BRB No. 02-0189 BLA

RALPH D. DYE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FARWEST COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Farmer & Rutherford), Norton, Virginia, for claimant.

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

Jeffrey S. Goldberg (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

SMITH, J., Administrative Appeals Judge:

Farwest Coal Company (Farwest) appeals the Decision and Order Awarding Benefits (2001-BLA-0381) of Administrative Law Judge Daniel F. Solomon 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). Claimant, the miner, filed an application for benefits on July 25, 1974. Director's Exhibit 36-24B. The district director initially denied benefits, but in a letter issued on April 21, 1981, informed claimant that he was entitled to benefits. *Id*. The district director then notified Mining Incorporated of the existence of the claim and that it had been identified as the putative responsible operator. In a subsequent disposition, however, the district director dismissed Mining Incorporated and indicated that in the event that claimant was ultimately determined to be entitled to benefits, the Black Lung Disability Trust Fund would assume liability for payment. *Id*. On June 10, 1982, the district director informed claimant that although he had proven that he had pneumoconiosis, the evidence of record was insufficient to establish that claimant was totally disabled. Accordingly, benefits were denied.

Claimant took no further action until filing a second claim on February 3, 1994. Director's Exhibit 36-1. After rendering an initial determination that claimant may be entitled to benefits, the district director notified Farwest of its potential liability. Director's Exhibit 36-18. Farwest responded, controverting its identification as the responsible operator and the merits of entitlement. Director's Exhibits 36-18, 36-19. Following a formal hearing, Administrative Law Judge James Guill issued a Decision and Order in which he determined that the newly submitted evidence established that claimant is totally disabled, but that claimant failed to prove that pneumoconiosis was a contributing cause of his total disability. Accordingly, Judge Guill denied benefits without reaching the issue of whether Farwest was the responsible operator. Director's Exhibit 36-36. The Board affirmed the denial of benefits in a Decision and Order issued on September 25, 1998, holding that Judge Guill's finding that claimant failed to establish total disability due to pneumoconiosis was rational and supported by substantial evidence. *Dye v. Far West Coal Co*., BRB No. 98-1828 BLA (Sept. 25, 1998)(unpub.); Director's Exhibit 36-44.

On June 12, 2000, claimant filed a third application for benefits. Director's Exhibit 1. The district director identified Farwest as the responsible operator and notified it of its potential liability. Director's Exhibit 14. Farwest controverted liability on the merits and disputed the district director's finding that it was the last operator for which

claimant had worked for at least one year. Director's Exhibits 15, 17. Following a formal hearing, Administrative Law Judge Daniel F. Solomon (the administrative law judge) issued the Decision and Order that is the subject of this appeal. The administrative law judge determined that Farwest was the responsible operator pursuant to 20 C.F.R. §725.493(a)(1). The administrative law judge also found that because the newly submitted evidence was sufficient to establish that pneumoconiosis is a contributing cause of claimant's total disability, claimant demonstrated a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).[1] The administrative law judge further determined, based upon a weighing of the newly submitted evidence, that claimant established the remaining elements of entitlement. Accordingly, benefits were awarded effective June 1, 2000.

Employer argues on appeal that the administrative law judge erred in identifying it as the responsible operator and that claimant was barred from filing an additional claim under the terms of 20 C.F.R. §725.308. Employer also asserts that the administrative law judge did not properly weigh the evidence relevant to the issues of material change in conditions, the existence of pneumoconiosis, total disability, total disability causation, and the date of onset of total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has responded in support of the administrative law judge's designation of Farwest as the responsible operator. Claimant has not filed a brief in this appeal.

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

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[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 (2002). The amendments to 20 C.F.R. §725.309 do not apply to cases, such as this one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

Turning first to the responsible operator issue, the record contains the following evidence regarding claimant's employment history: On the Form CM-911a submitted with his 1974 application for benefits, claimant indicated that he worked for Mining Incorporated from August 1969 to May 1974 and for Russ Coal Company (Russ Coal) from October 1979 to June 1980. Director's Exhibit 36-24U. In conjunction with the claim filed in 1994, claimant reported on Form CM-911a that Farwest and Mining Incorporated were the "same company" and that he was employed by this company from August 1969 to May 1974. Director's Exhibit 36-2. Claimant also indicated that he worked for Russ Coal from September 1979 to February 1980. *Id*. The file associated with claimant's most recent claim does not contain a completed Form CM-911a.

Records from the Social Security Administration (SSA) detailing claimant's earnings from 1955 through 1977 were obtained by the district director. These records reflect employment with Farwest beginning in the third quarter of 1969 and extending to the first quarter of 1972. Director's Exhibits 13, 36-3, 36-24B. Earnings from employment with Mining Incorporated commenced in the first quarter of 1972 and continued through the second quarter of 1974. *Id*. Because the SSA records do not cover the period subsequent to 1977, Russ Coal does not appear as an employer.

The record also contains copies of the stubs from the paychecks that claimant received from a number of mining companies during the period from 1977 to 1980. There are no stubs from Russ Coal nor do the stubs reflect employment with any single company for at least one year. Director's Exhibit 36-24F. At the formal hearings held with respect to the 1994 and 2000 applications for benefits, claimant indicated that Farwest and Mining Incorporated were the same company and that he worked for Farwest from 1969 to 1971 and for Mining Incorporated from 1971 to 1974. Transcript of July 5, 1995 Hearing at 34. Claimant also stated that after leaving employment with Mining Incorporated/Farwest, he did not work for any coal company for more than one year. *Id*. at 40. Claimant essentially described the same coal mine employment history on direct examination during the July 23, 2001 hearing. Transcript of July 23, 2001 Hearing at 13-14. On cross-examination, in framing a question to claimant, employer's counsel stated that claimant earned $6,000 at Russ Coal in 1979 and almost $11,000 in 1980, but did not specifically identify the source of this information. Claimant did not further indicate in his testimony whether he worked for Russ Coal for at least a year. *Id*. at 21-24.

In his Decision and Order, the administrative law judge dismissed employer's assertion that because claimant was subsequently employed by Russ Coal for at least one year, Farwest is not the responsible operator. The administrative law judge referred to claimant's 2001 hearing testimony and the Form CM-911a submitted with the 1974 application for benefits and determined that claimant "did not work for a subsequent

employer for a cumulative period of more than one year as required by 20 C.F.R. §725.493(a)(1) [(2000)]."[2] Decision and Order at 6. The administrative law judge further found, therefore, that Farwest is the responsible operator, as it was the most recent operator to employ claimant for more than one year. *Id.*

Farwest argues on appeal that the administrative law judge erred in finding that it was the last company for whom claimant worked at least one year based solely upon claimant's own written and oral statements regarding his coal mine employment history. The Director has responded and asserts that the administrative law judge's finding that Farwest is the responsible operator is rational and supported by substantial evidence.[3]

Upon review of the relevant evidence, the administrative law judge's finding, and the arguments raised on appeal, we hold that the administrative law judge acted within his discretion in crediting claimant's statements that he worked for Russ Coal for less than one year, whether from September 1979 to February 1980, as indicated on the 1994 CM-911a, or October 1979 to June 1980 as recorded on the 1974 CM-911a. Although the record does not include pay records from Russ Coal nor do the SSA documents reference this employment, there is evidence in the record that supports claimant's statements. The paycheck stubs submitted by claimant reflect that he received a check from Hawks Mining Corporation for the pay period ending September 21, 1979. There is then a gap

[2]The revisions to the regulations concerning the identification of the responsible operator do not apply to cases, such as this one, filed before January 19, 2001. *See* 20 C.F.R. §725.2.

[3]Farwest also disputes the Director's assertion below that the status of Old Republic Insurance Company as the carrier for both Farwest and Russ Coal renders the administrative law judge's responsible operator finding irrelevant. The Board need not address this argument, as the administrative law judge did not premise his responsible operator finding upon this rationale. *See* Decision and Order at 6.

until the pay period ending June 30, 1980 when claimant received a paycheck from Left Fork Coal Company and continued in their employ at least through the pay period ending October 15, 1980. Director's Exhibit 34-24F. This period coincides with claimant's reckoning of a period of employment with Russ Coal that did not total one year.

Moreover, the administrative law judge rationally determined that Farwest and Mining Incorporated were one entity for the purposes of Section 725.493 (2000), as claimant's statements in this regard are also supported by evidence in the record. As indicated by the Director, Mining Incorporated and Farwest shared the same address and issued their paycheck receipts on identical forms. Director's Exhibits 13, 36-24F. The paycheck stubs submitted by claimant also demonstrate that claimant was paid bi-weekly by Farwest until the period ending March 31, 1972 and that, without interruption, Mining Incorporated issued a paycheck for the two week period ending April 7, 1972 at the same hourly wage rate. The record also contains a Notice of Receipt of Application for Hearing from the Virginia Industrial Commission indicating that Farwest and Mining Incorporated were the same company. Director's Exhibit 36-24G. In addition, in the document memorializing the settlement of claimant's claim for state benefits, Farwest and Mining Incorporated appear to be treated as one entity for liability purposes. Director's Exhibit 36-24U. Thus, the administrative law judge rationally concluded that Farwest was properly identified as the responsible operator in this case. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995).

With respect to the viability of the claim filed on June 12, 2000, employer cites the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001) and argues that claimant's third application for benefits is barred by the time limitations set forth in Section 725.308. 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. The Sixth Circuit indicated in *Kirk* that the three year limitations period set forth in Section 725.308 applies to all claims, not just the first application for benefits. This interpretation stands in contrast to the Board's holdings in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), in which the Board indicated that the statute of limitations contained in Section 422(f) of the Act, as implemented by Section 725.308, applies only to the filing of a claimant's initial Part C claim. *Faulk, supra*; *Andryka, supra*.

Because the present case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, we decline to apply the Sixth Circuit's reasoning in *Kirk* in the present case.[4] Although decisions rendered by a circuit court can provide guidance in cases that do not arise within its geographical jurisdiction, the Board has declined to apply the language in *Kirk* regarding Section 725.308 beyond the boundaries of the Sixth Circuit, as it is not apparent that the court's holding is mandated by the Act and the implementing regulations. In addition, in a recent unpublished decision, the Sixth Circuit suggested that some of its statements in *Kirk* constituted dicta. *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), slip op. at 6. The court also indicated that the denial of a prior claim for failure to establish one or more of the elements of entitlement renders a medical determination of total disability due to pneumoconiosis submitted with that claim a misdiagnosis for legal purposes such that it does not trigger the running of the statute of limitations. *Id*. at 4-6. For these reasons, and in light of the fact that the Fourth Circuit has not adopted the approach set forth in *Kirk*, we decline to apply it in this case. *See Faulk*, *supra*; *Andryka*, *supra*; *see also Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

Employer next asserts that the administrative law judge did not correctly apply the standard adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), for assessing whether a claimant has established a material change in conditions pursuant to Section 725.309(d) (2000). Employer contends specifically that the administrative law judge did

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's relevant coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibits 13, 36-2, 36-24B; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

not explain how claimant's medical condition has changed since the denial of his 1995 claim. Employer also argues that the record does not contain any evidence which can show that claimant's condition has worsened, as there is no proof that legal pneumoconiosis progresses in the absence of further coal dust exposure. Employer's contentions are without merit.

Although the administrative law judge cited *Ross* and *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*), *modifying* 94 F.3d 369 (7th Cir. 1996), when addressing the issue of material change in conditions, the standard adopted by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), is applicable in this case. In *Rutter*, the court held that in order to establish a material change in conditions pursuant to Section 725.309(d) (2000), a claimant must prove, based upon a weighing of the evidence developed since the denial of the previous claim, at least one of the elements of entitlement previously adjudicated against him. The Fourth Circuit has not held that the newly submitted evidence must show that the miner's condition became worse subsequent to the denial of the prior claim. The administrative law judge's finding in the present case comports with this standard, as the administrative law judge determined, based upon his weighing of the newly submitted evidence, that claimant established that pneumoconiosis is a substantially contributing cause of his total disability, which was the sole element of entitlement adjudicated against claimant in the denial of his 1995 claim. Decision and Order at 3-4; *see Rutter, supra*. Employer's allegations of error regarding the administrative law judge's actual weighing of the newly submitted medical evidence will now be addressed.

With respect to the issue of total disability causation, the element of entitlement upon which the administrative law judge based his finding of material change in conditions, employer argues that the administrative law judge mischaracterized the opinions of Drs. Fino and Tuteur and erred in according less weight to Dr. Tuteur's opinion because he did not examine claimant. Employer also contends that the administrative law judge's determination that the qualifications of Dr. Rasmussen are equal to those possessed by Drs. Fino and Tuteur was not adequately explained. With respect to the administrative law judge's crediting of Dr. Rasmussen's opinion, employer maintains that the administrative law judge erred in determining that Dr. Rasmussen's conclusions are reasoned and documented despite the physician's failure to provide a rationale for his opinion. In addition, employer argues that the administrative law judge erred in shifting the burden of persuasion on the issue of causation to employer. Finally, employer asserts that the administrative law judge substituted his own opinion for those of the medical experts and ignored evidence indicating that claimant is totally disabled by a back injury, which removes him from the scope of the Act.

These contentions have merit, in part. In *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g* 14 BLR 1-37 (1990)(*en banc*), the United States Court of Appeals for the Fourth Circuit reaffirmed its position that an opinion in which a physician indicates that the miner's disabling condition is not caused by pneumoconiosis is entitled to little, if any, weight if, contrary to the administrative law judge's finding, the physician did not diagnose coal workers' pneumoconiosis or any condition related to coal dust exposure. The administrative law judge acted rationally, therefore, in discrediting Dr. Fino's newly submitted opinion under Section 718.204(c). *See Scott, supra*.

Regarding the respective qualifications of the physicians of record, we reject employer's allegation that the administrative law judge erred in determining that the qualifications possessed by Dr. Rasmussen, who is Board-certified in Internal Medicine and Forensic Medicine, are equivalent to those possessed by Drs. Fino and Tuteur, who are Board-certified in Internal Medicine and Pulmonary Diseases. Decision and Order at 19; Director's Exhibits 5, 6, 28; Employer's Exhibit 1; Claimant's Exhibit 3. The administrative law judge did not abuse the discretion afforded him as fact-finder in concluding that the physicians' qualifications were essentially equal based upon their areas of specialization and their history of publications and recognized achievements in their respective fields. *Id*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

With respect to the administrative law judge's consideration of Dr. Tuteur's opinion, the administrative law judge stated that Dr. Tuteur failed "to acknowledge that emphysema, specifically focal emphysema, can be associated with coal dust exposure." Decision and Order at 20; Employer's Exhibit 1. The administrative law judge also indicated that Dr. Tuteur failed "to offer any rationale as to why claimant's emphysema is not related to coal dust exposure." *Id*. These findings do not accord with Dr. Tuteur's opinion, as the physician noted that "coal workers' pneumoconiosis may produce a clinical condition of chronic airflow obstruction clinically not dissimilar from cigarette smoke induced chronic obstructive pulmonary disease." Employer's Exhibit 1. Dr. Tuteur explained how the data gathered in this case was consistent with emphysema caused by smoking and referred to studies supporting his conclusions. In addition, the administrative law judge's reference to focal emphysema is inapposite in the present case, as no physician stated that such a condition is present in claimant. The administrative law judge's findings with respect to Dr. Tuteur's opinion are, therefore, vacated and the case is remanded to the administrative law judge for reconsideration of the newly submitted medical opinions of Drs. Rasmussen and Tuteur.

On remand, when reconsidering the relevant evidence under Section 718.204(c), the administrative law judge must determine whether claimant has established, by a

preponderance of the evidence, that pneumoconiosis is a substantially contributing cause of his totally disabling impairment.[5] 20 C.F.R. §718.204(c); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). When reconsidering the medical opinions pursuant to Section 718.204(c), the administrative law judge must address the physicians' explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.[6] *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In this regard, the nonexamining status of a particular physicians does not, *per se*, render his opinion of lesser probative value. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hicks*, *supra*.

When rendering his findings on remand under Section 718.204(c), the administrative law judge must identify the evidence that he is weighing and the rationale underlying his determinations as is required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *See Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *Seese v. Keystone Coal Mining Corp.*, 6 BLR 1-149 (1983). Finally, the administrative law judge should address the significance of claimant's back injuries in accordance with the decisions of the United States Court of Appeals for the Fourth Circuit in *Hicks* and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).[7]

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[5]In his Decision and Order, after crediting Dr. Rasmussen's opinion, the administrative law judge stated that "the burden is now on employer to try and refute Dr. Rasmussen's medical report as to the etiology of claimant's total disability." Decision and Order at 20.

[6]Although the administrative law judge examined the opinions of Drs. Fino and Tuteur in light of these factors, he did not indicate that he had done so with respect to Dr. Rasmussen's opinion.

[7]The United States Court of Appeals for the District of Columbia held in *Nat'l Mining Ass'n v. United States Dep't of Labor*, 292 F.3d 849, BLR 2- (D.C. Cir. 2002), that the revised version of 20 C.F.R. §718.204(a), which provided that nonrespiratory or nonpulmonary conditions were not relevant to the total disability inquiry, was impermissibly retroactive. In *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), the Fourth Circuit indicated

Because we have vacated the administrative law judge's consideration of the newly submitted evidence pursuant to Section 718.204(c), we must also vacate the administrative law judge's finding that claimant established a material change in conditions under Section 725.309(d) (2000). The administrative law judge must reconsider this issue on remand and if he again determines that claimant has demonstrated a material change in conditions, he must address the merits of entitlement in light of a weighing of the evidence submitted with the prior claims together with the newly submitted evidence of record. *See Rutter, supra*.

Employer's allegations of error concerning the administrative law judge's weighing of the newly submitted evidence pursuant to Sections 718.202(a) and 718.204(b) will also be addressed. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge noted that the record contained eleven readings of four newly submitted x-rays. With respect to the x-rays dated February 7, 2000, August 30, 2000, and May 21, 2001, the administrative law judge determined that they were positive for pneumoconiosis based upon the readings provided by Drs. Cappiello, Patel, Navani, and Ahmed, all of whom are B readers and Board-certified radiologists. Decision and Order at 11-12; Director's Exhibits 9-11; Claimant's Exhibits 2-4. The administrative law judge determined that the x-ray obtained on September 6, 2000 was negative for pneumoconiosis based upon the readings submitted by Drs. Scott and Wheeler, both of whom are B readers and Board-certified radiologists. Decision and Order at 11; Director's Exhibits 28, 30, 33. The administrative law judge found that the 2/1 ILO/U-C classification proffered by Dr. Templeton, who has the same qualifications, was outweighed by the preponderance of negative readings. Decision and Order at 12; Director's Exhibit 30. The administrative law judge concluded that:

> Of the four x-rays submitted, I have found three to be positive and one to be negative. I give more weight to the three positive findings because there are multiple positive readings by physicians with special radiographical qualifications. I give less weight to the single negative reading because of the differing interpretations between the physicians who read the September 6, 2000 x-ray...I do not give any special weight to "numerosity," but I note that there is a disparity and I attribute significant weight to the fact that Dr. Templeton made a finding of pneumoconiosis (2/1) in the September 6,

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that a miner is not entitled to benefits if he would have been totally disabled to the same degree because of his other health problems.

> 2000 x-ray, whereas Drs. Fino, Scott, and Wheeler all failed to diagnose pneumoconiosis .

Decision and Order at 12-13 (citations omitted).

On appeal, employer asserts that the administrative law judge erred in treating Dr. Templeton's reading of the September 6, 2000 x-ray as positive for pneumoconiosis, because the physician appended comments to his ILO/U-C classification of 2/1 indicating that the disease process that he diagnosed is not pneumoconiosis. Director's Exhibit 30. This contention is without merit as it pertains to the administrative law judge's finding under Section 718.202(a)(1). In light of the fact that the administrative law judge determined that this film is negative for pneumoconiosis, error, if any, in his designation of Dr. Templeton's reading as positive for pneumoconiosis is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In addition, the administrative law judge provided a valid alternative rationale for his finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis. The administrative law judge acted within his discretion in basing his finding upon the preponderance of positive readings by physicians possessing special qualifications for interpreting x-rays. Decision and Order at 12; *see Adkins, supra*.

Employer is correct, however, in asserting that the administrative law judge's determination, in accordance with the holding in *Compton*, that the newly submitted evidence of record, as a whole, supported a finding of pneumoconiosis pursuant to Section 718.202(a) cannot be affirmed. As employer alleges, the administrative law judge did not consider all relevant evidence. Although the administrative law judge explicitly addressed the readings that Drs. Scott, Wheeler, and Templeton performed of the x-ray dated September 6, 2000, he did not discuss their readings of the CT scan performed on the same date that indicate that claimant does not have pneumoconiosis. Director's Exhibits 30, 33. In addition, the administrative law judge did not consider the comments that Dr. Templeton included with his x-ray interpretation and determine whether Dr. Templeton opined that claimant does not have pneumoconiosis in any form or that he does not have pneumoconiosis related to dust exposure in coal mine employment. The administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a) is, therefore, vacated and the case is remanded to the administrative law judge for reconsideration of this issue. The administrative law judge must consider Dr. Templeton's comments in assessing whether claimant has established the existence of pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b).

Under Section 718.204(b)(2)(i) and (ii), the administrative law judge determined that the objective studies were insufficient to establish total respiratory disability. The

administrative law judge found, pursuant to Section 718.204(b)(2)(iv), however, that claimant established that he has a totally disabling pulmonary impairment based upon the opinions of Drs. Fino and Rasmussen. Decision and Order at 17; Director's Exhibits 5, 28; Claimant's Exhibit 3. Employer contends that the administrative law judge erred in failing to make a specific finding as to the nature of claimant's usual coal mine job and in failing to determine whether Dr. Rasmussen's diagnosis of a totally disabling impairment is documented and reasoned. Employer also asserts that the administrative law judge failed to weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record.

These contentions have merit, in part. Although the administrative law judge did not make a specific finding as to the nature of claimant's usual coal mine employment, he set forth claimant's testimony with respect to the types of jobs he performed in the mines, including his statements that as a mine foreman, he was required to operate machinery when necessary. Decision and Order at 17. In addition, Drs. Fino and Rasmussen stated that claimant was required to engage in heavy manual labor, which is consistent with his statements regarding the activities in which he engaged as a mine foreman and agreed that claimant was unable to perform his last coal mine job. Director's Exhibits 6, 28; Claimant's Exhibit 3. Thus, the administrative law judge's finding on this issue is supported by substantial evidence and is, therefore, affirmed. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Scott*, *supra*.

The administrative law judge did not, however, weigh the opinions of Drs. Fino and Rasmussen against the contrary probative objective evidence of record. *See Hicks*, *supra*; *Akers*, *supra*; *Lane*, *supra*; *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*). Therefore, we must vacate the administrative law judge's finding that claimant established total disability under Section 718.204(b)(2) and remand the case to the administrative law judge for reconsideration of this issue.

The last issue raised on appeal by employer concerns the administrative law judge's determination that the date of onset of total disability due to pneumoconiosis in the present case is June 1, 2000 - the first day of the month in which claimant filed his most recent application for benefits. Employer asserts that the administrative law judge did not perform the analysis mandated by 20 C.F.R. §725.503. This contention has merit. The administrative law judge set forth his finding that claimant established total disability due to pneumoconiosis and then stated, without elaboration, that "I find that [claimant] became totally disabled due to pneumoconiosis on June 1, 2000." Decision and Order at 21. Because the record contains conflicting evidence on this issue, we must vacate the administrative law judge's finding under Section 725.503. If the administrative law judge determines that claimant has established entitlement to benefits on remand, he must consider all the relevant evidence of record in determining the onset date of total disability due to pneumoconiosis and must assess the credibility of that

evidence. *See Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989). If the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless uncontradicted medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins, supra*.

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 proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGranery, J., concurring and dissenting:

I concur in the majority's opinion in all respects except in their holding that the administrative law judge did not properly discredit Dr. Tuteur's opinion on the issue of causation at 20 C.F.R. §718.204(c). The majority points out that Dr. Tuteur explained how the medical evidence was consistent with emphysema caused by smoking. The administrative law judge explained his determination to discredit the opinion: "Dr. Tuteur fails to offer any rationale as to why claimant's emphysema is not related to his coal dust exposure." Decision and Order at 20. The administrative law judge was entirely correct. In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge had properly discredited a doctor's opinion on causation when the doctor stated that "the emphysema certainly will not be aggravated by anything other than the smoking." *Compton*, 211 F.3d at 212, 22 BLR at 2-177. The Fourth Circuit declared that the statement "is conclusory and does not explain why coal dust exposure could not have caused or aggravated the emphysema." *Id*. Because Dr. Tuteur's opinion does not even assert, much less explain, that claimant's coal dust exposure did not aggravate his emphysema, the administrative law judge correctly determined that it did not constitute substantial evidence on the issue of causation at Section 718.204(c). Accordingly, I would affirm the administrative law judge's discrediting of Dr. Tuteur's opinion on causation.

REGINA C. McGRANERY
Administrative Appeals Judge