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Office of Administrative Law Judges
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Issue Date: 19 November 2009

Case No: 2006-BLA-06184

In the Matter of:

STEVEN MULLINS,
Claimant

v.

PEN COAL CORP.,
Employer

WEST VIRGINIA CWP FUND,
Carrier

and

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

APPEARANCES:

Leonard Stayton, Esq.
For Claimant

Allison Moreman Esq.
For Employer/Carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the “Act”). The purpose of the Act is to provide benefits to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death is caused by the disease. 30 U.S.C. § 901(a); 20 C.F.R. § 718.1. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201(a). I base the following Decision upon my analysis of the entire record, the arguments of the parties, and applicable regulations, statutes, and case law.¹

Procedural History

Claimant filed this initial claim for benefits on March 18, 2005.² (DX 2). On June 1, 2006, the district director denied the claim in a proposed decision and order. (DX 31). Claimant contested the denial and requested a formal hearing. (DX 33). The claim was then transferred to the Office of Administrative Law Judges. (DX 35). Because Claimant was unavailable for the hearing, it was continued. On June 25, 2008, Claimant, represented by counsel, appeared and testified at the formal hearing in Prestonsburg, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses, and introduce evidence. Director’s Exhibits (“DX”) 1-35, Employer’s Exhibits (“EX”) 1-6, Claimant’s Exhibits (“CX”) 1-4, and ALJ Exhibits (“ALJX”) 1-2 were admitted into evidence.

Findings of Fact

Claimant was born in 1965. (Tr. 10). He completed the 10th grade and later earned a G.E.D. *Id.* He worked in underground coal mine employment from 1990 to 2001 and from August 2003 to March 2004. (DX 3; Tr. 14-15). During these times, he was a roof bolter for Pen Coal and RAG, respectively. (DX 3; Tr. 15). Currently, Claimant works for Alpha Omega Mine where he runs a shuttle car. (Tr. 18). At the time of the hearing, Claimant had been back in the mines for four months. *Id.*

Claimant suffers from shortness of breath and constant cough. (Tr. 18). He has been prescribed inhalers and occasionally uses a nebulizer for breathing treatments. (Tr. 20). He also has knee and back problems and suffers from carpal tunnel syndrome. (Tr. 20-21). He has testified to difficulty performing his current job when he has to get out of his buggy to address problems, although otherwise he is able to sit and run the shuttle car. (Tr. 26). Walking outside in hot or cold weather is difficult for Claimant. (Tr. 27). Although Claimant suffers from other health problems, his breathing problems do prevent him from hunting and doing other active hobbies. (Tr. 26-27).

¹ The record indicates that Claimant’s most recent coal mine employment occurred in West Virginia. Thus, the law of the United States Court of Appeals for the Fourth Circuit is applicable to this claim. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989).

² In this Decision, “DX,” “EX,” “CX,” and “ALJX” refer to the exhibits of the Director, Employer, Claimant, and the Administrative Law Judge, respectively. “Tr.” refers to the June 25, 2008 hearing.

A successful claimant receives augmented benefits for eligible dependents. 20 C.F.R. § 725.520(c). The record contains a marriage certificate, showing that Mr. Mullins married Sarah Mae Kazee in July 1983. (DX 7). The record also contains birth certificates, showing that Claimant is the father of Sarah Mullins's children. *Id.* Although Claimant reported on his application for benefits that he divorced his wife in 2001 (DX 2), he later testified that the divorce was not yet final. (Tr. 13). Despite the conflicting evidence, I find that Sarah Mae Mullins satisfies the relationship and dependency requirement in 20 C.F.R. §§ 725.204(a)(1) and 725.205(d) and (e). As Claimant and Sarah Mae Mullins are validly married, for a period not less than one year, and Claimant is the father of her children, Sarah Mae Mullins is a dependent for augmentation purposes.

On his application for benefits, Claimant also reported four children under age 18. (DX 2; *see also* Tr. 10-14). He later testified that he had an additional dependent and was under a court order to pay child support for that child. (Tr. 13). Claimant has not submitted a copy of the court order for child support payments or other evidence of dependency. As a result, the record does not support a finding of dependency for this child. The record does contain birth certificates confirming that Claimant was the father of four children under age 18 as of March 18, 2005, the date Claimant filed his claim for benefits. (DX 7). As such, the record supports a finding of five dependants—Claimant's spouse and four minor children. Accordingly, I find that Claimant has five dependents for purposes of augmentation.

The nature and duration of a miner's coal mine employment is relevant to several elements of entitlement, and may affect credibility findings with respect to the medical opinion evidence. *See Sellards v. Director, OWCP*, 17 B.L.R. 1-77, 1-81 (1993). Additionally, a miner who suffers from clinical pneumoconiosis and was employed in qualifying coal mine employment for ten or more years is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. § 718.203(b). The parties have stipulated to 11 years of coal mine employment. (Tr. 8-9). This stipulation is supported by the social security records, wage and tax statements, Claimant's testimony, and the district director's findings. (DX 3-5 and 12; Tr. 8-9; DX 31). Accordingly, I accept the parties' stipulation and find that Claimant was employed as a coal miner for 11 years.

The nature and extent of a miner's smoking history is often relevant to issues such as the existence of pneumoconiosis and the etiology of a miner's disability. *See Sellards*, 17 B.L.R. at 1-81. In determining a miner's smoking history, the administrative law judge must consider all relevant evidence and resolve any discrepancies contained in the record. *See Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123, 1-137 (2006).

Claimant testified that he began smoking at age 16 (1981) and smoked about one pack per day, a habit that continued for the next two years. (Tr. 23-24). After that, Claimant testified that he smoked two packs per day, until he began working in the coal mine around age 24. (Tr. 24). Since then, Claimant testified that he smoked a half pack per day and, at the date of the hearing, continued to smoke about a half pack per day. (Tr. 25). Consistent with this smoking history, Dr. Gaziano recorded 23 years of cigarette smoking on Claimant's medical history form. (DX 12). Dr. Repsher reported that Claimant smoked more than two packs of cigarettes per day, beginning at age 17 (1982). (Tr. 23; DX 29). He based this on carboxyhemoglobin levels and not on Claimant's statement to the medical personnel who administered the test and recorded a

smoking history of one pack per day. (Tr. 23; cf. DX 29, 12 with DX 29, 6). Dr. Dahhan reported that Claimant began smoking at the age of 18 or 19 (1983 or 1984) and averaged one-and-a-half packs per day. (EX 1). But in this instance, the carboxyhemoglobin level was consistent with smoking a half pack per day, which corroborates claimant’s testimony that he smoked about a half pack per day. (EX 1). Based on this conflicting evidence, I find Claimant’s smoking history to consist of approximately 26 pack-years (based on an average of one pack per day from 1983 until present).

Summary of the Medical Evidence

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties may submit into the record. 20 C.F.R. §§ 725.414; 725.456(b)(1). The claimant and the responsible 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) and (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.” 20 C.F.R. § 725.414(a)(2)(ii) and (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.* 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).

A. X-ray Interpretations

The record contains the following x-ray interpretations:

Exhibit	Date of X-ray	Physician / Qualifications³	Film Quality	Interpretation
DX 10	05/05/05	Gaziano B	1	Negative
DX 29	05/05/05	Wiot, B, BCR	1	Negative
CX 1	05/05/05	Alexander, B, BCR	1	1/1, pp
DX 29	03/29/06	Repsher, B	2	Negative
CX 2	03/29/06	Alexander, B, BCR	2	1/0, pp
EX 5	09/22/07	Spitz, B, BCR	1	Negative

³ “B” denotes a NIOSH-certified B Reader, which is a physician who has demonstrated a proficiency in evaluating chest x-rays and in classifying such x-rays for pneumoconiosis. “BCR” denotes a Board-certified radiologist.

B. Pulmonary Function Tests⁴

The record contains the following pulmonary function tests:

Exhibit	Date of Exam	Physician	Age Height	Broncho-Dilator?	FEV ₁	FVC	MVV	FEV ₁ / FVC	Comments
DX 13	05/05/05 ⁵	Gaziano	39 67¾–68”	Before After	2.03 2.20	3.99 3.61	66 –	51 61	Good understanding and cooperation
DX 29	03/29/06	Repsher	40 70”	Before After	2.15 2.51	3.56 3.83	57 69	61 66	Patient understood test and cooperated well with good effort.
EX 1	9/22/07	Dahhan	42 67.7” ⁶	Before After	2.08 1.94	3.37 3.14	43 38	62 62	Good cooperation and comprehension

C. Arterial Blood Studies

The record contains the following arterial blood gas studies:

Exhibit	Date of Test	Physician	pCO ₂	pO ₂	Resting/ Exercise
DX 11	05/05/05	Gaziano	44.0 39.0	81.0 94.0	Resting Exercise
DX 29	03/29/06	Repsher	37.0	98.8	Resting
EX 1	09/22/07	Dahhan	43.6 38.3	88.2 94.5	Resting Exercise

D. Medical Opinions⁷

The record contains the following medical opinions:

1. *Medical Opinion of Dr. Gaziano (DX 12 and EX 6)*

Dominic J. Gaziano, M.D., who is a B-reader, Board-certified in internal medicine, with a subspecialty in pulmonary disease, examined Claimant for his Department-sponsored pulmonary examination on May 5, 2005. (DX 12). He obtained an employment and medical history, and recorded Claimant’s symptoms and examination findings. He considered a coal mine employment history of 16 years, underground as a roof bolter, and a smoking history of one pack of cigarettes per day for the past 23 years. An x-ray was negative for pneumoconiosis, but showed scattered calcified granuloma. A pulmonary function test revealed moderate obstructive ventilatory impairment. An arterial blood gas test revealed normal rest and exercise levels.

⁴ Because of the discrepancy in height, the heights were averaged and a height of 68.36 inches was considered in the qualifying analysis.

⁵ Employer submitted a validation study by Joseph J. Renn, III, M.D. of this pulmonary function test. (EX 3).

⁶ Dr. Dahhan reported Claimant’s height to be 172 centimeters. I take judicial notice that this equals approximately 67.7 inches.

⁷ The physicians’ qualifications are found in the record or obtained from the “B reader List” of the National Institute of Occupational Safety and Health (NIOSH) and the certification database of the American Board of Medical Specialties. (<https://www.abms.org>). Judicial notice is hereby taken of these sources. See 29 C.F.R. § 18.1(a); Fed. R. Evid. 201(b); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 B.L.R. 1-135, 1-139 (1990).

Dr. Gaziano diagnosed legal pneumoconiosis and chronic obstructive pulmonary disease. He categorized Claimant's pulmonary impairment as "moderate impairment" due to "16 year coal mining work and 23 pack-year smoking history." In Dr. Gaziano's opinion, Claimant does not have the respiratory capacity to perform his last work as a coal miner or other comparable work.

Dr. Gaziano testified in a deposition taken on June 16, 2009, and confirmed the earlier diagnosis of legal pneumoconiosis and COPD caused by coal dust and cigarette smoking. (EX 6). He testified that this diagnosis was based on Claimant's significant exposure to coal dust during his 16-year work history. Dr. Gaziano also testified that Claimant's smoking was significant in the diagnosis. When asked whether he was able to determine the extent to which smoking and coal dust exposure contributed to Claimant's impairment, Dr. Gaziano testified that he could not differentiate the cause when the effect is the same.

2. *Medical Opinion of Dr. Repsher (DX 29 and EX 2)*

Lawrence H. Repsher, M.D., who is a B-reader, Board-certified in internal medicine, with a subspecialty in pulmonary disease, examined Claimant on March 29, 2006. (DX 29). He obtained an employment and medical history, and recorded Claimant's symptoms and examination findings. He considered a coal mine employment history of 14 years, underground as a roof bolter and buggy operator, and a smoking history of more than two packs of cigarettes per day for 23 years (carboxyhemoglobin levels indicated a two and a half to three pack per day cigarette smoking habit). An x-ray was negative for pneumoconiosis, but showed hyperinflation and emphysema. A pulmonary function test revealed COPD with an asthmatic component, although Dr. Repsher noted that interpretation was difficult because of underlying vocal cord dysfunction syndrome. An arterial blood gas test was normal. Physical examination of Claimant's chest revealed no rales or rhonchi, although the doctor noted inspiratory and expiratory wheezes, even with quiet breathing. A CT scan showed a noncalcified six mm nodule in the superior segment of the right lower lobe. A resting electrocardiogram was consistent with COPD.

Dr. Repsher diagnosed COPD, with a bronchospastic component. He opined that Claimant does not suffer from coal workers' pneumoconiosis or any condition attributable to the inhalation of coal dust. He discussed several reasons for this opinion: negative x-ray evidence, lack of biopsy evidence, no pulmonary function evidence of pneumoconiosis, and normal arterial blood gas levels. In addition, Dr. Repsher discussed cigarette smoking in connection with statistical rates of COPD in smokers and coal miners, concluding that "in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." He also attached seven published medical papers discussing lung disease in coal miners.

Dr. Repsher testified in a deposition taken on October 15, 2007, and confirmed the earlier diagnosis of COPD. (EX 2). Regarding the issue of coal workers' pneumoconiosis, he testified as follows:

[Claimant] doesn't have clinical or medical pneumoconiosis because his chest x-ray and CT scans are negative, and we don't have any autopsy or lung biopsy

material to look at for histologic medical coal workers' pneumoconiosis. And he doesn't have legal coal workers pneumoconiosis because he doesn't have airways obstruction, at least documented airways obstruction, and does not have evidence of any other intrinsic lung disease.

The doctor rated Claimant's pulmonary capacity as normal, testifying that Claimant "could do continuous heavy labor."

3. *Medical Opinion of Dr. Dahhan (EX 1 and EX 4)*

Abdul K. Dahhan, M.D., who is a B-reader, Board-certified in internal medicine, with a subspecialty in pulmonary disease, examined Claimant on September 22, 2007 and submitted a report dated September 24, 2007. (EX 1). He obtained an employment and medical history and recorded Claimant's symptoms and examination findings. He considered a coal mine employment history of 18 years, underground as a roof bolter and buggy operator, and a smoking history of one-and-a-half packs per day for the past 24 years (carboxyhemoglobin level indicated a half pack per day cigarette smoking habit). An x-ray was negative for pneumoconiosis. A pulmonary function test revealed moderately severe obstructive ventilatory impairment with no evidence of restrictive defect. An arterial blood gas test was normal. Electrocardiogram showed regular sinus rhythm with normal tracings.

Dr. Dahhan diagnosed a moderate obstructive ventilatory impairment. Citing several reasons for his opinion, Dr. Dahhan stated that the ventilatory impairment resulted from Claimant's "lengthy smoking habit." Specifically, the doctor opined:

[Claimant] is being treated with multiple bronchodilator agents indicating that his physician believes that his obstruction is not fixed, a finding that is inconsistent with the permanent adverse affects of coal dust on the respiratory system; reversibility of his airway obstruction cannot be determined due to poor performance on post bronchodilator studies; he has lost over 1500cc of his FEV1, an amount of loss that cannot be accounted for by the obstructive impact of coal dust on the respiratory system[.]

Dr. Dahhan also testified in a deposition taken on October 10, 2007. (EX 4). Before his deposition, Dr. Dahhan reviewed additional medical records, including Dr. Gaziano's Department of Labor exam report, Dr. Repsher's report, and Dr. Wiot's x-ray reading. Dr. Dahhan confirmed his earlier diagnosis and explained that Claimant "has airway obstruction severe enough to render him disabled from performing mild to moderate physical[] jobs," which would include his prior coal mining jobs. But the doctor testified that there was no evidence of pneumoconiosis because Claimant's chest x-ray was clear. Instead, Dr. Dahhan attributed Claimant's respiratory impairment to smoking, citing the same reasons discussed in his medical report. Regarding the medical records, Dr. Dahhan testified that they complemented and supported his diagnosis.

E. Treatment Records

The regulations provide that a party may submit records of a miner's hospitalization or medical treatment for a respiratory or pulmonary or related disease, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3). 20 C.F.R. § 725.414(a)(4). The record in this claim does not contain hospitalization or treatment records.

F. Other Medical Evidence

The regulations provide that a party may submit the results of any other medically acceptable test or procedure which tends to demonstrate the presence or absence of any respiratory or pulmonary impairment. 20 C.F.R. § 725.107(a). Interpretations of digital x-rays and Computed Tomography (CT) scans are often submitted pursuant to this provision. See *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123, 1-133 (2006), *aff'd on recon.*, 24 B.L.R. 1-1 (2007) (en banc). The Board has construed this provision to limit each party to the submission, as part of its affirmative case, to one reading of each separate test or procedure undergone by the claimant. *Id.* at 1-134. Dr. Repsher opined that a CT scan is medically acceptable for the evaluation of pulmonary disease, (DX 29), and the record in this claim contains the following CT scan interpretations:

Exhibit	Date of X-ray	Physician / Qualifications	Interpretation
CX 3	03/29/2006	Alexander, B, BCR	Findings consistent with simple coal workers' pneumoconiosis with low profusion of small opacities.
DX 29; EX 2	03/29/2006	Repsher, B	No evidence of coal workers' pneumoconiosis

Law and Analysis

Because Claimant filed this claim for living miner's benefits after March 31, 1980, the applicable regulations are contained in 20 C.F.R. § 718.2. To be eligible for benefits under Part 718, a claimant must establish 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 or she:
 - (i) Has pneumoconiosis;
 - (ii) The pneumoconiosis arose out of coal mine employment;
 - (iii) Is totally disabled;
 - (iv) The pneumoconiosis contributes to the total disability; and
- (3) Has filed a claim for benefits in accordance with the provisions of this part.

20 C.F.R. § 725.202(d). Claimant must prove each element of entitlement by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994). In this case, Employer contests the following elements of entitlement:

1. Whether Claimant has pneumoconiosis;
2. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;
3. Whether Claimant is totally disabled; and

4. Whether Claimant's total disability, if present, is due to pneumoconiosis.⁸

(DX 35; Tr. 8).

I. Existence of Pneumoconiosis

"Pneumoconiosis" is defined by the Act as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b); *see also* 20 C.F.R. § 718.201(a); 725.101(a)(25). This definition encompasses two forms of lung disease, "clinical pneumoconiosis" and "legal pneumoconiosis." 20 C.F.R. § 718.201(a); 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000). "Clinical pneumoconiosis" consists of:

those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the 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.

20 C.F.R. § 718.201(a)(1). Clinical pneumoconiosis is "generally visible on chest x-ray films." *Id.*; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210 (4th Cir. 2000).

"Legal pneumoconiosis" is more broadly defined to include "any chronic [restrictive or obstructive] pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2) and (b). Significantly, "[c]linical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act." *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306 (6th Cir. 2005). Legal pneumoconiosis "encompasses a broader spectrum of diseases than those pathologic conditions which can be detected by clinical diagnostic tests such as x-rays or CT scans." 65 Fed. Reg. at 79,945. Thus, an x-ray read as negative for pneumoconiosis should not necessarily be treated as evidence weighing against a finding of legal pneumoconiosis. *Compton*, 211 F.3d at 210.

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray evidence, biopsy evidence, autopsy evidence, or a physician's reasoned medical opinion. 20 C.F.R. § 718.202(a). Where applicable, a claimant may also rely on one of the presumptions found at 20 C.F.R. §§ 718.304, 718.305, or 718.306. *Id.* In addition to these four means, 20 C.F.R. § 718.107(a) provides that the results of any other medically acceptable test or procedure that tends to demonstrate the presence or absence of pneumoconiosis, "shall be given

⁸ Employer also contests the constitutionality of the evidentiary limitations. The administrative law judge does not have the authority to address issues involving the constitutionality of the Act or regulations. *Kosh v. Director, OWCP*, 8 B.L.R. 1-168 (1985). Moreover, the constitutionality of the current regulations has been upheld by appellate courts and the Board. *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278 (4th Cir. 2007); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 B.L.R. 1-47 (2004). Accordingly, these issues will not be addressed in this Decision, but are preserved for appeal.

appropriate consideration.” In cases arising within the Fourth Circuit, pneumoconiosis must be established by a preponderance of the evidence in all four categories; an administrative law judge may not look exclusively to one of 20 C.F.R. § 718.202(a)’s four subsections, while ignoring contrary evidence from one of the other three subsections. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 218-19 (4th Cir. 2006) (citing *Compton*, 211 F.3d at 207-08).

A. X-ray Evidence

A chest x-ray conducted and classified in accordance with the regulations may form the basis for a finding of pneumoconiosis. 20 C.F.R. § 718.202(a)(1). When two or more x-ray reports are in conflict, consideration must be given to the radiological qualifications of the physicians interpreting the x-rays. *Id.* The administrative law judge may defer to the numerical superiority of the x-ray readings, or to readings by physicians who are both B-readers and Board-certified radiologists. See *Webber v. Peabody Coal Co.*, 23 B.L.R. 1-123, 1-138 (2006); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 60 (6th Cir. 1995). No claim may be denied solely on the basis of chest x-ray evidence. 20 C.F.R. § 718.202(b).

The record contains six interpretations of three chest x-rays. Dr. Alexander, dually qualified, interpreted the May 5, 2005 film as positive for pneumoconiosis (1/1, pp). But Dr. Wiot, also dually qualified, read this film as negative for pneumoconiosis. Additionally, Dr. Gaziano, a B Reader with a subspecialty in pulmonary medicine, read this film as negative for pneumoconiosis. Because Drs. Alexander and Wiot are both dually qualified and rendered contradictory readings, their readings neither preclude nor establish the presence of pneumoconiosis. Based on Dr. Gaziano’s reading and his qualifications, however, I find the May 2005 film to be negative for pneumoconiosis.

The March 29, 2006, film was read as positive by Dr. Alexander (1/0, pp) and negative by Dr. Repsher, a B-reader. Based on Dr. Alexander’s dual qualifications, I credit his reading with greater weight than Dr. Repsher’s reading and find this film to be positive for pneumoconiosis. On the other hand, I find the September 22, 2007 film to be negative for pneumoconiosis because Dr. Spitz interpreted the film as negative for pneumoconiosis and there were no other readings.

In summary, two films are negative for pneumoconiosis and one is positive for pneumoconiosis. Because a preponderance of the x-ray evidence is not positive for pneumoconiosis, Claimant did not establish the existence of pneumoconiosis under this subsection.

B. Autopsy/Biopsy

A biopsy or autopsy conducted and reported in compliance with the regulations may also form the basis for a finding of pneumoconiosis. 20 C.F.R. § 718.202(a)(2). Autopsy and biopsy reports are generally considered to be the most reliable evidence of the existence of pneumoconiosis. *Gray v. SLC Coal Co.*, 176 F.3d 382, 387 (6th Cir. 1999); *Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). Because the record in this case contains no biopsy or autopsy evidence, Claimant has not established the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(2).

C. Statutory Presumptions

Three statutory presumptions, found in 20 C.F.R. §§ 718.304, 718.305, and 718.306, are available to aid a claimant in establishing pneumoconiosis. 20 C.F.R. § 718.202(a)(3). Section 718.305 applies only to claims filed prior to January 1, 1982, while section 718.306 applies only to survivor's claims in which the miner died on or before March 1, 1978. Neither presumption is applicable here. Section 718.304 sets forth the criteria for establishing the existence of complicated pneumoconiosis. The record in this claim contains no evidence of complicated pneumoconiosis. As a result, Claimant has not established the existence of pneumoconiosis by use of the presumptions listed at 20 C.F.R. § 718.202(a)(3).

D. Medical Opinions

A finding of pneumoconiosis may also be based upon a physician's documented and reasoned medical opinion. 20 C.F.R. § 718.202(a)(4). A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, 10 B.L.R. 1-19. Whether a medical report is sufficiently documented and reasoned is for the judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (en banc). Although the claimant bears the burden of proof in establishing legal pneumoconiosis, this burden is not heavy. *D.H. v. Old Ben Coal Co.*, B.R.B. No. 08-0391 B.L.A. (Dec. 16, 2008).

When weighing conflicting medical reports, the administrative law judge must address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of and bases for their diagnoses. See *J.V.S. v. Arch of West Virginia*, 24 B.L.R. 1-78, 1-96 (2008). The record includes three medical opinions on the issue of whether Claimant suffers from legal pneumoconiosis.

Dr. Gaziano was the only doctor to diagnose legal pneumoconiosis, finding COPD caused by cigarette smoking and coal dust exposure. Because Dr. Gaziano testified that he based this diagnosis on Claimant's work history, symptoms, and examination findings, the opinion is well-documented. Dr. Gaziano found that Claimant's COPD was partially caused by coal dust, reporting and testifying that Claimant "had a significant exposure to both coal and sand or silica dust of sixteen years." (DX 12; EX 6, 11). This opinion is based on an inaccurate coal mining history because the parties stipulated to eleven years of coal mining history. It is proper for a judge to discredit a medical opinion based on an inaccurate length of coal mine employment. *Worhach v. Director, OWCP*, 17 B.L.R. 1-105 (1993)(per curiam) (physicians reported an eight year coal mine employment history, but the judge only found four years of such employment). Because Dr. Gaziano relied on an inaccurate coal mining history, I accord his opinion little probative weight on the issue of legal pneumoconiosis.

The other two medical opinions are by Drs. Repsher and Dahhan, who both agree that Claimant suffers from some degree of respiratory or pulmonary impairment. Unlike Dr. Gaziano, they maintain that smoking was the sole cause of the impairment.

Dr. Repsher diagnosed COPD and stated that he based his opinion as to the cause of Claimant's impairment on the x-ray evidence, lack of histologic evidence, ABG results, pulmonary function test, and smoking history. Although Dr. Repsher diagnosed COPD, he later testified that Claimant "doesn't have airways obstruction, at least documented airways obstruction." (EX 2, 25-26). This statement seems inconsistent with his COPD diagnosis.

Dr. Repsher's opinion is also based on an inaccurate smoking history and generalities that do not focus on Claimant's individual condition. I have found Claimant's smoking history to be approximately 26 pack-years, based on one pack per day since 1983. In contrast, Dr. Repsher testified that he relied on a smoking history of two-and-a-half to three packs per day based on carboxyhemoglobin results. Dr. Repsher's opinion is not well-reasoned because he relied on a smoking history significantly greater than what I have found Claimant's smoking history to be. Dr. Repsher also discussed at length cigarette smoking in connection with statistical rates of COPD in smokers and coal miners, concluding that "in this individual coal miner, to an overwhelming probability, any detectable COPD would be the result of cigarette smoking and/or asthma, but not the result of the inhalation of coal mine dust." (DX 29, 8). He attempted to bolster his opinion by attaching seven published medical papers discussing lung disease in coal miners. Dr. Repsher relies on generalities, instead of specifically focusing on Claimant's condition and providing reasons why coal dust did not cause Claimant's pulmonary impairment. *Knizer v. Bethlehem Mines Corp.*, 8 B.L.R. 1-5 (1985). *See also Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723 (7th Cir. 2008). Accordingly, I give his opinion little probative weight on the issue of legal pneumoconiosis.

Like Dr. Repsher, Dr. Dahhan found that Claimant's pulmonary impairment was caused entirely by smoking, citing several reasons for his opinion. His opinion is poorly reasoned. He first discounted the effects of coal mine dust because Claimant had no exposure to coal dust for three years. This fails to address the potential for latency and progressivity and is at odds with the Department of Labor's determination that coal mine dust exposure can cause a chronic pulmonary impairment after a latent period. *See* 20 C.F.R. § 718.201(c); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *E.B. v. Consolidation Coal Co.*, BRB No. 08-0294 (Jan. 7, 2009).

Also, Claimant's bronchodilator use is not determinative of the existence of legal pneumoconiosis. Dr. Dahhan found it significant that Claimant was prescribed bronchodilators by his treating physician, indicating that his respiratory condition is reversible. In *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 238 (4th Cir. 2004), the evidence showed that when the miner was given bronchodilator medication, his pulmonary condition improved, but the residual impairment that remained was still disabling. *Id.* Although the miner's condition improved, "the fact that he experienced a disabling residual impairment suggested that a combination of factors [caused] his pulmonary condition." *Id.* Here, as in *Consolidated Coal*, Dr. Dahhan reported an improvement in Claimant's post-bronchodilator results, but the results were qualifying both pre- and post-bronchodilator. This suggests that a combination of factors caused his pulmonary condition. The fact that Claimant used bronchodilators does not automatically rule out the existence of legal pneumoconiosis. Dr. Dahhan did not adequately explain why Claimant's

response to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis.

Finally, Dr. Dahhan stated that Claimant's loss of FEV₁ was so great that it could not be accounted for by coal dust exposure. Again, Dr. Dahhan does not explain why both coal mine dust and cigarette smoking could not have contributed to Claimant's pulmonary impairment. His opinion that coal dust, alone, could not have caused such a great decrease in pulmonary function does not speak to whether Claimant's impairment was "significantly related to, or substantially aggravated by" his coal mine employment. See 20 C.F.R. § 718.201(b). For these reasons, I find that Dr. Dahhan's opinion regarding the cause of Claimant's chronic obstructive pulmonary impairment is not well-reasoned. Accordingly, I give his opinion little probative weight on the issue of legal pneumoconiosis.

Although the Department has recognized the causal link between coal mine dust exposure and COPD, the regulations still require that each miner prove by a preponderance of the evidence "that his obstructive lung disease did in fact arise out of his coal mine employment, and not from another source." 65 Fed. Reg. 79,938-39. "[N]ot all obstructive lung disease is pneumoconiosis. It remains the claimant's burden of persuasion to demonstrate that his obstructive lung disease arose out of his coal mine employment and therefore falls within the statutory definition of pneumoconiosis." 65 Fed. Reg. 79,923; see also *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515 (6th Cir. 2003); *Anderson v. Director, OWCP*, 455 F.3d 1102, 1105 (10th Cir. 2006). For the reasons discussed above, all three medical opinions are entitled to little probative weight on the issue of legal pneumoconiosis. Because a preponderance of the medical opinion evidence is not positive for pneumoconiosis, Claimant did not establish the existence of pneumoconiosis under this subsection.

E. Other Medical Evidence

A finding of pneumoconiosis may also be based upon any other "medically acceptable test or procedure reported by a physician." 20 C.F.R. § 718.107(a). The party submitting the evidence must demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claim for benefits. 20 C.F.R. § 718.107(b).

The record in this claim contains a CT scan interpretation by Drs. Repsher and Alexander. The CT scan was taken on March 29, 2006. Dr. Repsher read the CT scan and found no evidence of coal workers' pneumoconiosis, although he noted "a noncalcified 6 mm nodule probably in the superior segment of the right lower lobe." Dr. Alexander, however, did find evidence of simple coal workers' pneumoconiosis, reporting innumerable round opacities measuring up to 1.45 mm present in both lungs. Upon review of the record, Dr. Alexander fails to demonstrate that CT scans are medically acceptable and relevant to establishing a claim for benefits. Thus, there is no evidence that Dr. Alexander's interpretation satisfies 20 C.F.R. § 718.107(b). As a result, his interpretation will not be considered. Because Dr. Repsher opined that a CT scan is medically acceptable for the evaluation of pulmonary disease, (DX 29), he does satisfy 20 C.F.R. § 718.107(b). Based on Dr. Repsher's interpretation, I find that Claimant has not established pneumoconiosis under this subsection.

Pneumoconiosis is not established by any of the Section 718.202 categories. The x-ray evidence is negative for pneumoconiosis. There is no autopsy or biopsy evidence and none of the statutory presumptions apply. Further, the medical opinions fail to establish pneumoconiosis and the CT scan is negative for pneumoconiosis. Thus, I find that Claimant has not established the existence of pneumoconiosis by a preponderance of the evidence in all four categories.

II. Causation of Pneumoconiosis

A miner who suffers from pneumoconiosis must also establish that the pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering or suffered from pneumoconiosis was employed for ten or more years in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(c). Here, the presumption is applicable and Employer has offered no evidence that Claimant's pneumoconiosis did not arise out of coal mine employment. But as Claimant has not established that he suffers from the disease, he necessarily cannot establish that the disease arose out of coal mine employment.

III. Total Disability

A miner is considered totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him: "(i) from performing his or her usual coal mine work; and (ii) from engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 30 U.S.C. § 902(f); 20 C.F.R. § 718.204(b)(1). A miner need only establish that he is disabled with respect to his usual coal mine work; once such a showing is made, the employer must come forward with evidence showing that the miner is capable of performing gainful work requiring comparable skills or abilities. *See Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83, 1-87 (1988) (decided under analogous former section).

The regulations provide four methods by which a miner may establish total disability under the Act: (1) pulmonary function studies; (2) arterial blood gas tests; (3) a cor pulmonale diagnosis; or (4) a well-reasoned and well-documented medical opinion finding total disability. 20 C.F.R. § 718.204(b)(2)(i)-(iv). Unless outweighed by contrary probative evidence, evidence which meets the standards of subparagraphs (i), (ii), (iii), or (iv) establishes a miner's total disability. 20 C.F.R. § 718.204(b)(2). "Contrary probative evidence" includes all evidence, medical and otherwise, which is contrary and probative. *Id.*; *Fields v. Island Creek Coal*, 10 B.L.R. 1-19, 1-21 (1987).

A. Pulmonary Function Studies

Total disability may be established with pulmonary function studies. To establish total disability, the FEV₁ and either the MVV, FVC, or the FEV₁/FVC must qualify.⁹ 20 C.F.R. § 718.204(b)(2)(i). The record contains three pulmonary function tests with results reported both

⁹ A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

pre- and post-bronchodilator. All tests indicated good understanding and cooperation on behalf of Claimant. A summary of the results is as follows:

Exhibit	Date of Exam	Physician	Age Height	Bronchodilator	Qualifying	Comments
DX 13	05/05/05	Gaziano	39 67¾–68”	Before After	Yes No	Good understanding and cooperation
DX 29	03/29/06	Repsher	40 70”	Before After	Yes No	Patient understood test and cooperated well with good effort.
EX 1	9/22/07	Dahhan	42 67.7”	Before After	Yes Yes	Good cooperation and comprehension

The Board has held that when inconsistent heights are reported, it is permissible to use the average reported height. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). Because the doctors reported heights ranging from 67.7–70 inches, I find that Claimant’s average reported height is 68.36 inches. The closest value on the tables is 68.5 inches, which was the value used to assess Claimant’s pulmonary function testing.

Two pulmonary function tests (May 2005 and March 2006) were qualifying based on the pre-bronchodilator results. The May 2005 test qualified based on the FEV₁, MVV and FEV₁/FVC.¹⁰ The March 2006 test qualified based on the FEV₁, and MVV. Dr. Repsher questioned the validity of this test because of an underlying vocal cord dysfunction syndrome. He testified that he “ignored” the FEV₁, FEC, and ratio as a result of the syndrome. But this diagnosis was not supported by any other physician of record and I decline to accord less weight to the test based on Dr. Repsher’s uncorroborated testimony.

Finally, the September 2007 pulmonary function test qualified both pre- and post-bronchodilator based on the FEV₁ and MVV results. I accord greater weight to this test because it is the most recent pulmonary function test. Accordingly, based on this test and the qualifying results from the earlier two tests, I find that Claimant has established total disability under this subsection.

B. Blood Gas Studies

Total disability may also be established with qualifying arterial blood gas studies. 20 C.F.R. § 718.204(b)(2)(ii). Drs. Gaziano, Repsher, and Dahhan all reported the results from arterial blood gas studies. None of the tests were qualifying, and I find that Claimant has not established disability under this subsection.

¹⁰ The May 2005 test was reviewed by Dr. Renn, who stated that the test was valid for accurate interpretation and that the ventilatory function represented was moderately severe obstruction without significant bronchoreversibility. Technical validation of a study, without explanation, does not automatically entitle the study to greater weight. *Milburn Colliery Co. v. Director, OWCP [Hicks]*, 138 F.3d 524 (4th Cir. 1998). Dr. Renn validates the May 2005 study without explanation, stating only that the numerical derivations are “valid for accurate interpretation.” I decline to accord more or less weight to this test because of the study.

C. Cor Pulmonale

Total disability may also be established with medical evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. § 718.204(b)(2)(iii). There is no evidence of cor pulmonale in the record. Therefore, I find that Claimant has failed to establish total disability under this subsection.

D. Medical Opinions

The final way to establish total disability under 20 C.F.R. § 718.204(b)(2) is with a reasoned medical opinion. 20 C.F.R. § 718.204(b)(2)(iv). The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id.* Dr. Gaziano opined that Claimant did not have the respiratory capacity to work as a roof bolter or other comparable work based on Claimant's pulmonary function tests.

Dr. Repsher testified to the contrary, stating that Claimant "could do continuous heavy labor" based on his respiratory systems capacity. (EX 2, 25). This statement contradicts the March 2006 pulmonary function test's qualifying post-bronchodilator results. Although Dr. Repsher questioned the validity of this test because of an underlying vocal cord dysfunction syndrome, I have already declined to give weight to this statement because this diagnosis was not supported by any other physician of record. Because Dr. Repsher did not consider a valid, qualifying pulmonary function test, his opinion on the issue of total disability is poorly reasoned. It is entitled to little probative weight on the issue of total disability.

Dr. Dahhan reviewed the medical records from Drs. Repsher and Gaziano and agreed with Dr. Gaziano. He opined that "[f]rom a respiratory standpoint, [Claimant] does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand." (EX 1). In deposition, Dr. Dahhan testified that he based this opinion on the results of Claimant's pulmonary function studies.

Drs. Gaziano and Dahhan agreed that Claimant does not have the respiratory capacity to continue his previous coal mining work or job of comparable physical demand. As Drs. Gaziano and Dahhan provided reasoned and documented opinions that Claimant is totally disabled, I would find that Claimant has established total disability pursuant to reasoned medical opinion. At the hearing, however, Claimant testified that he "runs a shuttle car" and had been back in the mines four months. Both doctors considered Claimant's previous roof bolter operator job, and Dr. Dahhan considered Claimant's previous employment as a buggy man. Thus, the doctors' medical opinions are not based on Claimant's previous coal mining work. Although the doctors found that Claimant was totally disabled, their reasoning may be flawed and their opinions potentially inconclusive on the issue of total disability, if the physical demands of Claimant's current job are not comparable to his previous jobs. I make no finding as to whether the demands of running a shuttle car are comparable to either of Claimant's previous coal mining jobs. Instead, I accord more weight to the qualifying pulmonary function tests because they are objective medical evidence and find that the pulmonary function tests outweigh the contrary probative evidence (and potentially inconclusive evidence) and establish that Claimant is totally and permanently disabled.

IV. Total Disability Due to Pneumoconiosis

Claimant must next establish that his total disability is due to pneumoconiosis. Because Claimant has not established that he suffers from the disease, he necessarily cannot establish that he is totally disabled due to the disease.

Entitlement

Based on the findings in this case, Claimant has not met the conditions of entitlement. Therefore, his claim for benefits under the Act is denied.

Attorney Fees

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

Order

IT IS HEREBY ORDERED that the claim of Steven Mullins for benefits under the Black Lung Benefits Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

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. §§ 725.458 and 725.459. 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: 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).