BRB No. 04-0180 BLA

EUGENE J. REBYANSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CANTERBURY COAL COMPANY	)	
	)	DATE ISSUED: 09/29/2004
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Blair V. Pawlowski (Pawlowski, Bilonick & Long), Pineville, West Virginia, for claimant.

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

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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 – Awarding Benefits (03-BLA-5496) of Administrative Law Judge Daniel L. Leland rendered 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] Claimant's prior application for benefits, filed on September 21, 1992, was denied on October 9, 1997 by Administrative Law Judge Gerald M. Tierney because claimant did not establish the existence of pneumoconiosis. Judge Tierney further found that if claimant had been able to establish the existence of pneumoconiosis, he would have been able to prove total disability, but not that it was due to pneumoconiosis. On appeal, in a decision dated April 9, 1999 the Board affirmed Judge Tierney's finding that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000), and further affirmed his finding that total disability was established pursuant to 20 C.F.R. §718.204(c) (2000). *Rebyanski v. Canterra Coal Co./Canterbury Coal Co.*, BRB No. 98-0953 BLA (Apr. 9, 1999)(unpublished). On January 24, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

In a Decision and Order - Awarding Benefits dated October 21, 2003, the administrative law judge credited claimant with twenty-three years of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). The administrative law judge further found that claimant was totally disabled and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits as of January 1, 2001, the month in which the subsequent claim was filed.

On appeal, employer contends that the administrative law judge erred in excluding evidence submitted by employer in excess of the evidentiary limits imposed by the revised regulation at 20 C.F.R. §725.414.[3] Employer further argues that Section 725.414

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

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibits 4-7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[3] The revised regulation at 20 C.F.R. §725.414 applies to this claim because it was filed on February 8, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

is invalid, and that the administrative law judge erred in his application of it. Employer also contends that the administrative law judge erred in finding established a change in an applicable condition of entitlement, and erred in his analysis of the medical opinion evidence when he found that claimant established the existence of pneumoconiosis and that he is totally disabled due to pneumoconiosis. Employer argues, *inter alia*, that the administrative law judge applied a presumption that pneumoconiosis is always progressive, which employer asserts does not comply with controlling authority. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's arguments regarding both the validity of Section 725.414 and the progressivity of pneumoconiosis. Employer has filed a reply brief reiterating its contentions.[4]

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by 20 C.F.R. §725.414. Employer argues that Section 725.414 is invalid and that the administrative law judge erred in applying it.

The regulation at Section 725.414, in conjunction with 20 C.F.R. §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 responsible

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant has twenty-three years of coal mine employment, that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(3), and that the evidence submitted with the current claim does not contain any qualifying pulmonary function studies pursuant to 20 C.F.R. §718.204(b)(2)(i), nor evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

operator 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). 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."[5] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). 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).

At the hearing, employer attempted to submit, in addition to the x-ray readings submitted in support of its affirmative case and those submitted in rebuttal of claimant's affirmative case, four x-ray re-readings associated with claimant's prior claim by Drs. Mazzei, Palmer, and Gaziano. Hearing Transcript at 11-16. The administrative law judge admitted into the record the two specific x-ray readings identified by employer as its affirmative case pursuant to Section 725.414(a)(3)(i), and admitted the specific items of rebuttal evidence that employer identified pursuant to Section 725.414(a)(3)(ii). The administrative law judge excluded from the record in the current claim, however, the four additional x-ray readings which had been associated with claimant's prior claim, noting that these readings would remain in the record as part of the prior claim, but exceeded the evidentiary limitations imposed upon the current claim. Hearing Transcript at 16.

Employer argues that Section 725.414 is invalid because it imposes arbitrary limits on evidence in violation of the Administrative Procedure Act (APA), 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), and further conflicts with the decision of the United States Court of Appeals for the Fourth Circuit in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Employer's Brief at 16. Employer further argues that the

[5] Pursuant to 20 C.F.R. §725.406, the Director, Office of Workers' Compensation Programs, provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

administrative law judge improperly excluded the additional x-ray readings by Drs. Mazzei, Palmer, and Gaziano because they exceeded the applicable limitations and not because they were irrelevant, immaterial, or unduly repetitious, as required by the APA. Employer's Brief at 16-17.

Employer's contentions lack merit. Regarding the validity of Section 725.414, the Board recently held, in *Dempsey v. Sewell Coal Co.*, BLR , BRB Nos. 03-0615 BLA, 03-0615 BLA-A (Jun. 28, 2004)(*en banc*), that Section 725.414 does not conflict with either the APA or *Underwood.* We thus reject employer's arguments for the reasons set forth in *Dempsey*. In addition, regarding the additional x-ray readings of Drs. Mazzei, Palmer, and Gaziano, as Section 725.309(d)(4) specifically provides that a change in a condition of entitlement must be established through new evidence, the administrative law judge properly excluded these readings, already contained in the record associated with the prior claim, from the new evidence to be considered at Section 725.309(d). 20 C.F.R. §725.309(d)(4). To the extent that the administrative law judge in this case addressed the admissibility of x-ray readings, which are categorically limited by Section 725.414, he did not err in applying Section 725.414 in ruling on the evidence.

Employer further contends that in considering the evidence pursuant to Section 725.309(d), the administrative law judge erred in relying on the most recent x-ray and medical opinion evidence to find the existence of pneumoconiosis established at subsections 718.202(a)(1) and (a)(4), respectively.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Judge Tierney denied claimant's prior claim because he failed to establish the existence of pneumoconiosis. Consequently, claimant must submit new evidence establishing the existence of pneumoconiosis in this claim. 20 C.F.R. §725.309(d)(2), (d)(3); s*ee Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) (holding, pursuant to 20 C.F.R. §725.309 (2000), that in assessing whether the evidence is sufficient to establish a material change in conditions, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him). The administrative law judge found that the new evidence submitted in connection with the instant subsequent claim established the existence of pneumoconiosis, thereby establishing a change in an applicable condition of entitlement.

Employer specifically contends that the administrative law judge's reliance on the more recent medical evidence to find established the existence of pneumoconiosis creates, in effect, a presumption of latency and progressivity which does not comport with *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002)(*NMA*). Employer's Brief at 11-16. Employer asserts, relying on *Swarrow*, 72 F.3d. at 316, 20 BLR at 2-91, that in a case such as the instant one where no coal dust exposure occurred after the denial of the earlier claim, claimant must prove by a preponderance of the evidence that his pneumoconiosis was latent and that it progressed to the point of total disability. Employer's Brief at 11-12.

Employer's arguments are without merit. The Board recently held, in *Workman v. Eastern Associated Coal Corp.*, BLR , BRB No. 02-0727 BLA (Aug. 19, 2004)(*en banc*), that the amendments to Section 718.201 did not alter claimant's burden of proving that he suffers from pneumoconiosis arising out of coal mine employment by a preponderance of the evidence and without the benefit of any presumption of latency or progressivity. The Board in *Workman* also held that the regulations do not require that a miner separately prove he suffers from one of the particular kinds of pneumoconiosis that has been found in the medical literature to be latent and progressive, and that his disease actually progressed. *Workman*, slip op. at 4-5. In the present case, the administrative law judge, in assessing whether the evidence established a change in an applicable condition of entitlement, properly considered all of the new evidence, favorable and unfavorable to claimant, pursuant to Section 725.309(d). 20 C.F.R. §725.309(d); s*ee Swarrow*, 72 F.3d at 317-18, 20 BLR at 2-94-95; Decision and Order at 6.

Employer also asserts that in considering the evidence pursuant to Section 725.309(d), the administrative law judge erred in his evaluation of the x-ray evidence at Section 718.202(a)(1). Employer's Brief at 17. Contrary to employer's arguments, the administrative law judge properly considered the qualifications of the x-ray readers in combination with the numerical superiority of the positive readings in determining that the new x-ray evidence established the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*recon. en banc*); Director's Exhibits 11-13, 16, 17, 19, 20; Decision and Order at 3, 6. Consequently, we affirm the administrative law judge's finding that the x-ray evidence submitted in support of the current claim is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Employer also asserts that in considering the evidence pursuant to Section 725.309(d), the administrative law judge erred in his evaluation of the medical opinions and CT scans at Section 718.202(a)(4). Employer's Brief at 18. Employer specifically asserts that the administrative law judge's discussion of the medical opinions is conclusory and that he erred in according little weight to the opinion of Dr. Pickerill, that claimant does not suffer from pneumoconiosis. Employer's Brief at 12, 18. We disagree. In weighing the newly submitted medical opinion evidence pursuant to Section

718.202(a)(4), the administrative law fully discussed the findings and conclusions of each physician of record, noting that Drs. Schaaf and Malhotra diagnosed pneumoconiosis while Dr. Pickerill did not diagnose pneumoconiosis. Director's Exhibits 12-16, 24; Claimant's Exhibit 1; Decision and Order at 4-5. Contrary to employer's arguments, the administrative law judge properly accorded less weight to Dr. Pickerill's opinion on the ground that his statement, that the opacities seen on his own "1/2" x-ray reading "could be" related to cardiac disease and edema, was speculative, and because the x-ray Dr. Pickerill relied upon was also read as positive for pneumoconiosis by Dr. Abrahams, a more highly qualified reader. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *see Church v. Eastern Assoc. Coal Corp.*, 21 BLR 1-51 (1997), *rev'g in part and aff'g in part on recon.*, 20 BLR 1-8 (1996); *see also Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986)(in assessing the medical reports, an administrative law judge is not bound to accept the opinion of any medical expert, but may weigh the medical evidence and draw his or her own inferences); Director's Exhibit 16; Decision and Order at 6.

Employer also asserts that the administrative law judge erred in failing to resolve the conflicting CT scan evidence pursuant to Section 718.202(a)(4), and further erred in failing to properly weigh together the x-ray, CT scan, and medical opinion evidence to determine whether a preponderance of all the evidence of record establishes the existence of pneumoconiosis, as required by *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[6] Employer's Brief at 18.

Employer's contentions have merit. Employer correctly asserts that, in discussing the two negative and one positive CT scan readings of record, the administrative law judge did not analyze and weigh the CT scan readings of record with respect to the nature and quality of the evidence, or the relative qualifications of the readers, as he is required to do under the APA. APA; *see also* 20 C.F.R. §725.477(b); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Rather, the record shows that the administrative law judge stated only that the "CT scan evidence is contradictory and neither establishes nor negates the existence of pneumoconiosis." Director's Exhibit 11; Claimant's Exhibit 2; Decision and Order at 6. In addition, in finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge stated that he weighed the x-rays, CT scans, and medical opinions together, yet he did not specifically discuss the impact of the

[6] In *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the United States Court of Appeals for the Third Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing the existence of pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

negative CT scan readings or explain why he found them outweighed by the positive x-rays and medical opinions of record. Director's Exhibit 11; Claimant's Exhibit 2; Decision and Order at 6.

Based on the foregoing, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and, consequently, his finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). We remand this case for the administrative law judge to resolve the conflicting CT scan evidence and to weigh the x-ray readings, CT scans, and medical opinions together in accordance with *Williams*.

With respect to the administrative law judge's finding that the evidence of record establishes the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b), employer asserts that the administrative law judge erred in his evaluation of the newly submitted blood gas study and medical opinion evidence pursuant to Section 718.204(b)(2)(ii) and (iv). Employer's Brief at 19-21. Employer specifically asserts that the administrative law judge erred in finding the newly submitted blood gas study evidence supportive of a finding of total respiratory disability, as the tests were interpreted as representing cardiac disease by Dr. Pickerill, who administered them. Employer's Brief at 20-21; Director's Exhibits 12, 16, 24.

Employer's contention lacks merit. The administrative law judge must weigh any contrary probative evidence in determining whether total disability is established. *Collins v. J & L Steel*, 21 BLR 1-181, 1-191 (1999); *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13-14 (1991). Although the record contains a February 27, 2001 resting blood gas study which was non-qualifying,[7] the administrative law judge permissibly found that study outweighed by both the exercise blood gas study conducted on February 27, 2001 and the resting blood gas study conducted on April 24, 2001, which were both qualifying. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*); *Beatty*, 16 BLR at 1-13-14; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*); Director's Exhibits 12, 16; Decision and Order at 7. In so finding, the administrative law judge properly considered Dr. Pickerill's opinion that claimant suffered from cardiac disease, but permissibly concluded that as the physician specifically opined that the test results revealed the presence of hypoxemic *respiratory* failure, the blood gas studies were valid indicators of respiratory disability pursuant to Section 718.204(b)(2)(ii) (emphasis in original). *See Hess v. Director, OWCP*, 21 BLR 1-141 (1998); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984)(it is proper for an administrative law judge to consider medical opinions which call into question the

[7] A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

reliability of a blood gas study); Decision and Order at 7. Because substantial evidence supports the administrative law judge's findings regarding the blood gas study evidence, we reject employer's allegation of error pursuant to Section 718.204(b)(2)(ii).

Pursuant to Section 718.204(b)(2)(iv), employer contends that the administrative law judge mischaracterized the opinions of Drs. Malhotra and Schaaf as supportive of a finding of total respiratory disability. Employer specifically asserts that neither physician opined that claimant is disabled by his respiratory impairment alone, but rather they opined that claimant's disability stems from a combination of pneumoconiosis and heart disease. Employer's Brief at 20. Under Section 718.204(b)(2)(iv), total disability may be found if a physician, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual or comparable coal mine work. 20 C.F.R. §718.204(b)(2)(iv). Contrary to employer's argument, Dr. Schaaf testified, in his deposition of January 27, 2003, that claimant is totally disabled from a pulmonary standpoint. Claimant's Exhibit 1 at 30. Similarly, Dr. Malhotra stated, in response to a written question asking claimant's *degree of respiratory impairment*, that it was totally and permanently disabling (emphasis added). Director's Exhibit 21. Therefore, we reject employer's allegation of error and affirm the administrative law judge's characterization of the opinions of Drs. Schaaf and Malhotra as supportive of a finding of total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 7.

Based on the foregoing, we affirm the administrative law judge's finding that the x-ray evidence submitted in support of the current claim is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that the administrative law judge properly weighed the medical opinion evidence pursuant to pursuant to Section 718.202(a)(4), properly weighed the blood gas study evidence pursuant to Section 718.204(b)(2)(ii), and properly characterized the medical opinions of Drs. Malhotra and Schaaf pursuant to Section 718.204(b)(2)(iv). We vacate, however, the administrative law judge's finding that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as the administrative law judge failed to resolve the conflicting CT scan evidence and failed to weigh the x-rays, CT scans, and medical opinions together in accordance with *Williams*. Should the administrative law judge find the existence of pneumoconiosis established at Section 718.202, he must then determine whether claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). We further vacate the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). We remand this case for further findings based on the new evidence at 20 C.F.R. §718.202(a)(4) and at 20 C.F.R. §725.309(d). Should the administrative law judge again find, on remand, that claimant established a change in an

applicable condition of entitlement, he must consider the instant subsequent claim on its merits pursuant to *Swarrow*.[8]

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[8] Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Third Circuit, in *Soubik v. Director, OWCP*, 366 F.3d 226, 234, BLR (3d Cir. 2004), cited with approval the holding in *Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002) that an administrative law judge may not credit a medical opinion stating that a claimant did not suffer from pneumoconiosis causing respiratory disability after the administrative law judge had already accepted the presence of pneumoconiosis, unless the administrative law judge stated specific and persuasive reasons why he relied upon such an opinion. Thus, on remand, should the administrative law judge again find the existence of pneumoconiosis established, he must consider the medical opinions of record pursuant to *Soubik* in determining whether claimant has established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).