BRB No. 98-1566 BLA

MITCHELL MESSER	)
	)
Claimant-Petitioner	)
	)
v.	)
	)
	)
EASTOVER MINING COMPANY	)
	)
Employer-Respondent	)
	)
	)
DIRECTOR, OFFICE OF WORKERS'	)
COMPENSATION PROGRAMS, UNITED	) DATE ISSUED:10/18/99
STATES DEPARTMENT OF LABOR	)
	)
Party-in-Interest	) DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Mark D. Goss (Goss & Goss), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order (86-BLA-3341) of Administrative Law Judge J. Michael O'Neill denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the fourth time. Initially, Administrative Law Judge Bernard J. Gilday, Jr. credited the miner with fourteen years of coal mine employment. [1988] Decision and Order at 5. Applying the regulations at 20 C.F.R. Part 718, Judge Gilday found the evidence sufficient to establish the existence of pneumoconiosis

[1]Claimant is Mitchell Messer, the miner, who filed his claim for benefits on September 28, 1984. Director's Exhibit 1.

pursuant to 20 C.F.R. §718.202(a)(4) by applying the true doubt rule. [1988] Decision and Order at 11. The administrative law judge also found that claimant was entitled to the presumption of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §718.203(b) and that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). [1988] Decision and Order at 11-14. Judge Gilday, however, found that claimant's pneumoconiosis was not, in and of itself, totally disabling pursuant to 20 C.F.R. §718.204(b). [1988] Decision and Order at 14. Accordingly, benefits were denied.

On appeal, the Board affirmed the findings of Judge Gilday at 20 C.F.R. §§718.202(a)(1)-(a)(3), 718.203(b), and 718.204(c), as they were unchallenged on appeal. *See Messer v. Eastover Mining Co.*, BRB No. 88-2086 BLA (Feb. 28, 1990)(unpub.). The Board also affirmed Judge Gilday's Section 718.202(a)(4) finding. *Id.* However, the Board vacated Judge Gilday's Section 718.204(b) finding in light of the decision by the United States Court of Appeals for the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), and remanded this case for him to reconsider the relevant medical evidence in accordance with *Adams*. *Id.*

On first remand, Judge Gilday reaffirmed his use of the true doubt rule to find the existence of pneumoconiosis pursuant to Section 718.202(a)(4). [1994] Decision and Order on Remand at 3. Pursuant to Section 718.204(b), Judge Gilday found the relevant evidence equally probative and applied the true doubt rule to find that claimant's pneumoconiosis was a contributing cause of his total respiratory disability. [1994] Decision and Order on Remand at 4. Accordingly, benefits were awarded, commencing September, 1984. [1994] Decision and Order on Remand at 5.

On second appeal, the Board vacated Judge Gilday's findings pursuant to Sections 718.202(a)(4) and 718.204(b) in light of the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [Ondecko], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), invalidating the true doubt rule. *See Messer v. Eastover Mining Co.*, BRB No. 94-0829 BLA (June 28, 1995)(unpub.).

On second remand, this case was transferred without objection to Administrative Law Judge J. Michael O'Neill [hereinafter, the administrative law judge] who found the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(b). [1997] Decision and Order on Remand at 5-7. Accordingly, benefits were denied.

On third appeal, the Board vacated the administrative law judge's findings pursuant to

Section 718.202(a)(4) and Section 718.204(b). *See Messer v. Eastover Mining Co.*, BRB No. 97-0771 BLA (Feb. 17, 1998)(unpub.). The Board affirmed the administrative law judge's length of coal mine employment finding as unchallenged on appeal. *Id.*

On third remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). [1998] Decision and Order on Remand at 11-12. Accordingly, benefits were denied.

On this appeal currently pending before the Board, claimant asserts that the administrative law judge erred in according less weight to the opinions of Drs. Anderson, Baker, and Clarke pursuant to Section 718.202(a)(4). Claimant's Brief at 2-4. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 applicable law, 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first asserts that the Board held that the administrative law judge impermissibly accorded less weight to Dr. Anderson's opinion by stating that this physician relied on a positive x-ray when the administrative law judge found the weight of the x-ray evidence to be negative for pneumoconiosis. Claimant's Brief at 2. Thus, claimant further contends that the administrative law judge continued to impermissibly accord less weight to Dr. Anderson's opinion on this basis. Claimant's Brief at 2. The record reflects, however, that the administrative law judge accorded little weight to Dr. Anderson's diagnosis of pneumoconiosis because it was based solely on an x-ray reading: in neither the report nor his deposition testimony did this physician reveal any other evidence he relied upon in making this diagnosis. The administrative law judge properly concluded that Dr. Anderson's opinion is "poorly explained and poorly supported." Decision and Order at 10. Therefore, contrary to claimant's contention, the administrative law judge permissibly accorded less weight to this opinion on remand. [1998] Decision and Order at 9-10; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993)(medical opinion that purports to be based on clinical findings beyond x-ray may be found to be based solely on x-ray reading); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Next, claimant argues that the administrative law judge accorded less weight to Dr. Clarke's opinion because it was based in part on a positive x-ray, whereas the administrative law judge had found the weight of the evidence was negative. Reference to the administrative law judge's decision shows that he reasonably determined that " Dr. Clarke's

recitation of the I.L.O. reading does not carry much support for his opinion." Decision and Order at 10. Thus, the administrative law judge rationally analyzed the opinion, just as he rationally analyzed Dr. Penman's opinion and accorded it substantial weight, notwithstanding the doctor's's partial reliance on a positive x-ray reading.

Then, claimant contends that the administrative law judge erred in finding that Dr. Clarke took inconsistent positions with respect to the cause of claimant's breathing difficulties. Claimant's Brief at 2-3. Dr. Clarke diagnosed pneumoconiosis, found that claimant's pneumoconiosis was a substantially contributing cause of his pulmonary impairment, and stated that he was unable to determine any cause for claimant's disabling dyspnea other than his coal mine employment. Director's Exhibits 11, 27. At his deposition, Dr. Clarke testified that chronic bronchitis and emphysema can cause the same symptoms and complaints as those from which claimant suffers and that claimant's cigarette smoking and obesity account for part of his pulmonary impairment. Director's Exhibit 27 at 13-14.

The administrative law judge found that Dr. Clarke's testimony that claimant's cigarette smoking and obesity account for part of his pulmonary impairment contradicts his earlier statement that he could find no cause for claimant's disabling dyspnea apart from his work in a dusty environment. [1998] Decision and Order at 10. "Due to Dr. Clarke's failure to reconcile these statements," the administrative law judge found "his opinion poorly supported, poorly reasoned, and entitled to little weight." *Id.* Contrary to claimant's assertion, it was reasonable for the administrative law judge to find that Dr. Clarke's subsequent deposition testimony is inconsistent with his statement that he was unable to determine any cause for claimant's disabling dyspnea other than his coal mine employment and to accord less weight to his opinion on this basis. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Claimant also asserts that the administrative law judge again erred in discrediting Dr. Baker's opinion. The administrative law judge found that Dr. Baker stated that he had based his diagnoses "on a positive x-ray interpretation and a significant duration of exposure." Decision and Order at 11. Substantial evidence supports this determination. In box "d" of his medical report, Director's Exhibit 12, the doctor had checked "yes" to indicate that the diagnosed condition was related to dust exposure in coal mine employment. Beneath the "yes," where he was directed to "provide medical rationale," the doctor wrote: "abnormal chest x-ray & significant duration of exposure." Contrary to the suggestion of our dissenting colleague, we are not pointing to Dr. Baker's statement on the DOL form in order to make necessary findings which the administrative law judge omitted, we are simply demonstrating that clear, unequivocal and uncontradicted evidence supports the administrative law judge's finding that Dr. Baker's diagnosis of pneumoconiosis was based solely "on a positive x-ray interpretation and a significant duration of exposure." Decision and Order at 11. We thus discharge our statutory responsibility: "the findings of fact in the decision under review by

the Board shall be conclusive if supported by substantial evidence in the record as a whole." 33 U.S.C. §921(b)(3).

Notwithstanding the doctor's own, plain statement of his diagnosis's derivation, our dissenting colleague asserts that Dr. Baker's diagnosis of pneumoconiosis must be based upon the findings of his examination because he filled out the Department of Labor form "Medical History and Examination for Coal Mine Workers' Pneumoconiosis." We disagree. The administrative law judge reasonably relied upon the doctor's statements of the bases of his diagnoses. Director's Exhibit 12. The administrative law judge is the fact-finder and his findings will not be disturbed unless clearly erroneous. *Riley v. National Mines Corp.*, 852 F.2d 197, 198, 11 BLR 2-182, 2-184 (6th Cir. 1988).[2]

[2]The record offers additional support for the administrative law judge's determination. In his deposition, Dr. Baker testified that he had not actually examined claimant, that his diagnosis was based on a rereading of an x-ray and that he is not a B-reader. Director's Exhibit 27 at 10. The Board has conjectured in a prior opinion that on January 17, 1985, when Dr. Baker testified that he had not examined claimant, he was referring to the date of the x-ray films he had read, he was not negating his report of December 4, 1984. Decision and Order issued February 17, 1998 at 5 n.5. This interpretation appears doubtful. Since Dr. Baker was not advised of the date of the x-ray in his deposition, it seems unlikely that his statement referred to that date. Furthermore, Dr. Baker testified not only that he had not examined claimant, but when asked, "Doctor again you never have actually seen Mr. Messer, have you?" Director's Exhibit 27 at 10, 12-13, he replied, "No, sir." Director's Exhibit 27 at 13. This testimony underlines the riskiness of assuming a diagnosis is based on the findings of an examination. It also demonstrates the wisdom of the administrative law judge in crediting the doctor's statement that his diagnosis was based on x-ray and coal dust exposure.

The administrative law judge stated that he gave Dr. Baker's opinion little weight because a positive x-ray reading and coal dust exposure were the sole bases of the doctor's opinion and the administrative law judge had determined that the weight of the x-ray evidence was negative for pneumoconiosis. Our dissenting colleague is correct, that an administrative law judge may not reject a diagnosis of pneumoconiosis because it is based in part on a positive x-ray reading and the weight of the evidence is negative. That principle, however, has no application to the case at bar because the only evidence supporting the diagnosis of pneumoconiosis was a positive x-ray reading, hence, the diagnosis was not based only "in part" on a positive x-ray reading. *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). In *Sahara Coal Co*., Dr. Houser had indicated that he based his diagnosis of pneumoconiosis on claimant's occupational exposure and x-ray findings. The court held that Dr. Houser's report was not probative evidence of pneumoconiosis. The court declared:

> Occupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence might be found. The only evidence that Houser mentions is x-ray evidence, over which the rereadings [by more experienced radiologists] placed a cloud.

Id. at 783, 18 BLR at 2-387.

As our dissenting colleague observes, the Board is not bound to apply *Sahara Coal Co.*, a decision of the Seventh Circuit because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Nevertheless, the Board should find the reasoning of the court compelling. That the Sixth Circuit finds the Seventh Circuit's reasoning persuasive is revealed by two cases in which the Sixth Circuit cited *Sahara Coal Co*. as authority in affirming an administrative law judge's discrediting a medical opinion at Section 718.202(a)(4), because it was based on positive x-ray interpretations, contrary to the weight of the x-ray evidence. *Adams v. Red Fox Coal Co., Inc.*, 181 F.3d 99, 1999 WL 313904 (6th Cir.)(unpub.); *Couch v. Shamrock Coal Co., Inc.*, 149 F.3d 1182, 1998 WL 381662 (6th Cir.)(unpub.).[3] Interestingly, our dissenting colleague apparently concedes that even the

[3]In accordance with the rules of the Sixth Circuit, we cite these unpublished opinions because we believe they have "precedential value in relation to a material issue in a case, and that there is not published opinion that would serve as well. . . ." 6th Cir. R. 28(g).

narrowest interpretation of *Sahara Coal Co.*, would support the administrative law judge's rejection of Dr. Baker's report because in both *Sahara Coal Co.* and the case at bar the administrative law judge rejected a doctor's report based on a positive reading of an x-ray which was re-read by better qualified doctors as negative. Decision and Order at 11 n.2.

It is true, as our dissenting colleague observes, neither of these Sixth Circuit cases addresses the Seventh's Circuit statement regarding coal mine employment history: "Occupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence might be found." *Sahara Coal Co. v. Fitts*, 39 F.3d at 783, 18 BLR at 2-387. But it is also true that the dissent does not demonstrate any flaw in the Seventh Circuit's analysis. In sum, the administrative law judge properly determined that Dr. Baker's opinion was not a well reasoned opinion at Section 718.202(a)(4) because it was based on coal dust exposure and a positive x-ray reading contrary to the weight of the x-ray evidence.[4] *See Sahara Coal Co., supra; Adams, supra; Couch, supra.*

Regarding the remaining opinions, the administrative law judge accorded substantial weight to the opinions of Drs. Penman and Wright, who found pneumoconiosis, and to the opinions of Drs. Long, Dahhan, and O'Neill,[5] who did not find pneumoconiosis. [1998] Decision and Order at 8-11. The administrative law judge then concluded that because he finds "that the opinions of Drs. Long, Dahhan, and O'Neill are entitled to at least as much weight, if not more, than the opinions of Drs. Anderson, Clarke, Penman, Baker, and Wright,. . .claimant has failed to establish pneumoconiosis by a preponderance of [the] medical opinion

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[4]Our dissenting colleague's concern is not well founded: that the "administrative law judge's reasoning here essentially forecloses the possibility that claimant can establish the existence of pneumoconiosis by medical opinion simply because he has failed to establish pneumoconiosis by x-ray. . . ." (citations omitted). Decision and Order at 9. The administrative law judge in the case at bar gave "substantial" weight to the opinions of both Drs. Wright and Penman, diagnosing pneumoconiosis at Section 718.202(a)(4). The administrative law judge noted that Dr. Penman had relied in part on a positive x-ray and history of coal dust exposure, nevertheless the administrative law judge credited the opinion because the doctor explained how his examination findings had supported his diagnosis. Decision and Order at 11.

[5]In its previous decision, the Board instructed the administrative law judge to reconsider the opinions of Drs. Long, O'Neill, and Dahhan on remand. The administrative law judge adequately addressed the Board's concerns in his most recent decision, [1998] Decision and Order at 8-9, and claimant does not challenge on appeal the administrative law judge's reconsideration of these opinions, *see Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence." [1998] Decision and Order at 11. Inasmuch as the administrative law judge did not explain how he weighed these opinions, we instruct the administrative law judge to state the bases for his determination on whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) by a preponderance of the evidence. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Additionally, we instruct the administrative law judge that if on remand he finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then reconsider all the relevant medical evidence to determine if claimant's pneumoconiosis is a contributing cause of his totally disabling respiratory impairment pursuant to Section 718.204(b). *See Adams, supra.*

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. MCGRANERY
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in the opinion of my colleagues except insofar as the majority affirms the administrative law judge's treatment of Dr. Baker's opinion. It is from this holding that I respectfully dissent.

Regarding Dr. Baker's opinion, the administrative law judge stated that he "found the

x-ray evidence negative for pneumoconiosis. Thus, Dr. Baker's positive x-ray interpretation carries little support for his opinion." [1998] Decision and Order at 11. Noting that "[t]he only other support given for Dr. Baker's diagnosis is the claimant's significant duration of exposure to coal dust," the administrative law judge found this opinion "entitled to less weight." *Id.* As claimant asserts, and as the Board stated in its previous Decision and Order, an administrative law judge may not accord less weight to a medical opinion because the physician relied, in part, on a positive x-ray reading, which conflicts with the weight of the x-ray evidence. *See Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). As Section 718.202(a) provides alternative methods of establishing pneumoconiosis, *see Dixon v. North Camp Coal* Co., 8 BLR 1-344 (1985); *see generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), the administrative law judge's reasoning here essentially forecloses the possibility that claimant can establish the existence of pneumoconiosis by medical opinion, simply because he has failed to establish pneumoconiosis by x-ray, *see Taylor, supra; Dixon, supra; see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Anderson, supra.* There is more to Dr. Baker's opinion than the administrative law judge suggests. The record reflects that Dr. Baker performed a physical examination, noting claimant's subjective complaints, work, family, and smoking histories, and that Dr. Baker performed pulmonary function and blood gas studies. Director's Exhibits 9(b), 12, 13.

The majority refers to Dr. Baker's deposition testimony as further support for the administrative law judge's discrediting of Dr. Baker's opinion. The majority states that Dr. Baker testified that he had not actually examined claimant, that his diagnosis was based on a rereading of an x-ray, and that he is not a B-reader. We addressed Dr. Baker's deposition testimony in our previous Decision and Order when we held that the administrative law judge improperly "rejected the report of Dr. Baker on the grounds that Dr. Baker did not examine claimant." *See Messer v. Eastover Mining Co.*, BRB No. 97-0771 BLA (Feb. 17, 1998)(unpub.)(*Messer III)*. As we previously stated, the record contains a prepared written opinion and documentation of objective testing performed by Dr. Baker on December 4, 1984, in addition to his deposition testimony. Director's Exhibits 9(b), 12, 13, 27. Dr. Baker's testimony focused on his review of the January 17, 1984 x-ray taken by Dr. Anderson, not on the examination Dr. Baker performed on December 4, 1984. In a footnote in our previous Decision and Order, we noted that Dr. Baker acknowledged that he had been asked to review the January 17, 1984 x-ray taken by Dr. Anderson and that in response to questions related to this x-ray responded that he did not examine claimant. *See Messer III, supra*. Although Dr. Baker's answer to this question is unclear, we stated that it is reasonable to assume that his answer related to the date of the x-ray, not a negation of his report and objective testing performed on December 4, 1984. *Id.*

Moreover, I note that the majority relies on *Sahara Coal Co. v. Fitts,* 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), a circuit court decision that is not controlling in this case which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.

Acknowledging that the Board is not bound to apply *Fitts*, a decision of the Seventh Circuit because this case arises within the jurisdiction of the U. S. Court of Appeals for the Sixth Circuit, the majority cites two unpublished Sixth Circuit court cases, *Adams v. Red Fox Coal Co., Inc.*, 181 F.3d 99, 1999 WL 313904 (6th Cir.)(unpub.) and *Couch v. Shamrock Coal Co., Inc.*, 149 F.3d 1182, 1998 WL 381662 (6th Cir.)(unpub.), to illustrate that the Sixth Circuit finds the reasoning of the Seventh Circuit in *Fitts* persuasive. The majority states that in *Adams* and *Couch* the Sixth Circuit cites *Fitts* as authority in affirming an administrative law judge's discrediting of a medical opinion pursuant to Section 718.202(a)(4), because it was based on positive x-ray interpretations that are contrary to the weight of the x-ray evidence. However, in *Fitts*, the Seventh Circuit court specifically found "questionable" positive x-ray readings, relied upon by two physicians in their opinions, because the x-rays were reread as negative by more experienced x-ray readers. *See Fitts*, 39 F.3d at 783, 18 BLR 2-387.

While *Fitts* clearly states that it is reasonable for an administrative law judge to reject a physician's opinion which is based upon an x-ray that was reread as negative by physicians with superior radiological qualifications, it is unclear whether the Sixth Circuit court in *Adams* and *Couch* is citing *Fitts* for this proposition or whether the court is going further to state that an opinion based on a positive x-ray may be discredited if the administrative law judge has found the x-ray evidence negative for pneumoconiosis pursuant to Section 718.202(a)(1).[1] Because a court's reasoning is not always as carefully delineated in an unpublished decision as compared to a published decision, reliance on unpublished decisions is precarious. In fact, the Rules of the U.S. Court of Appeals for the Sixth Circuit state that the "[c]itation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case." U.S. Ct. of App. 6th Cir. Rule 28(g), 28 U.S.C.A.

Further, the level of analysis demonstrated by the majority in discussing the administrative law judge's treatment of Dr. Baker's opinion is far more detailed than the reasoning provided by the administrative law judge in discrediting this opinion. The Sixth Circuit court has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case. . . ." *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). The regulations state that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law.

[1]Additionally, neither in *Adams* nor in *Couch* does the Sixth Circuit adopt the reasoning of the Seventh Circuit that "[o]ccupational exposure is not evidence of pneumoconiosis, however, but merely a reason to expect that evidence might be found." *See Fitts*, 39 F.3d at 783, 18 BLR 2-387.

20 C.F.R. §802.301; *see Rowe, supra; see also Lemar, supra*. The majority's discussion here goes beyond our scope of review and attempts to "fill in the gaps" in the administrative law judge's reasoning in order to affirm his findings.[2]

ROY P. SMITH
Administrative Appeals Judge

[2]I note that Dr. Baker's positive x-rays were re-read as negative by physicians with superior qualifications. Director's Exhibits 14, 35, 37. This reasoning would constitute a valid basis for discrediting Dr. Baker's opinion, if so determined by the administrative law judge. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).