U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2006

Case No. 2005-BLA-5102

In the Matter of:
D.D.[1]
Claimant,

v.

LONE MOUNTAIN PROCESSING, INC.
Employer,
and
ARCH COAL, INC.,
c/o UNDERWRITERS SAFETY AND CLAIMS
Carrier,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Ron Carson, Lay Representative
On behalf of Claimant

Denise Davidson, Esq.
On behalf of Employer

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

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[1] The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. § 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On October 19, 2004, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 63).[3] A formal hearing on this matter was conducted on April 18, 2006 in Harlan, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross-examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the Claimant has established the existence of pneumoconiosis;

2. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether the Claimant is totally disabled;

4. Whether the Claimant's disability is due to pneumoconiosis;

5. Whether the Claimant has established a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial pursuant to § 725.310; and

6. Whether the Claimant has demonstrated that one of the applicable conditions of entitlement has changed since the date of the last denial pursuant to § 725.309(d).

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those collected at 27 Fed. Proc., L. Ed. § 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/ parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor 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 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the official transcript of this proceeding.

(DX 63; Tr. 9-10).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant was born on May 3, 1944; he was 61 years old at the time of the hearing. (DX 2; Tr. 11). He completed the ninth grade. He married L.L. on May 3, 1962, and they remain married and living together. (DX 2, 7). They have no other dependents.

Claimant testified that he last worked in the coal mines on September 13, 1996. (Tr. 11). He quit due to back pain that rendered him disabled. (Tr. 14). He first noticed difficulty breathing in the early 1990s. (Tr. 14). Claimant treated with Dr. Morfessia for three years until he moved his office. He currently sees Drs. Alam, DeLue, and Dahhan, as well as Kelly Brooks, a nurse practitioner. (Tr. 15). Dr. Alam treats him for his lungs. Claimant uses an inhaler and a nebulizer. (Tr. 16-17). His breathing has gotten worse since March 2003 in that he no longer does much around the house. (Tr. 15). He cannot mow the lawn or walk very far. He no longer hunts or fishes. (Tr. 16). His days are primarily spent sitting and watching television. (Tr. 16). Claimant needs three pillows to sleep and believes his breathing problems are worse at night.

Claimant testified that he began smoking at a young age such as nine and smoked for 40-50 years before quitting two or three years ago. (Tr. 17-18).

Procedural History

Claimant filed his initial claim for benefits under the Act on January 3, 1997, and that claim was denied by a Department of Labor claims examiner on February 28, 1997, for failure to establish any element of entitlement. (DX 1). Because the miner took no further action, the claims examiner issued a letter dated May 7, 1997, stating that the claim was administratively closed and deemed abandoned.

On June 8, 2001, Claimant filed a subsequent claim for benefits under the Act. (DX 2). The Director, Office of Worker's Compensation Programs ("OWCP"), issued a proposed decision and order denial of benefits on March 8, 2003, (DX 34), and it was amended to change the name of the carrier on April 15, 2003. (DX 37). Claimant requested modification of the denial on August 29, 2003. (DX 41). The District Director issued a proposed decision and order denying request for modification on June 28, 2004. (DX 55). The Claimant timely requested a formal hearing before the Office of Administrative Law Judges. (DX 57).

Length of Coal Mine Employment and Responsible Operator

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. There are several permissible sources of credible evidence. First, an administrative law judge may rely solely upon a coal mine employment history form completed by the miner. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's uncontradicted and credible testimony may also be the exclusive basis for a finding on the length of miner's coal mine employment. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is permissible for an administrative law judge to credit Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

In this case, the Employer does not contest that Claimant worked as a coal miner for at least 30 years. His last job, which he performed for eight to ten years, was section repairman. (Tr. 11). He kept the equipment running and filled in for other laborers when they went on break. For example, he operated shuttle cars and the miner, assisted the roof bolters, and hauled coal. (Tr. 12). He did this every day for an average of three to four hours a day. The dustiest job was operating the miner and driving the shuttle car, in his opinion. The work required a lot of manual labor, including carrying tools at all times, five gallons of oil and a five-gallon grease gun. He left mining in 1996 because his back left him disabled. (Tr. 14).

Claimant's last employment was in the state of Kentucky; therefore, the law of the Sixth Circuit is controlling.

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. In a request for modification, the claimant and responsible operator are entitled to submit, in support of their cases, no more than one chest x-ray interpretation, the results of no more than one pulmonary function test, the results of no more than one blood gas study, no more than one report of each biopsy, and no more than one medical report. §§ 725.310 and 725.414(a)(2)(ii) and (a)(3)(ii). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(ii) and (3)(ii) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (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. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Glen Baker, M.D. to provide his Department of Labor sponsored complete pulmonary examination. (DX 9). Dr. Baker conducted the examination on January 21, 2002. (DX 12). I admit Dr. Baker's report under § 725.406(b). I also admit Dr. Sargent's quality-only interpretation of the January 21, 2002 chest x-ray under § 725.406(c). (DX 13).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. Claimant designated Dr. Baker's complete pulmonary examination conducted on January 21, 2002. (DX 12). Claimant also designated Dr. Ahmed's interpretation of the April 3, 2003 x-ray as initial evidence, as well as Dr. Alexander's interpretation of the January 21, 2002 x-ray as rebuttal evidence of the Director's x-ray. (DX 11; CX 2). Claimant also designated Dr. Cappiello's reading of the April 3, 2003 x-ray as initial evidence, but this exceeds the evidentiary limitations for a modification. However, because Employer designated Dr. Shipley's reading of the April 3, 2003 x-ray as its initial evidence, Dr. Cappiello's report can be considered rebuttal of that reading without exceeding the evidentiary limits. I will, therefore, consider Dr. Cappiello's x-ray reading as Claimant's rebuttal of the Employer's affirmative x-ray report. (CX 1). Claimant further designated the May 7, 2002 pulmonary function study and January 21, 2002 blood gas study administered by Dr. Baker as affirmative evidence. (DX 12). Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(2) and (3). Therefore, I admit the evidence Claimant designated in his summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. Employer designated Dr. Jarboe's review of medical evidence dated February 9, 2004. (DX 18). Employer also designated Dr. Shipley's interpretation of the April 3, 2003 x-ray as initial evidence, as well as Dr. West's interpretation of the January 21, 2002 x-ray as rebuttal evidence of the Director's x-ray and Dr. Wiot's interpretation of the April 3, 2003 x-ray as rebuttal evidence of the Claimant's x-ray. (EX 1; DX 15, 19). Employer further designated Dr. Baker's January 21, 2002 PFT as affirmative evidence. (DX 12). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(2) and (3). Therefore, I admit the evidence Employer designated in its summary form.

All the evidence of record relevant to the request for modification and the subsequent claim will be set forth below.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 12	1/21/02	1/21/02	Baker	0/1; p/p; 2 zones
DX 13	1/21/02	4/10/02	Sargent/ B[4], BCR[5]	Quality 1

[4] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

DX 15	1/21/02	08/19/02	West/B, BCR	Negative
CX 1	1/21/02	02/19/04	Alexander/B, BCR	2/1; p/p; 6 zones
DX 11	4/03/03	06/12/03	Ahmed/B, BCR	1/1; s/s; 6 zones
CX 2	4/03/03	10/15/03	Cappiello/B, BCR	2/1; s/p; 6 zones
DX 19	4/03/03	02/19/04	Wiot/B, BCR	Negative
EX 1	4/03/03	07/16/04	Shipley/B, BCR	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 12 1/21/02	Fair to poor/ Good/ Yes	57/ 67"	1.49	2.64	---	56%	No; Moderate impairment but questionable effort; Dr. Burki found the study unacceptable due to less than optimal effort. (DX 12).
DX 12 5/7/02	Fair/ Good/ Yes	58/ 67"	1.85	3.25	---	57%	No; Mild impairment

ARTERIAL BLOOD GAS STUDIES

Exhibit	**Date**	**pCO_2***	**pO_2***	**Qualifying**
DX 12	1/21/02	42	68	No

Narrative Reports

Dr. Glen Baker examined Claimant on January 21, 2002. (DX 12). Based on symptomatology (a productive cough, wheezing, dyspnea, chest pain, orthopnea, and ankle edema), a family medical history (high blood pressure, heart disease, diabetes, and cancer), an individual medical history (pneumonia, wheezing, back injury, heart disease, high blood

[5] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

pressure, myocardial infarction, and coronary artery bypass graft), a smoking history (one pack of cigarettes a day from age eight until 2000 for a total of 48 years), 35 years of coal mine employment, lastly as a section repairman, physical examination (decreased breath sounds at left base), x-ray (0/1), PFT (moderate obstructive defect but questionable effort), EKG (normal sinus rhythm, old anterior infarct, diffuse ST-T changes), and ABG (moderate resting hypoxemia), Dr. Baker diagnosed chronic obstructive pulmonary disease with a moderate obstructive defect based on the pulmonary function study of questionable effort; hypoxemia; bronchitis based on a history of cough, sputum production, and wheezing; and ischemic heart disease based on a prior coronary artery bypass graft. Dr. Baker attributed the first three diagnoses to cigarette smoking and coal dust exposure. However, Dr. Baker also checked a box stating that he did not believe that Claimant has an occupational lung disease caused by his coal mine employment. He attributed the heart disease to arteriosclerotic heart disease. He assessed a moderate impairment with decreased FEV1 and pO2 and bronchitis. Dr. Baker felt that all four diagnoses (from cigarette smoking and coal dust exposure) fully contributed to this impairment. He also opined that Claimant does not retain the respiratory capacity to perform the work of a coal miner based on an FEV1 of 48%, assuming it is accurate. Dr. Baker is board certified in internal medicine and pulmonary disease.

Dr. Thomas Jarboe, who is board certified in internal medicine and pulmonary disease, reviewed medical evidence of record and provided an opinion dated February 9, 2004. (DX 18). He reviewed Dr. Baker's report, x-ray reading, PFTs, and ABG, a May 30, 2003 PFT, Dr. Alam's records on the Claimant, including February 13, 2002, February 20, 2002, May 12, 2002 and August 20, 2003 PFTs, and ABGs from February 13, 2002 and August 20, 2003, Dr. Patel's reading of an August 20, 2003 x-ray[6], and Dr. West's reading of the January 21, 2002 x-ray. He opined that Claimant does not have coal workers' pneumoconiosis because of a lack of adequate x-ray evidence, and because the PFTs varied considerably over time. He pointed out that the miner's FEV1 improved from 1.55 to 1.99 in the course of one month in 2002, representing a significantly reversible pulmonary condition, namely asthma due to smoking. Because the May 2003 FEV1 was even higher (2.04), Dr. Jarboe believed that it too showed a wide change in function that is not found when coal dust inhalation is the cause of the impairment; it causes a fixed impairment. He also opined that the miner is not totally disabled and has no disability due in whole or in part to pneumoconiosis. He relied on the most recent PFT of 5/30/03 as his proof that it does not show a disabling respiratory condition. He pointed out that while still above disability limits, the FEV reduction could be from the miner's sternal splitting heart surgery. Dr. Jarboe asserted that Claimant's moderate airflow obstruction is due to his long history of cigarette smoking which began at the age of eight but that it doesn't prevent him from performing coal mining based on the non-disabling and most recent PFT and ABG.

[6] Dr. Alam's records, the May 30, 2003 PFT, and the August 20, 2003 x-ray are not part of the record. However, an administrative law judge is granted broad discretion in resolving procedural issues. *Harris v. Old Ben Coal Co.*, 23 BLR 1-___, BRB No. 04-0812 BLA (Jan. 27, 2006) (en banc) (J. McGranery and J. Hall, concurring and dissenting). I choose not to exclude Dr. Jarboe's report because it is based on some admissible evidence and because I will consider his review of the inadmissible evidence when determining the weight to place on his opinion.

Smoking History

Claimant testified that he had been smoking at the age of nine and quit just two to three years before the hearing, for a 50-year smoking history. (Tr. 17-18). Dr. Baker received a history of smoking from the age of eight until 2000 for a total of 48 years at a rate of a pack of cigarettes a day. I find these two histories compatible and conclude that Claimant smoked one pack of cigarettes a day for approximately 50 years before quitting in 2003.

DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by § 725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Furthermore, the Sixth Circuit Court of Appeals, under whose appellate jurisdiction this case arises, stated that a modification request need not specify any factual error

or change in conditions. *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994). Rather, Claimant may merely allege that the ultimate fact, total disability from pneumoconiosis arising out of coal mine employment, was incorrectly decided. *Id.* Additionally, the court stated that the Administrative Law Judge has the duty to reconsider all the evidence for a mistake of fact or a change in conditions. *Id.*

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Benefits Review Board ("Board") similarly stated:

> the Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.
>
> *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *See also Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993). Furthermore, if the newly submitted evidence is sufficient to establish modification . . ., the Administrative Law Judge must consider all of the evidence of record to determine whether Claimant has established entitlement to benefits on the merits of the claim. *Kovac v. BNCR Mining Corp.*, 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992).

In the March 8, 2002 decision, the District Director found that Claimant had failed to establish any element of entitlement. In accordance with the above precedent, I will review the newly submitted evidence, in conjunction with the evidence that was before the District Director when he considered the subsequent claim, to determine whether such evidence establishes any element of entitlement. In addition, the entire record will be reviewed to determine whether a mistake in the determination of a fact occurred in the denial of March 8, 2003.

<u>Pneumoconiosis</u>

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.

(1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

(1) Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under § 718.202(a)(1), one method for finding that pneumoconiosis exists is the use of x-ray evidence.

In deciding the subsequent claim, the District Director considered the readings of Drs. Baker, Sargent, and West. (DX 34). My analysis consists of those readings as well as the others listed above that were submitted in connection with the request for modification. Therefore, in this claim the record contains seven interpretations of two chest x-rays, and one quality-only interpretation. Dr. Baker read the January 21, 2002 x-ray as negative for pneumoconiosis. He possesses no particular qualifications for x-ray interpretation. Dr. Sargent, who is both a B-reader and a Board-certified radiologist, found the x-ray to be quality 1. Dr. West, another dually certified reader, found the x-ray to be negative and quality 2. Dr. Alexander, a board-certified radiologist and B-reader, read the x-ray as positive (category 2/1) and quality 2. Because the two best-qualified readers are divided as to the presence or absence of pneumoconiosis but agree as to the quality of the radiograph, I find that the evidence as to this x-ray is in equipoise and therefore, cannot consider it positive by itself.

The April 3, 2003 x-ray was read by four dually certified readers. Drs. Ahmed and Cappiello found the film positive with readings of category 1/1 and category 2/1, respectively. They both graded the film quality as the best. Drs. Wiot and Shipley considered the x-ray negative, with Dr. Wiot grading the film as quality 2 and Dr. Shipley quality 3. Because neither

Dr. Wiot nor Dr. Shipley described the film quality as "poor" or "unreadable," I find that they believed the quality of the film was sufficient to provide an accurate reading. *See Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). In this instance, I find that the difference in quality grading does not affect the probative value of the readings. As a result, I find that the evidence as to this x-ray is equally divided and in equipoise. Accordingly, I cannot consider this x-ray positive. Consequently, I find that the x-ray evidence does not tend to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant, medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

The District Director considered Dr. Baker's report in issuing his determination regarding the subsequent claim. (DX 34). My analysis also includes Dr. Jarboe's opinion. Dr. Baker diagnosed COPD and bronchitis, both of which he indicated were due to a combination of cigarette smoking and coal dust exposure. Therefore, these findings meet the legal definition of coal workers' pneumoconiosis. However, Dr. Baker also indicated that he did not believe that the Claimant has an occupational lung disease caused by his coal mine employment. Because

these two findings directly contradict each other, I find Dr. Baker's finding equivocal and place no weight on it. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

Dr. Jarboe did not find coal workers' pneumoconiosis. Dr. Jarboe's review of evidence includes Dr. Patel's interpretation of the August 20, 2003 x-ray, which is inadmissible evidence. It was not submitted by either party, and because it does not appear of record, I cannot determine whether it supports Dr. Jarboe's assessment of a "lack of adequate x-ray evidence" of pneumoconiosis. The other two x-rays he reviewed were found negative, but he did not have the readings of Drs. Alexander, Ahmed, or Cappiello to consider. The other basis for Dr. Jarboe's opinion is the variability in PFT results. However, pulmonary function studies are not diagnostic of pneumoconiosis. *Burke v. Director, OWCP*, 3 BLR 1-410 (1981). Thus, the only support for Dr. Jarboe's opinion comes from the two negative x-ray readings, and this renders Dr. Jarboe's opinion no more than an x-ray reading. *Cornett v. Benham Coal Co.*, 227 F.3d 569 (6th Cir. 2000). Therefore, I accord Dr. Jarboe's opinion no weight.

Because I do not find either of the medical reports persuasive and have accorded them no weight, I find that the medical opinion evidence does not tend to establish the existence of pneumoconiosis by a preponderance of the evidence under § 728.202(a)(4).

Upon consideration of all the evidence under § 718.202(a), I find the x-ray evidence in combination with the medical opinion evidence fails to establish, by a preponderance of the evidence, the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000). As a corollary, I find that the newly submitted evidence, considered in conjunction with the evidence that was before the District Director when he decided the subsequent claim, fails to establish a change in condition. I also find no mistake of fact.

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must also prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). For a miner who suffers from pneumoconiosis and was employed for ten or more years in one or more coal mines, it is presumed that his pneumoconiosis arose out of his coal mine employment. *Id.* As I have found that Claimant has established 30 years of coal mine employment, and as no rebuttal evidence was presented, if I had found that he suffered from pneumoconiosis, he would also be entitled to the rebuttable presumption set forth in § 718.203(b) that his pneumoconiosis arose out of his coal mine employment.

Total Disability

Claimant may demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones &*

Laughlin Steel Corp., 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant has established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. No new PFTs since the denial of the subsequent claim have been submitted. There are two PFTs that were submitted in conjunction with the subsequent claim. Neither produced qualifying values. Therefore, I find that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(i) and that no mistake of fact was made by the District Director when he made the same finding.

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. No new ABG since the denial of the subsequent claim has been submitted. One ABG was submitted in connection with the subsequent claim, and it did not yield qualifying values. I find, then, that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(ii) and that no mistake of fact was made by the District Director when he made the same finding.

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment required him to carry tools at all times and carry five gallons of oil and a five-gallon grease gun on a daily basis. (Tr. 14).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing

the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Baker opined that the miner does not have the respiratory capacity to perform the work of a coal miner. Dr. Jarboe opined that the miner did not demonstrate a totally disabling respiratory impairment.

Dr. Baker's opinion is based on the PFT and ABG he administered. He stated that his finding of total disability rested on the assumption that the FEV1 of 48% was accurate. In fact, Dr. Baker himself questioned the effort Claimant gave on the PFT, and Dr. Burki, a reviewing pulmonologist, found the study unacceptable due to less than optimal effort. I consider the PFT invalid, and, thus, eliminate one of the bases of Dr. Baker's opinion. The ABG Dr. Baker administered did not produce qualifying values, and he did not explain why, in light of the non-qualifying objective testing, he still considered Claimant totally disabled. *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984). Finally, Dr. Baker indicated that he assessed a moderate impairment with "decreased FEV1 and pO2 and bronchitis." However, he did not explain how the miner's bronchitis pointed to a finding of disability. For these reasons, I do not consider Dr. Baker's opinion to be well reasoned, and I discount it. *Fuller v. Gibraltar Corp.*, 6 BLR 1-1291 (1984).

While Dr. Jarboe considered some inadmissible medical evidence when forming his opinion, he also considered the two PFTs that Dr. Baker administered in January and May 2002. These, as well as the January 2002 ABG, support his finding that the Claimant is not totally disabled from a pulmonary perspective. An administrative law judge is granted broad discretion in resolving procedural issues. *Harris v. Old Ben Coal Co.*, 23 BLR 1-___, BRB No. 04-0812 BLA (Jan. 27, 2006) (en banc) (J. McGranery and J. Hall, concurring and dissenting). I choose not to exclude Dr. Jarboe's report because I find that the admissible evidence he reviewed was sufficient, even absent the inadmissible evidence, to support his conclusions. Accordingly, for the determination for total disability only, I find Dr. Jarboe's opinion well documented and reasoned, and I place greater weight on it. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Thus, I find that the medical narrative evidence does not support a finding of total pulmonary disability under § 718.204(b)(iv).

In weighing all the evidence for or against total disability under subsection (b)(i)(iv), I find that Claimant has failed to establish, by a preponderance of the evidence, that he has a totally disabling pulmonary impairment. As a corollary, he has not established a change in condition or a mistake in a determination of fact since the denial of his subsequent claim.

Entitlement

Claimant has failed to establish either the existence of pneumoconiosis or a totally disabling pulmonary impairment, and, thus, has failed to establish either a change in condition or a mistake of fact. Therefore, I find that he is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of D.D for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).