the case for further consideration of the CT scan evidence. *Shinseki*, 556 U.S. at 413.

Additionally, employer argues that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.202(a)(4) and in relying on the preamble to the 2001 regulations to evaluate the medical opinion evidence. Employer contends that the administrative law judge erred in shifting the burden to employer to disprove the existence of pneumoconiosis, even though the amended Section 411(c)(4) presumption is not applicable. Employer further contends that the administrative law judge was unfairly critical in his evaluation of the opinions of employer's physicians. We disagree.

The administrative law judge considered the opinions of Drs. Forehand, Fino and Castle. Dr. Forehand[10] opined that the miner suffered from clinical and legal pneumoconiosis, that he had a totally disabling respiratory impairment and that coal dust exposure had had an additive effect on claimant's impairment. Dr. Fino[11] opined that the

[10] Dr. Forehand conducted an examination of the miner and objective testing. He diagnosed coal workers' pneumoconiosis based on the miner's positive x-ray, and an obstructive lung disease due to the miner's coal dust exposure and cigarette smoking. Director's Exhibit 13.

[11] Based on an examination of the miner and objective testing, Dr. Fino opined that there was insufficient objective medical evidence to justify a diagnosis of clinical or legal pneumoconiosis. Rather, Dr. Fino diagnosed idiopathic pulmonary fibrosis and

miner suffered from idiopathic pulmonary fibrosis, that the miner's fibrosis may have been caused by smoking, but it was not caused by the miner's coal dust exposure. Dr. Castle[12] opined that the miner had either usual interstitial pneumonitis or idiopathic pulmonary fibrosis, neither of which was related to the miner's coal dust exposure. Weighing the medical opinion evidence, the administrative law judge noted that both Dr. Fino and Dr. Castle emphasized the fact that the miner's impairment was *restrictive* in nature, rather than *obstructive* when ruling out the existence of pneumoconiosis, although the "[r]egulations state that legal pneumoconiosis includes any chronic restrictive *or* obstructive pulmonary disease arising out of coal mine employment." Decision and Order at 19. Additionally, the administrative law judge found that Dr. Castle did not adequately explain why, although not typical, the miner could not have had one of those rare cases of disabling coal workers' pneumoconiosis that does not manifest an obstructive impairment. *Id*. Similarly, the administrative law judge found that Dr. Fino failed to offer an adequate explanation for finding that the miner's pulmonary fibrosis could be due to cigarette smoking, but without any additive effect from the miner's coal dust exposure. *Id*. at 19-20. Rather, the administrative law judge found the opinion of Dr. Forehand, diagnosing clinical and legal pneumoconiosis, was well-reasoned and documented, in light of the physician's underlying documentation. *Id*. at 20. Consequently, the administrative law judge accorded greater weight to the opinion of Dr. Forehand than to the contrary opinions of Drs. Fino and Castle. *Id*.

Contrary to employer's contention, the administrative law judge gave a sufficient basis for discrediting the opinions of Drs. Castle and Fino. In weighing the opinion of Dr. Castle, the administrative law judge acted within his discretion as the fact-finder in according less weight to Dr. Castle's opinion, finding that it was based on generalities and not on the miner's particular circumstances. Decision and Order at 19. Specifically, the administrative law judge found that Dr. Castle failed to explain "why [this miner's condition] could not be one of those rare cases of CWP without obstruction." Decision and Order at 19; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *Consolidation Coal Co. v. Director*,

---

opined that the miner was totally disabled by it. Director's Exhibit 17. In addition, Dr. Fino opined that the miner showed some restrictive disease, but did not show any obstructive disease. Employer's Exhibit 6.

[12] Based on a review of the medical evidence, Dr. Castle opined that the miner did not have clinical or legal pneumoconiosis, but rather, that the miner had a mild to moderate restrictive disease due to idiopathic pulmonary fibrosis, or usual interstitial pneumonitis, which is a condition associated with increasing age, slowly progressive dyspnea, and nonproductive cough. Employer's Exhibits 4, 5.

OWCP [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103-4 (7th Cir. 2008); *Knizer v. Bethlehem Mining Corp*., 8 BLR 1-5, 1-7 (1985).

The administrative law judge also permissibly questioned Dr. Fino's opinion that the miner's fibrosis was idiopathic, but acknowledged that smoking could have caused the fibrosis, while insisting it was unrelated to coal dust exposure. The administrative law judge accurately noted that the preamble to the 2001 regulations acknowledges the prevailing view of the medical community that the effect of coal mine dust exposure is additive to smoking. Decision and Order at 19, *citing* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Additionally, the administrative law judge noted that the DOL recognizes that smoking and coal dust exposure affect the lung through similar mechanisms. Decision and Order at 19, *citing* 65 Fed. Reg. 79, 943 (Dec. 20, 2000). In light of these accepted principles, the administrative law judge permissibly found the opinion of Dr. Fino, that the miner's fibrosis and respiratory impairment were unrelated to coal mine dust exposure, not well-reasoned. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; Decision and Order at 19. Therefore, having examined the reasoning provided by Drs. Castle and Fino, the administrative law judge reasonably accorded less weight to these opinions because the physicians were not able to adequately explain the bases for their conclusions.[13] *See Hicks*, 138 F.3d at 532, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Because it is supported by substantial evidence, the administrative law judge's finding, that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed. The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer further challenges the administrative law judge's finding that the medical evidence is sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c), arguing that, because the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), his finding regarding disability causation is also erroneous and must be vacated.

[13] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Fino and Castle, the administrative law judge's error, if any, in according less weight to their opinions for other reasons, would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Fino and Castle.

In light of our decision to affirm the administrative law judge's Section 718.202(a) findings of clinical and legal pneumoconiosis, *see* discussion, *supra*, we also affirm his finding that claimant established disability causation pursuant to Section 718.204(c) because employer has not raised any specific allegation of error with regard to disability causation.[14] *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see also Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984). Consequently, we affirm the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits on Living Miner's Claim is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to affirm the administrative law judge's Decision and Order Granting Benefits on Living Miner's Claim. Instead, I would vacate the administrative law judge's Decision and Order and

[14] The administrative law judge rationally discounted the disability causation opinions of Drs. Fino and Castle because the physicians did not diagnose pneumoconiosis, contrary to the administrative law judge's finding on this issue. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 21.

remand the case for further consideration of the relevant evidence pursuant to 20 C.F.R. §§718.107(d) and 718.202(a)(4). Finally, the administrative law judge should weigh all of the evidence together, in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

With regard to the CT scan evidence, as acknowledged by the majority, the administrative law judge applied an improper standard in his consideration of this evidence. Contrary to the administrative law judge's statement that "[t]he parties are entitled to introduce only one reading of the 'other evidence' such as CT scans," Decision and Order at 14, the parties are permitted to submit one reading of each piece of "other evidence," such as a CT scan, and are not limited to one CT scan interpretation in total. 20 C.F.R. §718.107(d); *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-135 (2006) (en banc) (J. Boggs, concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 14.

The employer here submitted readings of three separate CT scans as part of its affirmative case: a reading of the June 27, 2012 CT scan by Dr. Fino, Employer's Exhibit 3; a reading of the August 20, 2008 CT scan by Dr. Fino, Director's Exhibit 17; and a reading of the March 8, 2012 CT scan by Dr. Castle, Employer's Exhibit 4. *See* Employer Evidence Summary Form dated November 14, 2012. The administrative law judge, however, admitted and considered only one CT scan, Dr. Fino's reading of the June 27, 2012 CT scan. Decision and Order at 14; Employer's Exhibit 3. This was error. The majority concludes, however, that this error is harmless, holding that employer's argument that the exclusion of this evidence could affect the result in this case did not demonstrate prejudicial error. I disagree.

By the majority's reasoning, improper exclusion of evidence would always be harmless error because it is not possible to determine with certainty its effect on the trier-of-fact's ultimate determination, and thereby demonstrate prejudice. The administrative law judge's failure to consider the additional CT scan evidence could affect his consideration of the medical opinion evidence pursuant to Section 718.202(a)(4), as well as his weighing of all medical evidence, like and unlike, pursuant to *Compton*. Contrary to the majority's holding, this case is not analogous to *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1027, 24 BLR 2-297, 2-318-19 (10th Cir. 2010),[15] because the evidence

[15] The evidence in *Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1027, 24 BLR 2-297, 2-318-19 (10th Cir. 2010), a letter reporting that claimant had a chest x-ray that detected evidence of pneumoconiosis, was excluded because it exceeded the evidentiary limit and, in any event, it lacked crucial information. The court found that because the letter in question did not contain crucial information (the date the x-ray was taken, the name or qualifications of the doctor who read it, or the type of opacities found), its exclusion was not an abuse of the administrative law judge's discretion. The

in question was not permissibly excluded, and employer's argument that it may affect the administrative law judge's weighing of the totality of the evidence has merit, in light of *Compton*. Therefore, I would vacate the administrative law judge's weighing of the CT scan evidence and remand the case for the administrative law judge to reconsider this evidence pursuant to Section 718.107(d).

Further, because of the administrative law judge's error in the evaluation of the CT scan evidence, his overall finding of the existence of pneumoconiosis at Section 718.202(a) is tainted, as he has not accurately set forth the evidence underlying the medical opinions. Therefore, I would vacate the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4) and remand the case for him to reweigh the medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Moreover, I would instruct the administrative law judge to then weigh together all of the evidence, like and unlike, in this case, to determine whether the existence of pneumoconiosis is established pursuant to Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

Consequently, I would vacate the administrative law judge's Decision and Order Granting Benefits on Living Miner's Claim and remand the case for the administrative law judge to specifically address all of the CT scan evidence, and then consider all of the relevant evidence under Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-174.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

---

court further observed that in light of the detailed evidence as to his medical history already in the record, claimant had failed to show its exclusion caused him prejudice. *Gunderson*, 601 F.3d at 1027, 24 BLR at 2-318-19. That is not the case here.