BRB No. 05-0672 BLA

DOUGLAS KEENE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCAR COAL COMPANY	)	DATE ISSUED: 05/26/2006
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (04-BLA-5856) of Administrative Law Judge Thomas M. Burke awarding 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).[1] This case involves a subsequent claim filed on April 22, 2002.[2]

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726

After crediting claimant with twenty-three years and two months of coal mine employment, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[3] The

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on February 20, 1975. Director's Exhibit 1. The district director denied benefits on May 5, 1975, October 29, 1975 and October 2, 1980. *Id.*

Claimant filed a second claim on November 29, 1989. Director's Exhibit 2. In a Decision and Order dated November 21, 1991, Administrative Law Judge Joel R. Williams found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Williams also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Williams denied benefits. *Id.* By Decision and Order dated July 23, 1993, the Board held that claimant's 1975 claim was still pending when he filed his 1989 claim. *Keene v. Bucar Coal Co.*, BRB No. 92-0692 BLA (July 23, 1993) (unpublished). Consequently, the Board held that claimant's 1989 claim merged with his earlier 1975 claim. *Id.* The Board, therefore, vacated Judge Williams's Decision and Order and remanded the case for consideration of claimant's 1975 claim pursuant to 20 C.F.R. Part 727. *Id.*

In a Decision and Order dated April 12, 1994, Judge Williams found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Director's Exhibit 2. Judge Williams also found that claimant was not entitled to benefits pursuant to 20 C.F.R. Part 410, Subpart D. *Id.* Accordingly, Judge Williams denied benefits. *Id.* There is no indication that claimant took any further action in regard to his 1975 claim.

Claimant filed a third claim on January 8, 1999. Employer's Exhibit 7. Claimant, however, subsequently withdrew this claim. *Id.* Claimant also filed a fourth claim that was withdrawn. *See* Director's Exhibit 4; Transcript at 26-27.

Claimant filed a fifth claim on April 22, 2002. Director's Exhibit 6.

[3]In finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge relied upon the newly submitted evidence of record. Consequently, the administrative law judge found that claimant demonstrated that one of the applicable conditions of entitlement had changed

administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding that claimant's 2002 claim was timely filed. Employer also contends that the record is incomplete because it does not include the evidence that was submitted in connection with claimant's third claim. Employer further contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Employer also argues that the administrative law judge admitted x-ray evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer further argues that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer also challenges the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, arguing, *inter alia*, that the administrative law judge properly found that claimant's 2002 claim was timely filed.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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since the date upon which claimant's prior 1975 claim became final. 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2002 claim on the merits.

Timeliness

Employer initially contends that the administrative law judge erred in finding that claimant's 2002 claim was timely filed pursuant to 20 C.F.R. §725.308.[4] Because the administrative law judge found that the record contains no evidence that claimant received the requisite notice that he was disabled due to pneumoconiosis more than three years prior to filing his 2002 claim, the administrative law judge found that claimant's claim was timely filed. Decision and Order at 4.

Employer argues that the 1981 and 1984 medical reports of Drs. Sutherland and Clarke submitted in claimant's original 1975 claim triggered the statute of limitations, and, therefore, claimant's subsequent claim must be dismissed under the reasoning set forth in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[5] We disagree. The Board has declined to apply the reasoning of the United States

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[4]Section 725.308 provides in relevant part that:

> (a) A claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

[5]In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to [*Sharondale v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination….and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does

Court of Appeals for the Sixth Circuit regarding the statute of limitations in *Kirk* beyond the boundaries of that circuit. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). As the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not adopted the approach set forth in *Kirk*, we decline to apply it in this case. *Dempsey*, 23 BLR at 1-56.

The Board has held that the statute of limitations at Section 725.308 applies only to the first claim filed. *See Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). Because the instant case involves a subsequent claim, we affirm the administrative law judge's finding that claimant's 2002 claim was timely filed.

Withdrawn Claim

At the August 31, 2004 hearing, employer challenged the Department of Labor's treatment of claimant's 1999 claim as withdrawn.[6] Employer argued that while claimant was entitled to withdraw his request for modification, he was not entitled to withdraw the 1999 claim itself. Transcript at 28. Employer, therefore, sought to introduce claimant's 1999 application and related documents as Employer's Exhibit 7. *Id.* at 29. In his decision, the administrative law judge found that the district director acted within his authority in approving claimant's request for withdrawal of his 1999 claim. *See* Decision and Order at 7; Employer's Exhibit 7. Consequently, the administrative law judge held that no documentation submitted in connection with Employer's Exhibit 7 (the 1999 claim) would be considered. *Id.*

Employer currently argues that the withdrawn claim evidence should have been

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> not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298 (footnote omitted).

[6]Claimant filed a duplicate claim on January 8, 1999. Employer's Exhibit 7. The district director denied benefits on March 19, 1999. *Id.* By letter dated March 8, 2000, claimant requested modification of his denied claim. *Id.* While his request for modification was pending, claimant requested that his 1999 claim be withdrawn. *Id.* By letter dated June 26, 2000, employer notified the Department of Labor that it had no objection to claimant's request to withdraw his request for modification. *Id.* On July 21, 2000, however, the district director granted claimant's request to withdraw his 1999 claim. *Id.*

admitted because the district director should not have permitted claimant to withdraw his 1999 claim. The Director contends that "whether the claim was properly or not properly withdrawn is now of no moment because [employer] had standing to object to the withdrawal of the claim in 2000, and it failed to do so." Director's Brief at 3. We agree with the Director's position. Employer did not object to the withdrawal of the claim and thus is precluded from challenging the district director's Order. *See Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002). Consequently, we reject employer's contention that the administrative law judge erred in not considering the evidence submitted in connection with claimant's 1999 claim.[7]

Employer argues that the withdrawn claim evidence should have been admitted because it was submitted in connection with a prior claim. Section 725.309(d)(1) provides that "[a]ny evidence submitted in connection with a prior claim shall be made part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." 20 C.F.R. §725.309(d)(1). However, claimant's 1999 claim was withdrawn. Section 725.306(b) provides that a withdrawn claim "will be considered not to have been filed." 20 C.F.R. §725.306(b). Thus, because claimant's 1999 claim is considered not to have been filed, the evidence submitted in connection with that claim is not admissible pursuant to 20 C.F.R. §725.309(d)(1).[8]

We also reject employer's contention that Dr. Forehand's 1999 medical report should be admitted pursuant to 20 C.F.R. §725.406 because it was generated as part of the Department's obligation to provide claimant with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Section 725.406 refers to a single pulmonary evaluation. In this 2002 claim, the Director's obligation to provide claimant with a complete, credible pulmonary evaluation was satisfied by Dr. Rasmussen's 2003 physical examination. *See* Director's Exhibit 17. Dr. Forehand's report, provided by the Department as part of claimant's 1999 claim, is not part of the record since claimant's 1999 claim was withdrawn.

Employer also contends that the evidence submitted in connection with claimant's 1999 withdrawn claim must be considered because its consideration is mandated by the

[7]Although claimant also filed a claim in 2001, this claim was withdrawn by claimant before he underwent any medical testing or evaluation. *See* Transcript at 26-27.

[8]Employer argues that 20 C.F.R. §725.306 does not provide that *evidence* submitted in connection with a withdrawn claim will be considered not to have been filed. *See* Employer's Brief at 21. However, because the 1999 claim itself is considered not to have been filed, we hold that the evidence submitted in connection with the 1999 claim must also be excluded.

Administrative Procedure Act. As the Director notes, employer's argument is essentially an attack on the evidentiary limitations set forth at 20 C.F.R. §725.414. The Board and the United States Court of Appeals for the District of Columbia have upheld the validity of Section 725.414. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004) (*en banc*). Moreover, if employer wanted to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it was required to make a showing of "good cause" for its submission. In this case, employer did not attempt to make such a showing.

Employer finally argues that Dr. Forehand's 1999 medical report is admissible pursuant to 20 C.F.R. §725.414(a)(4). Section 725.414(a)(4) provides that "[n]otwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Dr. Forehand's report is on a form supplied by the Department of Labor and was generated as part of claimant's claim for benefits. Consequently, it is not admissible pursuant to 20 C.F.R. §725.414(a)(4).

Thus, we reject employer's contention that the administrative law judge erred in not considering the evidence submitted in connection with claimant's 1999 withdrawn claim.

Section 725.309

Employer next contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Employer argues that the administrative law judge "considered only the new evidence without regard to whether it showed an actual change in condition when analyzed in light of the prior evidence." Employer's Brief at 27. Employer argues that the administrative law judge erred in not comparing the evidence in the original claim to the new evidence in the subsequent claim to ensure that the evidence "differs qualitatively." *Id.*

Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1997 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[9] has changed since the date upon which the order

[9]The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d). The

denying the prior claim became final. *Id.* Administrative Law Judge Joel R. Williams denied benefits on claimant's 1975 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. Thus, in order to establish that an applicable condition of entitlement has changed, the newly submitted evidence must establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

Revised Section 725.309 does not require that an administrative law judge conduct a qualitative analysis between the newly submitted evidence and the previously submitted evidence. The United States Court of Appeals for the Fourth Circuit had previously held that in assessing whether a material change in conditions had been established under 20 C.F.R. §725.309 (2000), an administrative law judge was required to consider all of the new evidence, favorable and unfavorable, and determine whether the miner had proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). However, even under the previous duplicate claim standard set forth at 20 C.F.R. §725.309 (2000), the Fourth Circuit had rejected the Sixth Circuit's requirement that an administrative law judge was required to consider whether the newly submitted evidence differed "qualitatively" from the evidence considered in the earlier denial. *See Rutter*, 86 F.3d at 1363 n.11, 20 BLR at 2-237 n.11. Consequently, we reject employer's contention that the administrative law judge was required to conduct a qualitative comparison of the evidence pursuant to 20 C.F.R. §725.309.

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applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2).

Section 725.414

Employer next argues that the administrative law judge erred in admitting evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.[10] Employer contends that Dr. Rasmussen improperly relied upon an inadmissible x-ray interpretation. Dr. Rasmussen conducted the Department of Labor-sponsored evaluation on January 27, 2003. Director's Exhibit 17. As part of that evaluation, Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's January 27, 2003 x-ray as positive for pneumoconiosis. *Id.* Dr. Patel identified the opacities as s/s, 1/1, appearing in all six lung zones. *Id.* However, in his February 24, 2003 medical report, Dr. Rasmussen described claimant's January 27, 2003 x-ray as revealing "[p]neumoconiosis s/s 1/0 all lung zones." *Id*. Because Dr. Rasmussen listed a profusion of 1/0, instead of Dr. Patel's profusion of 1/1, employer contends that Dr. Rasmussen relied upon his own interpretation of claimant's January 27, 2003 x-ray. Because Dr. Rasmussen's interpretation of claimant's January 27, 2003 x-ray was not admitted into the record, employer argues that Dr. Rasmussen improperly relied upon an inadmissible x-ray interpretation.[11]

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[10]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id*. "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

[11]The regulations do not specify what is to be done with a medical report that references an inadmissible x-ray interpretation. *See Dempsey v. Sewell Coal Co.*, 23

As the Director notes, Dr. Rasmussen may have simply incorrectly recorded the result of Dr. Patel's x-ray interpretation as 1/0, instead of 1/1. Dr. Rasmussen's listing of the shape/size of the opacities on claimant's January 27, 2003 x-ray as s/s, and his notation that the opacities appear in all lung zones, are both consistent with Dr. Patel's x-ray interpretation. Moreover, Dr. Rasmussen attached a February 19, 2003 narrative report to his February 24, 2003 Department of Labor medical report. In his narrative report, Dr. Rasmussen summarizes Dr. Patel's x-ray interpretation, but does not reference any other x-ray interpretations. In fact, there is no evidence that Dr. Rasmussen rendered a separate interpretation of claimant's January 27, 2003 x-ray.[12] Moreover, because the administrative law judge properly found that the weight of the x-ray evidence is positive for pneumoconiosis, Dr. Rasmussen's reliance, if any, upon his own inadmissible positive x-ray interpretation appears unlikely to have affected his ultimate diagnoses. We, therefore, hold that the administrative law judge's error, if any, in not considering whether Dr. Rasmussen relied upon his own x-ray interpretation, as opposed to that of Dr. Patel, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

BLR 1-47 (2004). However, in a recent case, the Board considered the treatment that an administrative law judge should afford admissible evidence which contains references to evidence that has been excluded as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. *See Harris v. Old Ben Coal Co.,* BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Because the regulations do not contain a provision regarding the appropriate treatment of such evidence, the Board held that the weight to be accorded such evidence is committed to an administrative law judge's discretion. *Harris*, slip op. at 6.

[12]Dr. Rasmussen reexamined claimant on July 21, 2004. Claimant's Exhibit 1. As part of that examination, Dr. Rasmussen relied upon Dr. Patel's positive interpretation of claimant's July 21, 2004 film. *Id.*

Section 718.202(a)(1)

Employer contends that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer initially argues that the administrative law judge erred in according greater weight to the x-ray interpretations submitted in connection with claimant's 2002 subsequent claim. We disagree. The administrative law judge acted within his discretion in according greater weight to the evidence submitted in connection with claimant's 2002 subsequent claim, since this evidence is twelve to thirteen years more recent than the evidence submitted in connection with claimant's prior claim and is, therefore, more probative of claimant's current condition. *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 10.

The x-ray evidence submitted in connection with claimant's 2002 claim consists of seven interpretations of four x-rays. While Drs. Patel and Alexander, each dually qualified as a B reader and Board-certified radiologist, interpreted claimant's January 27, 2003 x-ray as positive for pneumoconiosis, Director's Exhibits 17, 18, a similarly qualified physician, Dr. Wiot, interpreted this x-ray as negative for the disease.[13] Director's Exhibit 22. While Dr. Alexander, a B reader and Board-certified radiologist, interpreted claimant's June 20, 2003 x-ray as positive for pneumoconiosis, Director's Exhibit 20, Dr. Fino, a B reader, interpreted this x-ray as negative for the disease. Employer's Exhibit 1. Dr. Hippensteel, a B reader, interpreted claimant's April 15, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's July 21, 2004 x-ray as positive for pneumoconiosis. Decision and Order at 10.

Employer argues that the administrative law judge, in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis, engaged in an improper "head-count" of the evidence. We disagree. In considering whether the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge acted within his discretion in crediting the x-ray interpretations rendered by physicians dually qualified as B readers and Board-certified radiologists. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9-10. Because a majority of the best qualified physicians rendering interpretations of claimant's January 27, 2003 x-ray found it positive for pneumoconiosis, the administrative law judge properly found that this x-ray was positive

[13]Dr. Barrett interpreted claimant's January 27, 2003 x-ray for quality purposes only. Director's Exhibit 17.

for pneumoconiosis. *See Sheckler, supra*; *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. In regard to the interpretations of claimant's June 20, 2003 x-ray, the administrative law judge properly found that Dr. Alexander's positive interpretation of this x-ray was entitled to greater weight than Dr. Fino's negative interpretation, based upon Dr. Alexander's superior qualifications. *Id.* The administrative law judge noted that claimant's remaining x-rays, taken on April 15, 2004 and July 21, 2004, were each only interpreted by a single reader. Although Dr. Hippensteel, a B reader, interpreted claimant's April 15, 2004 x-ray as negative for pneumoconiosis, Dr. Patel, a B reader and Board-certified radiologist, interpreted claimant's July 21, 2004 x-ray as positive for pneumoconiosis. The administrative law judge properly found that Dr. Patel's positive interpretation of claimant's July 21, 2004 x-ray was entitled to greater weight than Dr. Hippensteel's negative interpretation of claimant's April 15, 2003 x-ray, based upon Dr. Patel's superior qualifications. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[14]

Section 718.202(a)(4)

Employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[15] is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[14]Employer argues that the administrative law judge erred in weighing only "like-kind" evidence under Section 718.202(a)(1), in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis. Employer's Brief at 35. The administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a) before determining whether the evidence is sufficient to establish the existence of simple pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). However, an administrative law judge may properly consider whether the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) before considering whether all of the relevant evidence, when weighed together, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

[15]"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).

We reject employer's contention that the administrative law judge erred in according greater weight to the medical opinion evidence submitted in connection with claimant's 2002 subsequent claim. The administrative law judge acted within his discretion in according greater weight to the evidence submitted in connection with claimant's 2002 subsequent claim, since this evidence is twelve to thirteen years more recent than the evidence submitted in connection with claimant's prior claim and is, therefore, more probative of claimant's current condition. *Cooley*, *supra*; *Clark*, *supra*; *Casella*, *supra*; Decision and Order at 19.

Clinical Pneumoconiosis

While Dr. Rasmussen opined that claimant suffered from coal workers' pneumoconiosis, Director's Exhibit 17; Claimant's Exhibit 1, Drs. Fino and Hippensteel opined that claimant did not suffer from this disease. Director's Exhibit 21; Employer's Exhibits 2, 6, 8. The administrative law judge accorded greater weight to Dr. Rasmussen's finding of clinical pneumoconiosis because he found that it was "better in accord with the current objective medical data of record."[16] Decision and Order at 17.

Employer contends that the administrative law judge's impermissible consideration of the x-ray evidence affected his treatment of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). However, in light of our affirmance of the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis, employer's argument has no merit. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[16]In addition to the x-ray evidence, the administrative law judge noted that Dr. Rasmussen also based his diagnosis of coal workers' pneumoconiosis on his physical examination of claimant and claimant's symptomatology. Decision and Order at 18.

Legal Pneumoconiosis

In considering whether the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis, the administrative law judge credited Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease was due to coal dust exposure and smoking, over the opinions of Drs. Fino and Hippensteel, that claimant's lung disease was attributable to smoking and not coal dust exposure. Decision and Order at 17-19. The administrative law judge also found that Dr. Rasmussen's opinion was supported by the opinion of claimant's treating physician, Dr. Husain. *Id.* at 19.

Employer argues that the administrative law judge erred in not considering whether Dr. Husain's opinion was sufficiently reasoned. The record contains Dr. Husain's office notes from November 26, 2001 to October 18, 2002. Director's Exhibit 19. Although Dr. Husain consistently diagnosed chronic obstructive pulmonary disease, he did not discuss the etiology of the disease. *Id.*

In a letter dated September 2, 2003, Dr. Husain stated that:

> [Claimant] has been a patient of mine since November of 2001. He worked as an underground coal miner for twenty years. He worked as a shell card operator and on the coal tipple. He smoked for 15 years, ½ pack per day but quit 12 years ago. His pulmonary function studies reveals [sic] moderate obstructive ventilatory impairment without significant response to inhaled bronchodilators. Chest x-ray shows hyperinflation, pleural thickening and extensive linear markings especially on the left side. These findings are consistent with coal workers' pneumoconiosis.

Director's Exhibit 20.

Because Dr. Husain only diagnosed clinical pneumoconiosis, not legal pneumoconiosis, the administrative law judge erred in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was supported by Dr. Husain's opinion.

The administrative law judge provided "five grounds" for crediting Dr. Rasmussen's opinion over the opinions of Drs. Fino and Hippensteel. Employer argues that each of these five grounds is improper. We agree.

First, the administrative law judge found that a comparison of the admitted medical reports revealed that claimant's respiratory condition had deteriorated since the denial of his last claim ten years ago to the point that it is totally disabling. Decision and Order at 17-18. The administrative law judge found that this was consistent with the

presence of coal workers' pneumoconiosis. *Id.* However, the administrative law judge failed to explain why a deterioration in claimant's pulmonary condition could not also be consistent with the presence of a smoking-related pulmonary condition. The administrative law judge also provided no support for his finding that claimant's condition had, in fact, deteriorated.

Second, the administrative law judge found that the irreversibility of claimant's moderately obstructive impairment was consistent with a coal dust-induced disease process. Decision and Order at 18. Again, the administrative law judge did not cite any medical evidence in support of his finding. Moreover, the administrative law judge did not discuss evidence indicating that claimant's pulmonary impairment was variable. Specifically, Dr. Fino found that there was improvement in claimant's pulmonary function following the administration of bronchodilators. Director's Exhibit 21. Dr. Hippensteel characterized claimant's obstructive respiratory impairment as "variable." Employer's Exhibit 8 at 19.

Third, the administrative law judge noted that "recent examinations of the miner by Drs. Fino, Hippensteel and Rasmussen consistently yielded symptoms of wheezing on examination of the lungs." Decision and Order at 18. The administrative law judge found that these physical findings across recent examinations provided further support for a finding of legal coal workers' pneumoconiosis. *Id.* The administrative law judge did not cite any medical opinion evidence in support of his conclusion. By inferring that wheezing supports a finding of a coal dust-induced lung condition, the administrative law judge improperly substituted his opinion for that of the medical experts. *See generally Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Fourth, the administrative law judge found that Drs. Fino, Hippensteel and Rasmussen agreed that the miner's diffusing capacity was reduced. *Id.* The administrative law judge noted that "consistent observations of a reduced diffusing capacity further support the presence of coal workers' pneumoconiosis." *Id.* In so doing, the administrative law judge improperly substituted his opinion for that of the medical experts. *See Marcum*, *supra*. The interpretation of medical data is a medical determination and an administrative law judge may not substitute his opinion for that of a physician. *Id.*

The administrative law judge finally credited Dr. Rasmussen's opinion, that claimant suffered from clinical pneumoconiosis, over the contrary opinions of Drs. Fino and Hippensteel, based upon Dr. Rasmussen's superior qualifications. Decision and Order at 18-19. The Fourth Circuit has held that experts' respective qualifications are important indicators of the reliability of their 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). Employer contends that the

administrative law judge erred in finding that Dr. Rasmussen's qualifications were superior to those of Drs. Fino and Hippensteel. In this case, the administrative law judge noted that while Drs. Rasmussen, Fino and Hippensteel are Board-certified in Internal Medicine, Drs. Fino and Hippensteel are also Board-certified in Pulmonary Disease. Decision and Order at 19. However, the administrative law judge further noted that:

> Dr. Rasmussen is also board-certified in forensic medicine and has worked extensively in the area of black lung disease since 1969, when he was presented with the American Public Health Association Presidential Award for "exceptional service in the fight against 'black lung'." Drs. Fino and Hippensteel have a variety of accomplishments in the area of pulmonary medicine; however, Dr. Rasmussen's long-term and highly specialized expertise in the area of black lung is more compelling.

Decision and Order at 19.

Employer argues that Dr. Rasmussen's certification in Forensic Medicine provides him with no additional expertise in the diagnosis of the effects of pneumoconiosis versus cigarette smoking. Employer's Brief at 42. In this case, the administrative law judge failed to explain why Dr. Rasmussen's Board-certification in Forensic Medicine entitled his opinion to greater weight. The administrative law judge also failed to explain why Dr. Rasmussen's expertise in the area of black lung was more significant than the fact that Drs. Fino and Hippensteel are both Board-certified in Pulmonary Disease.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, *supra*; *Akers*, *supra*.

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the Fourth Circuit rejected the idea that all evidence of clinical pneumoconiosis should be weighed together and all evidence of legal pneumoconiosis should be weighed together, but evidence of the former should not be weighed against the latter. The Fourth Circuit held that this position was not a reasonable interpretation of the Act or 20 C.F.R. §718.202(a). Consequently, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a) and instruct the administrative law judge, on remand, to weigh the x-ray evidence with the physicians' opinions to determine whether claimant has established the existence of pneumoconiosis by a preponderance of the evidence. *Compton*, *supra*.

In light of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish that existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a finding that was based upon the evidence submitted in connection with claimant's 2002 claim, we also vacate the administrative law judge's finding that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309.

Section 718.204(c)

Because the administrative law judge must reevaluate whether the medical evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c).

The Fourth Circuit has held that, pursuant to 20 C.F.R. §718.204(b) (2000),[17] a miner must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Revised Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

[17]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

20 C.F.R. §718.204(c)(1).[18]

In this case, the administrative law judge found that Dr. Rasmussen's opinion was sufficient to establish that claimant's total disability was due to pneumoconiosis. Decision and Order at 19-20. Although Dr. Rasmussen opined that claimant's disability was attributable to his coal dust exposure,[19] he did not specifically address whether

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[18]In enacting this revised regulation, the DOL explained:

> The Department did not mean to alter the current law through its proposals, however, or to suggest that *any* adverse effect, no matter how limited, was sufficient to establish total disability due to pneumoconiosis. Rather, the Department meant only to codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish that element of entitlement. In order to clarify this consistent intent, the Department has added the word "material" to §718.204(c)(i) and "materially" to §718.204(c)(ii). In so doing, the Department intends merely to implement the holdings of the courts of appeals. Thus, evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability.

65 Fed. Reg. 79,946 (2000).

[19]Dr. Rasmussen examined claimant on January 27, 2003. In a report dated February 24, 2003, Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibit 17. Dr. Rasmussen also diagnosed legal pneumoconiosis (chronic obstructive pulmonary disease/emphysema attributable to coal dust exposure and cigarette smoking). *Id.* In addressing the cause of claimant's pulmonary impairment, Dr. Rasmussen stated:

> The two risk factors are his cigarette smoking and his coal dust exposure. Both are causative factors since both cause lung damage resulting in the type of lung function loss encountered in [claimant]. Both cause damage using cellular and biochemical pathways to cause lung damage. The patient's coal mine dust exposure is a major contributing factor.

Director's Exhibit 17.

Dr. Rasmussen reexamined claimant on July 21, 2004. In a report dated July 21, 2004, Dr. Rasmussen stated that:

claimant's disability was attributable to clinical pneumoconiosis, legal pneumoconiosis, or a combination of the two diseases. Consequently, should the administrative law judge, on remand, find that the evidence is insufficient to establish the existence of legal pneumoconiosis, he is instructed to address what effect, if any, this has on the credibility of Dr. Rasmussen's opinion regarding disability causation.

Employer argues that the administrative law judge erred in mechanically discrediting the opinions of Drs. Fino and Hippensteel regarding disability causation because these physicians did not find the existence of pneumoconiosis. On remand, should the administrative law judge find the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he should reconsider whether the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In weighing the relevant evidence, the administrative law judge should consider the holdings of the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86

> [Claimant] had a significant history of exposure to coal mine dust. He has x-ray changes consistent with coal workers' pneumoconiosis. It is medically reasonable to conclude that he had coal workers' pneumoconiosis, which arose from his coal mine employment.
>
> There are two known risk factors for this patient's disabling lung disease. These are his cigarette smoking and his coal mine dust exposure. Both contribute. Both cause chronic obstructive lung disease including chronic bronchitis, small airways disease of the lung and emphysema.
>
> [Claimant] also has a history of possible childhood lung disease and may have an underlying hyperactive airways disease. Hyperactive airways disease is known to render individuals susceptible to the adverse effects of occupational exposures including cigarette smoking and dusts.
>
> Occupational dust and smoke are also known to aggravate bronchial asthma.
>
> [Claimant's] coal mine dust exposure is a major contributing cause of [claimant's] disabling lung disease.

Claimant's Exhibit 1 (citations to medical literature omitted).

(4th Cir. 1995); and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge