BRB No. 05-0838 BLA

CURTIS M. KISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L & J EQUIPMENT COMPANY	)	
	)	
and	)	
	)	
AMERICAN MINING INSURANCE COMPANY	)	DATE ISSUED: 12/29/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Michael P. Cooke (Wolfe, Williams, and Rutherford), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (03-BLA-6545) of Administrative Law Judge Pamela Lakes Wood on a subsequent miner's 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). Initially, the administrative law judge credited the miner with twenty-six years of coal mine employment. The administrative law judge found that claimant[1] demonstrated that one of the applicable conditions of entitlement had changed since the prior denial of benefits pursuant to 20 C.F.R. §725.309(d).[2] Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204. Accordingly, the administrative law judge awarded benefits, commencing as of May 1, 2000, but not payable until September 1, 2001.[3]

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[1]Claimant is Curtis M. Kiser, who filed his second claim for benefits on May 21, 2001. Director's Exhibit 3.

[2]The administrative law judge noted that the record contains evidence of a prior claim that was filed by claimant on October 10, 1979 and was finally denied on October 1, 1980. The administrative law judge stated that "[d]espite an extensive search, the prior claim in this case could not be located, and thus I am unable to determine the basis for the prior denial of benefits in order to determine where to begin my analysis in this subsequent claim." Decision and Order at 9. However, the administrative law judge noted that because claimant was still working when his previous claim was filed and denied, it may have been denied on that basis. Noting that claimant is no longer working in the mines, the administrative law judge found that claimant "has arguably satisfied a condition of entitlement upon which the prior denial was premised." *Id.* Accordingly, the administrative law judge proceeded to consider the merits of the second claim. Because none of the parties challenges the administrative law judge's finding pursuant to 20 C.F.R. §725.309, we affirm it. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]The administrative law judge, relying on *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), noted that benefits will commence as of May 2001, the month in which claimant filed his second claim, pursuant to 20 C.F.R. §725.503, but will be suspended for the period from May 1, 2001 until August 31, 2001 pursuant to 20 C.F.R. §725.504, due to claimant's continued employment during that time. None of the parties challenges the administrative law judge's findings regarding the date of entitlement.

On appeal, employer asserts that pursuant to Section 718.202(a)(1), the administrative law judge erred in considering Dr. Halbert's interpretation of the September 30, 2002 x-ray to be positive for the existence of pneumoconiosis. Employer further contends that the administrative law judge erred in refusing to allow employer to replace Dr. Halbert's interpretation of the September 30, 2002 x-ray with Dr. Scott's reading of the same x-ray. Additionally, employer argues that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.202(a)(4) and in considering all the relevant evidence at Section 718.202(a). Employer further contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), initially declined to participate in this appeal.[4]

On August 11, 2006, the Board issued an order requesting supplemental briefing from the Director on the issue of whether the administrative law judge properly considered Dr. Halbert's interpretation of the September 30, 2002 x-ray to be positive for the existence of pneumoconiosis. *Kiser v. L & J Equipment Co.*, BRB No. 05-0838 BLA (Aug. 11, 2006) (Order) (unpub.). Specifically, the Board requested the Director to address whether the comments Dr. Halbert made on his interpretation of the September 30, 2002 x-ray, which undermine the credibility of his positive ILO classification, should be considered at Section 718.202(a) or at Section 718.203. *Id.* The Board also requested the Director to address whether *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc*) is applicable to cases, such as the instant one, arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit,[5] following the court's issuance of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

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. 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).

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[4]We affirm the administrative law judge's finding of twenty-six years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203(b), as these findings are unchallenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711-12. We also affirm the administrative law judge's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), as it is unchallenged on appeal. *Id.*

[5]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as claimant's coal mine employment occurred in Virginia. Director's Exhibits 4, 6; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

SECTION 718.202(a)(4)

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis. The administrative law judge first considered the two reports of Dr. Rasmussen dated August 16, 2001 and September 3, 2003 and found them both "to be well-reasoned and documented." Decision and Order at 17. In his August 16, 2001 report, Dr. Rasmussen found coal workers' pneumoconiosis and possibly complicated pneumoconiosis based on claimant's thirty-seven years of coal mine employment and x-ray evidence of pneumoconiosis. Director's Exhibits 10, 11. Dr. Rasmussen also found chronic bronchitis due to coal dust exposure and noted that the "possibility of a resting right to left shunt is not entirely excluded, however, [claimant's] coal mine dust exposure remains the only known cause of his impairment." *Id.* In his later report, Dr. Rasmussen noted that claimant has "about 23 years" of coal mine employment and found "x-ray changes consistent with pneumoconiosis" and that "[t]he only known risk factor for [claimant's] disabling lung disease is his coal mine dust exposure," but noted that "[t]he possibility of a right to left shunt associated with pulmonary hypertension is not excluded as a possibility." Claimant's Exhibit 2.

In considering Dr. Rasmussen's 2001 and 2003 reports, the administrative law judge noted one discrepancy in this physician's 2001 report, which was that he relied on an inaccurate length of coal mine employment of thirty-seven years. Decision and Order at 17. As noted previously, the administrative law judge found twenty-six years of coal mine employment. *Id.* at 6. Although the administrative law judge noted that it is proper to discredit a report based on an inaccurate length of coal mine employment, she declined to discredit Dr. Rasmussen's 2001 report on this basis. Rather, the administrative law judge found Dr. Rasmussen's 2001 report was "still credible" because this physician "took into consideration other data in reaching his conclusions." *Id.* Moreover, the administrative law judge found it significant that "Dr. Rasmussen reached essentially the same conclusions when he took into consideration an accurate [coal mine employment] history at the time of his second examination." *Id.* The administrative law judge concluded that "both reports contained good analysis to support the conclusions," but "accorded greater weight to [Dr. Rasmussen's] second report inasmuch as it provides more reasoning and a comprehensive view of the Claimant's condition." *Id.* at 18.

Employer raises numerous contentions[6] regarding the administrative law judge's finding that Dr. Rasmussen's opinions are well-reasoned, but the crux of employer's arguments is that Dr. Rasmussen's finding of clinical pneumoconiosis is only based on an x-ray and coal dust exposure history and that his finding of legal pneumoconiosis is not explained. In discussing the credibility of Dr. Rasmussen's reports, the administrative law judge did not separate out Dr. Rasmussen's clinical pneumoconiosis and legal pneumoconiosis findings. Because the administrative law judge found that claimant established the existence of "pneumoconiosis as defined under Section 718.201"[7] based on Dr. Rasmussen's report, Decision and Order at 21, the pertinent issue is whether the administrative law judge's crediting of Dr. Rasmussen's finding of legal pneumoconiosis is correct.

The administrative law judge accorded greater weight to Dr. Rasmussen's 2003 finding of legal pneumoconiosis because she found that Dr. Rasmussen "explained how the Claimant's pattern of breathing impairment and progressive worsening of the pulmonary functions were both indicators of CWP." Decision and Order at 19. The administrative law judge additionally found that because Dr. Rasmussen evaluated claimant on two occasions, these "two visits provided the opportunity for him to note the progressive worsening of the Claimant's pulmonary condition, which is consistent with pneumoconiosis." *Id.* Employer challenges the administrative law judge's finding that Dr. Rasmussen's 2003 opinion is well-reasoned and entitled to greater weight on these bases. Specifically, employer argues that although Dr. Rasmussen found the existence of legal pneumoconiosis because the pattern of impairment seen with claimant's lung disease is "consistent with the effects of coal mine dust exposure," Claimant's Exhibit 2, he never explained why this pattern of impairment is typical for coal workers' pneumoconiosis. Employer further argues that while Dr. Rasmussen stated in his 2003

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[6]Contrary to employer's contention, the administrative law judge considered the qualifications of Drs. Rasmussen, Rosenberg, and Fino and permissibly declined to accord greater weight to the opinions of Drs. Rosenberg and Fino because they are both Board-certified in pulmonary disease, whereas Dr. Rasmussen is not. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

The qualifications of Drs. Rasmussen and Rosenberg are in the record. Director's Exhibit 32; Claimant's Exhibit 2. However, the record does not reveal the qualifications of Dr. Fino, even though the administrative law judge noted that they were submitted under Employer's Exhibit 1. Decision and Order at 19 n.17.

[7]"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).

report that "[t]he only known risk factor for [claimant's] disabling lung disease is his coal mine dust exposure," he also noted, later in this opinion, that "[t]he possibility of a right to left shunt associated with pulmonary hypertension is not excluded as a possibility." *Id.* Moreover, employer points out that claimant suffered from pneumonia on two different occasions in 2000 and that he was exposed to silica in the form of sand during his employment as a foundry worker.[8] While Dr. Rasmussen noted in his 2003 report that claimant suffered from pneumonia twice "in about 2001" and that he "worked in a foundry building bells for about 5 years, as a molder with significant exposure to sand dust," he still stated that the only known risk factor for claimant's lung disease is coal dust exposure. *Id.* The administrative law judge did not discuss this inconsistency in her weighing of Dr. Rasmussen's reports at Section 718.202(a)(4).

Employer additionally asserts that the administrative law judge erred in relying on "the fact that [Dr. Rasmussen] also pointed to the progressive worsening of the claimant's pulmonary condition, stating that this was characteristic of pneumoconiosis." Employer's Brief at 12. In her Decision and Order, the administrative law judge stated that Dr. Rasmussen "explained how the Claimant's pattern of breathing impairment and progressive worsening of the pulmonary functions were both indicators of CWP" and that Dr. Rasmussen's two evaluations of claimant provided him the opportunity to note the progressive worsening of claimant's pulmonary condition, which is consistent with pneumoconiosis.[9] Decision and Order at 19. Employer asserts that Dr. Rasmussen never stated that progressive impairment was evidence of pneumoconiosis and, therefore, that the administrative law judge impermissibly substituted her opinion for that of the physician when making this statement. While Dr. Rasmussen stated that claimant "has shown progressive impairment in his pulmonary functions in a previous study of 8/16/01," he did not state that this was an indication that claimant's impairment was due to his coal dust exposure. Claimant's Exhibit 2. Because the interpretation of the objective medical evidence is for the experts, the administrative law judge, in stating that "the progressive worsening of the pulmonary functions" was an indication of coal

[8]At the hearing and in his deposition, claimant testified that he was exposed to sand during his work making church bells in a foundry. Hearing Transcript at 26-27, 29, 32; Director's Exhibit 31 at 24-26. Additionally, claimant testified at the hearing that he suffered from pneumonia on two occasions. *Id.* at 25.

[9]As employer notes, the administrative law judge cited to *Clark*, 12 BLR at 1-149, "for the proposition that progressive worsening of a claimant's pulmonary condition is consistent with pneumoconiosis," Employer's Brief at 13, but a review of this case reveals that it does not stand for this proposition.

workers' pneumoconiosis, impermissibly substituted her opinion for that of Dr. Rasmussen. *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984)(interpretation of the medical evidence is for the experts). Moreover, in substituting her judgment for Dr. Rasmussen's, employer suggests that the administrative law judge appears to have applied a presumption that any progressive worsening seen in a respiratory impairment is necessarily due to coal workers' pneumoconiosis. As employer asserts, while it is proper for an administrative law judge to find that an opinion that pneumoconiosis is never progressive is hostile to the Act, there is "no contrary proposition that pneumoconiosis always has to result in such a progressive worsening of symptoms or that pneumoconiosis is the only cause of such a worsening of respiratory symptoms." Employer's Brief at 13-14; *see Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-26 (2004) (Motion for Recon.) (*en banc*) (the amendments to Section 718.201 did not alter claimant's burden of proving the existence of pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity); *see generally Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863, 23 BLR 2-124, 2-172-173 (D.C. Cir. 2002) (pneumoconiosis can be latent and progressive, but is not in the majority of cases). In light of the foregoing, we vacate the administrative law judge's Section 718.202(a)(4) finding and remand this case for the administrative law judge to reconsider her credibility determinations regarding Dr. Rasmussen's opinion.

The administrative law judge next considered Dr. Rosenberg's initial report dated October 15, 2002 and his addendum of April 24, 2003. In his initial report, Dr. Rosenberg found that:

> it can be stated with a reasonable degree of medical certainty, that [claimant] has interstitial lung disease, which has some characteristics of CWP. This is a situation where a high resolution CAT (HRCT) scan of the chest should be performed to better characterize [claimant's] lung parenchyma. Also, the question of left hilar fullness needs to be evaluated (also by obtaining a CAT scan) . . . . After his HRCT or other information becomes available, I will offer an addendum to this report.

Director's Exhibit 32. In his addendum of April 24, 2003, Dr. Rosenberg reviewed claimant's high resolution CT scan performed on November 22, 2002 and stated that:

> Based on a review of the above study, [claimant] does not have the micronodularity of CWP. The cystic destruction that was observed is not consistent with a CWP related condition, but rather other forms of interstitial lung disease, such as eosinophilic granuloma or

> sarcoidosis. Consequently, with respect to [claimant], despite the "positive B reading", his high resolution CAT scan confirms [claimant] does not have a coal dust related condition.

Employer's Exhibit 2. The administrative law judge found that Dr. Rosenberg's initial report was "comprehensive," but that his addendum "was not as well-reasoned as the report dated October 15, 2002." Decision and Order at 18. In doing so, the administrative law judge stated that "this addendum is little more than a CT scan interpretation made by a physician who is not a radiologist." *Id.* The administrative law judge further stated that Dr. Rosenberg failed to explain what factors supported his conclusion that cystic destruction was not consistent with CWP. The administrative law judge added that Dr. Rosenberg excluded coal dust as a cause of claimant's interstitial lung disease, but "did not address the possible contribution by other types of coal mine dusts, such as silica." *Id.* The administrative law judge noted that in the regulations, silica is specifically included as a form of clinical pneumoconiosis and that the definition of legal pneumoconiosis is much broader. *Id.* Thus, the administrative law judge concluded that the addendum lacked analysis and that "[i]ts lack of analysis is particularly troublesome as Dr. Rosenberg completely changes his opinion based upon a single piece of evidence." *Id.*

Employer asserts that the administrative law judge erred in mischaracterizing Dr. Rosenberg's two reports. Specifically, employer contends that the administrative law judge erred in stating that Dr. Rosenberg completely changed his opinion based on a CT scan. Rather, employer asserts that Dr. Rosenberg's initial diagnosis in his first report was a tentative one that was revised based on additional critical evidence that this physician had requested in order to make a final diagnosis. Employer further argues that the administrative law judge erred in finding that Dr. Rosenberg failed to explain his CT scan findings.[10]

Employer's contentions have merit. In his first report, Dr. Rosenberg stated that claimant's interstitial lung disease "has some characteristics of CWP. This is a situation where a high resolution CAT (HRCT) scan of the chest should be performed to better characterize [claimant's] lung parenchyma." Director's Exhibit 32. Dr. Rosenberg concluded his first report by stating that he will offer an addendum to this report after the CT scan or other information becomes available. Thus, because it is clear from the

[10]As employer asserts, because a positive CT scan interpretation, by itself, is indicative of clinical pneumoconiosis, not legal pneumoconiosis, the administrative law judge placed an "unfair burden" on Dr. Rosenberg by "requiring him to address whether a CT scan was pertinent to a diagnosis of legal pneumoconiosis as opposed to clinical pneumoconiosis." Employer's Brief at 16.

wording contained in Dr. Rosenberg's first report that his initial diagnosis of coal workers' pneumoconiosis was qualified pending further information, the administrative law judge erred in finding that Dr. Rosenberg completely changed his opinion based upon a single piece of evidence. *See generally Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11 (1991); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Additionally, contrary to the administrative law judge's findings, Dr. Rosenberg offered reasons in his addendum as to why he did not find that the CT scan showed evidence of coal workers' pneumoconiosis. Specifically, in his addendum, Dr. Rosenberg concluded that "[t]he cystic destruction that was observed is not consistent with a CWP related condition, but rather other forms of interstitial lung disease, such as eosinophilic granuloma or sarcoidosis" because on the November 22, 2002 CT scan, he did not see any hilar mass, and observed throughout the lung fields cystic changes without the micronodularity of coal workers' pneumoconiosis. Employer's Exhibit 2. Based on the foregoing, we instruct the administrative law judge, on remand, to reconsider Dr. Rosenberg's opinion.

Regarding Dr. Fino's opinion, employer asserts that the administrative law judge erred in relying on a typographical error in Dr. Fino's report when she concluded that Dr. Fino found claimant had "sufficient" evidence of legal pneumoconiosis, because Dr. Fino "never provided any documentation or reasoning anywhere else in his report to support such a finding."[11] Employer's Brief at 17-18. After considering the opinion of Dr. Fino, the administrative law judge accorded it "less weight" because she found it to be "conclusory." Decision and Order at 18. The administrative law judge noted that although Dr. Fino found no x-ray or CT scan evidence of coal workers' pneumoconiosis, he found the evidence sufficient to establish the existence of legal pneumoconiosis. The administrative law judge rejected employer's suggestion that Dr. Fino's reference to "sufficient evidence" of legal pneumoconiosis in his report was a typographical error. In doing so, the administrative law judge stated that Dr. Fino's "report is entirely consistent with the conclusion that there is sufficient evidence to diagnose legal pneumoconiosis" because "[t]here is no statement in Dr. Fino's report that could be construed as excluding coal mine dust as a causative agent for Claimant's respiratory disability and [he] has

[11]Employer maintains that while the administrative law judge may, within her discretion, accord little weight to Dr. Fino's report if she finds it to be insufficiently reasoned, she erred in referring to Dr. Fino's finding as one of legal pneumoconiosis on pages 19 and 21 of her Decision and Order. Even though the administrative law judge found Dr. Fino's finding of legal pneumoconiosis to be conclusory, she referred to it in concluding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) and in discussing the CT scan evidence. *See* Decision and Order at 19, 21.

pointed to no other etiology."[12] *Id*. Nonetheless, the administrative law judge accorded Dr. Fino's opinion less weight, because she found that "Dr. Fino reached that conclusion without explaining or specifically referencing the evidence upon which he was relying." *Id.* As employer argues, it is unclear, without further elaboration, how the administrative law judge was able to reject employer's assertion that Dr. Fino's conclusion of legal pneumoconiosis was a typographical error when there was no documentation in Dr. Fino's opinion to support a finding of either clinical or legal pneumoconiosis. Accordingly, we instruct the administrative law judge to more fully explain her reasoning regarding this issue when reexamining Dr. Fino's opinion on remand.[13] *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

SECTION 718.202(a)(1)

Additionally, we address employer's assertions regarding Section 718.202(a)(1), based on the facts of this case and the applicability of *Compton* in this case arising within the jurisdiction of the Fourth Circuit. Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge erred in refusing to allow employer, in its written Closing Argument, to replace Dr. Halbert's interpretation of the September 30, 2002 film with Dr. Scott's interpretation of the same x-ray. At the March 2, 2004 hearing, Dr. Scott's reading of the September 30, 2002 x-ray was admitted into the record as Employer's Exhibit 3. Hearing Transcript at 34. At the hearing, employer submitted its Evidence Summary Form on which it designated Dr. Scott's negative interpretation of the September 30, 2002 x-ray as its rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). As the administrative law judge properly noted in her Decision and Order, Dr. Scott's reading of the September 30, 2002 x-ray "does not qualify as [rebuttal evidence] because the only other readings of that x-ray were submitted by Employer as its initial evidence." Decision and Order at 7. The administrative law judge noted that employer had designated Dr. Halbert's 1/1 interpretation of the September 30, 2002 x-ray and Dr. Wiot's reading of the November 22, 2002 as its initial x-ray evidence pursuant to Section 725.414(a)(3)(i). *Id.* The administrative law judge noted that in its Closing Argument dated April 15, 2005, "Employer sought to substitute Dr. Scott's negative interpretation of the September 30, 2002 film (EX 3) for Dr. Halbert's positive interpretation (DX 32)." *Id.* at 12. The administrative law judge, citing *Dempsey v.*

[12]Dr. Fino found a very mild respiratory impairment present and found that claimant is able to perform his usual coal mine employment. Employer's Exhibit 1.

[13]We note that it is within the administrative law judge's discretion to reopen the record on remand to request a supplemental letter from Dr. Fino clarifying the conclusions he made in his January 8, 2003 report regarding the existence of legal pneumoconiosis. *Lynn v. Island Creek Coal Co*., 12 BLR 1-146, 1-148 (1989)(*en banc*).

Sewell Coal Co., 23 BLR 1-47 (2004),[14] declined to "allow such a substitution at this late date as Claimant has reasonably relied upon Employer's prior designation and Employer has made no showing of good cause for amending its designation over one year after the hearing in this matter." *Id.*

Employer argues that *Dempsey* is distinguishable from the present case because, in *Dempsey*, the claimant had objected to the employer's substitution of a report at the hearing. Employer asserts that, in the instant case, claimant did not object to employer's request, in its Closing Argument, to substitute Dr. Scott's x-ray reading in place of Dr. Halbert's reading.[15] Contrary to employer's contentions, the administrative law judge did not abuse her discretion in refusing employer's request to replace Dr. Halbert's positive x-ray reading with Dr. Scott's negative reading. As noted by the administrative law judge, in its Closing Argument, employer did not offer any reason as to why it chose to amend its designation of the x-ray evidence over a year after the hearing was held. Moreover, while claimant did not object to employer's request to substitute its evidence, it was rational for the administrative law judge to assume that "Claimant has reasonably relied upon Employer's prior designation," particularly in light of the fact that employer was requesting to substitute Dr. Halbert's positive x-ray for Dr. Scott's negative x-ray reading. Accordingly, we affirm the administrative law judge's denial of employer's request to substitute Dr. Scott's interpretation of the September 30, 2002 film for Dr. Halbert's interpretation. *Dempsey*, 23 BLR at 1-62-63 (an administrative law judge is given broad discretion to handle procedural matters); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Additionally, employer contends that the administrative law judge erred in considering that Dr. Halbert's interpretation of the September 30, 2002 x-ray is positive for the existence of pneumoconiosis. On his report interpreting the September 30, 2002 x-ray, Dr. Halbert found small opacities of a size and shape of s/t and a profusion of 1/1 and noted in the "Other Comments" section: prominent inferior left hilum, suggest CT, scar in right apex, no evidence of coal workers' pneumoconiosis. Director's Exhibit 32.

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[14]In *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004), the Board held that the administrative law judge did not abuse his discretion in refusing an employer's request to substitute a report at the hearing.

[15]Employer also suggests that claimant would not have made different evidentiary submissions had employer replaced Dr. Halbert's September 30, 2002 x-ray interpretation with Dr. Scott's reading earlier in the proceedings. *See* Employer's Brief at 5. We reject employer's arguments because there is no basis for employer to presume that claimant would not have acted any differently had employer requested earlier to substitute Dr. Scott's reading for Dr. Halbert's reading.

In a narrative report interpreting the September 30, 2002 x-ray, Dr. Halbert stated that "[t]here are small irregular opacities present in the mid and lower lung zones bilaterally consistent with some types of pneumoconiosis such as asbestosis. I see no evidence of coal workers' pneumoconiosis." *Id.*

In considering Dr. Halbert's x-ray interpretation, the administrative law judge noted that this physician "found opacities consistent with pneumoconiosis of some type (such as asbestosis) but no CWP." Decision and Order at 12. The administrative law judge, nevertheless, deemed Dr. Halbert's reading as "positive for pneumoconiosis because the regulations do not limit the diseases covered to CWP and specifically include silicosis." *Id.* The administrative law judge found that it was proper for her to consider Dr. Halbert's x-ray interpretation to be positive because this physician identified opacities consistent with pneumoconiosis on the x-ray. In doing so, the administrative law judge cited to *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999) (*en banc*)[16] for the proposition that an administrative law judge may properly consider an x-ray interpretation to be positive for pneumoconiosis, without considering comments that the condition was not coal workers' pneumoconiosis, when the comments merely address the source of the disease.

Employer asserts that *Cranor* should have limited applicability in this Fourth Circuit case because of *Compton*, which requires that all evidence be weighed together before a finding of pneumoconiosis can be made at Section 718.202(a). Specifically, employer maintains that "[b]ecause under the ILO system, readers are required to consider if the x-ray changes apparent on a chest x-ray film are typical of any form of pneumoconiosis and not just if the x-ray changes are due to coal workers' pneumoconiosis, . . . it does not make any sense for the finder of fact to refuse to consider the entire x-ray report under § 718.202(a)(1)." Employer's Brief at 4. Employer further asserts that "[a]t best, the ALJ should only have considered Dr. Halbert's report to be equivocal." *Id.*

In the Director's response to our request for supplemental briefing, he asserts that the Board's holding in *Cranor* "is reasonable, is in accordance with the regulatory scheme, and does not violate *Compton's* essential requirement that all contrary evidence be considered before a finding of pneumoconiosis is made." Director's Brief at 4. The Director contends that the holdings of *Compton* and *Cranor* are "fully consistent" because "*Compton* requires the ALJ to weigh all evidence to determine if clinical pneumoconiosis exists, and if [s]he finds it does, *Cranor* then requires [her] to weigh all

[16]In her Decision and Order, the administrative law judge mistakenly identified *Cranor* as *Connor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc*). Decision and Order at 12.

relevant evidence to determine if the disease is related to coal mine employment dust exposure." *Id.* at 4-5. The Director asserts that because Dr. Halbert classified the September 30, 2002 x-ray as showing opacities of 1/1, his interpretation is considered evidence of clinical pneumoconiosis pursuant to Sections 718.102(b) and 718.202(a)(1) because Section 718.202(a)(1) does not require that claimant prove the cause of the clinical pneumoconiosis diagnosed by x-ray. *Id.* at 5. The Director maintains that "*Compton* does not require a different procedure; it merely and reasonably requires that the evidence under each of section 718.202(a)'s subsections must be weighed together before claimant can prove he has clinical pneumoconiosis." *Id.* The Director states that if claimant proves the existence of clinical pneumoconiosis, then he must also prove that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203. *Id.*

We agree with the Director and reject employer's argument that, in this Fourth Circuit case, *Cranor* should not be applied because of *Compton*. As the Director states, there is nothing in *Compton* that conflicts with the Board's holding in *Cranor*. *Compton* holds that all evidence relevant to Section 718.202(a) should be weighed together before a claimant can establish the existence of pneumoconiosis, whereas *Cranor* holds that evidence that is relevant to the source of the pneumoconiosis should be considered at Section 718.203. Because the comments made by Dr. Halbert, in the instant case, address the source of the pneumoconiosis he diagnosed, the administrative law judge properly applied *Cranor*. Consequently, the administrative law judge properly found Dr. Halbert's x-ray interpretation to be positive at Section 718.202(a)(1)[17] and considered Dr. Halbert's comments at Section 718.203(b).[18]

[17]Pursuant to the regulations, the existence of pneumoconiosis may be established based on an x-ray that is classified as Category 1/0 or greater. 20 C.F.R. §§718.102, 718.202(a)(1); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*).

[18]The Director notes that because the administrative law judge found the existence of legal pneumoconiosis, she erred in applying the presumption of causation found at Section 718.203(b). Director's Brief at 5, 6 n. 3 (citing *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006) (Section 718.203(b) presumption of causation does not extend to diagnoses of legal pneumoconiosis)); *see Henley v. Cowan & Co., Inc.*, 21 BLR 1-147, 1-151 (1999) (if an administrative law judge finds the existence of legal pneumoconiosis, then she need not separately determine the etiology thereof at Section 718.203 because her findings at Section 718.202(a)(4) will necessarily subsume that inquiry). However, the Director argues that such error is harmless because the Section 718.203(b) presumption did not aid claimant in proving entitlement, given that the administrative law judge credited Dr. Rasmussen's finding of legal pneumoconiosis at Section 718.202(a)(4). Director's Brief at 5, 6 n. 3.

SECTION 718.202(a)

Employer also asserts that the administrative law judge erred in weighing all of the relevant evidence together to determine whether claimant has established the existence of pneumoconiosis at Section 718.202(a) in accordance with *Compton*. In light of our decision to vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a) and instruct the administrative law judge to again consider all the relevant evidence pursuant to Section 718.202(a) on remand. As the Fourth Circuit court in *Compton* noted, the administrative law judge must be mindful of the distinction between clinical and legal pneumoconiosis and of the different diagnostic purposes of the various pieces of evidence, when reconsidering all of the relevant evidence at Section 718.202(a) on remand. *Compton*, 211 F.3d at 210-11, 22 BLR at 2-173-74.

SECTION 718.204(c)

Lastly, employer contends that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis based on Dr. Rasmussen's opinion. Pursuant to Section 718.204(c), in according "the most weight" to Dr. Rasmussen's opinion regarding disability causation, the administrative law judge referenced her Section 718.202(a)(4) findings regarding Drs. Rasmussen, Rosenberg, and Fino. Decision and Order at 25-26. Because we instruct the administrative law judge, on remand, to reevaluate her weighing of the opinions of Drs. Rasmussen, Rosenberg, and Fino regarding the existence of pneumoconiosis, we also vacate the administrative law judge's Section 718.204(c) finding, because it is based on her consideration of these physicians' opinions at Section 718.202(a)(4). If the issue of disability causation is again reached on remand, the administrative law judge must consider all the relevant evidence regarding whether claimant's total respiratory disability is due to pneumoconiosis, 20 C.F.R. §718.204(c); *see Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990) (citing *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)), and fully explain the rationale for her conclusions, *see Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

Accordingly, the administrative law judge's Decision and Order Granting 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