BRB No. 05-0628 BLA

GARY L. KEARNS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 02/21/2006
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (00-BLA-0402) of Administrative Law Judge Robert L. Hillyard with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] This case has been before the

[1] Claimant is the miner, Gary L. Kearns. He filed his application for benefits on January 5, 1999. Director's Exhibit 1.

Board previously. In his prior Decision and Order, the administrative law judge determined that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4), but failed to prove that he is totally disabled under 20 C.F.R. §718.204(b). Claimant argued on appeal that the administrative law judge erred in finding the evidence insufficient to establish total respiratory or pulmonary disability. In its response to claimant's appeal, employer contended that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4). Upon consideration of the arguments raised on appeal, the Board vacated the administrative law judge's findings under Sections 718.202(a)(1), (a)(4), 718.204(b)(2)(iv) and remanded the case to the administrative law judge for reconsideration. *Kearns v. Peabody Coal Co.*, BRB No. 03-0730 BLA (Jul. 23, 2004)(unpub.). On remand, the administrative law judge determined that the evidence of record was insufficient to establish either the existence of pneumoconiosis or total disability and denied benefits accordingly.

Claimant argues on appeal that the administrative law judge erred in reconsidering his initial determination that the presence of pneumoconiosis was demonstrated by the x-ray and medical opinion evidence of record. Claimant also asserts that the administrative law judge did not properly weigh the evidence relevant to the existence of pneumoconiosis and total disability. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in the merits of this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Claimant first argues that the administrative law judge erred in reconsidering his initial finding that pneumoconiosis was established at Section 718.202(a)(1) and (a)(4), as employer should have raised the allegations of error that the Board found meritorious in a cross-appeal. This contention has no merit. Employer was not required to file a cross-appeal because the arguments it raised supported the administrative law judge's ultimate disposition of the claim. *Persinger v. North American Coal Co.*, 9 BLR 1-18, 1-

19 n.1 (1986); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge noted that the record contained seventy-five readings of ten films. He considered each film separately and totaled the number of positive and negative readings by physicians with special radiological qualifications to determine whether each film was negative or positive. After applying this method, the administrative found that the films dated October 19, 2000, August 8, 2000, September 9, 1999, and April 20, 1993 were negative for pneumoconiosis. The administrative law judge determined that the x-rays dated August 17, 1999 and February 18, 1999 were positive for pneumoconiosis. The administrative law judge found that the films dated September 15, 1999, March 13, 1997, March 9, 1999, and June 6, 1998, were unreadable. The administrative law judge concluded that because a majority of the readable x-rays, including the more recent x-rays, were negative for pneumoconiosis, claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 7.

Claimant argues that the administrative law judge erred in several ways: by counting heads, by failing to properly apply the "later evidence" rule, by ignoring Dr. Karwat's credentials, by not treating as supportive of a diagnosis of pneumoconiosis readings that mentioned interstitial fibrosis, by neglecting to explain why he did not give equal weight to a positive reading of the March 13, 1997 film by an A reader, and by treating physicians qualified as Board-certified radiologists and B readers, and those who are only B readers, in an inconsistent manner.

These contentions are without merit. The administrative law judge did not rely solely upon the numerical superiority of the negative readings, but also considered the qualifications of the readers. Contrary to claimant's allegation of error, the administrative law judge indicated that he would give more weight to the interpretations performed by dually qualified physicians and did nothing in setting forth his findings to contradict his stated intention. Decision and Order at 5. Even assuming that the administrative law judge intended to accord equal weight to the readings proffered by dually qualified doctors and those who are only B readers, the administrative law judge's tally of the films of record would remain the same. Regarding the administrative law judge's application of the later evidence rule, error, if any, on the administrative law judge's part in referring to this principle when rendering his finding is harmless, as the administrative law judge provided a valid, alternative rationale for his finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis – that the preponderance of interpretations by highly qualified readers was negative. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

In addition, although the form on which Dr. Karwat recorded his interpretation of the September 9, 1999 film identifies him as a "radiologist," there is nothing in the record establishing that he is Board-certified in radiology or that he otherwise possesses special expertise in interpreting x-rays for pneumoconiosis. Director's Exhibit 25 at 14. Finally, the administrative law judge did not err in failing to treat interpretations in which interstitial fibrosis was diagnosed as supportive of a finding of pneumoconiosis, as these readings did not include the required ILO classification of the film as positive for pneumoconiosis and, in the majority of instances, the doctor specifically noted that the fibrosis was not consistent with coal workers' pneumoconiosis. 20 C.F.R. §§718.102, 718.202(a)(1); Director's Exhibits 26, 28, 35; Employer's Exhibit 28.

With respect to Section 718.202(a)(4), the administrative law judge considered all of the relevant medical reports of record and found that the opinions in which Drs. Paul, Houser, Prabhu, and Cohen indicated that the miner is suffering from either clinical or legal pneumoconiosis or both were entitled to little weight based upon various factors. Regarding Dr. Paul's opinion, the administrative law judge determined that it did not support a finding of pneumoconiosis because Dr. Paul stated his conclusions in equivocal terms. Decision and Order at 10; Director's Exhibit 25; Employer's Exhibits 25, 26. Claimant maintains that the administrative law judge ignored Dr. Paul's more definite testimony at his deposition. This allegation of error is without merit, as the administrative law judge's finding is rational and supported by substantial evidence. Although the administrative law judge did not explicitly refer to Dr. Paul's deposition in his Decision and Order, Dr. Paul's testimony indicated that claimant has pulmonary fibrosis which "may be related" to coal dust exposure and that "you don't know if the pulmonary fibrosis was caused by coal dust." Employer's Exhibit 26 at 24. These statements are consistent with Dr. Paul's written reports in which he indicated that "it appears" that claimant has pulmonary fibrosis and that this condition, as well as his reactive airways disease, is "probably" or "may be" related to his history of coal dust exposure. Director's Exhibit 25; Employer's Exhibit 25. We affirm, therefore, the administrative law judge's finding that Dr. Paul's opinion is entitled to little probative weight because it is equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

With respect to Dr. Houser's opinion, the administrative law judge determined that his diagnosis of clinical pneumoconiosis was not well-reasoned or well-documented. Decision and Order at 12; Claimant's Exhibit 8. Claimant asserts that the administrative law judge's finding is in error because, in contrast to employer's physicians, Dr. Houser relied on claimant's history of coal mine employment in addition to an x-ray reading. Claimant overlooks the administrative law judge's discussion of this evidence in which he stated that a certain period of coal mine employment does not tend to establish the existence of pneumoconiosis. Decision and Order at 11. The administrative law judge's reasoning accords with the Seventh Circuit's in *Sahara Coal Co. v. Fitts*, 39 F.3d 781,

783, 18 BLR 2-384, 2-387 (7th Cir. 1994) in which the court stated, "Occupational exposure is not evidence of pneumoconiosis . . . , but merely a reason to expect that evidence might be found." *See also Worhach v. Director*, OWCP, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Regarding Dr. Houser's diagnosis of legal pneumoconiosis, the administrative law judge gave it little weight because the doctor did not "state the basis of his chronic bronchitis and chronic obstructive pulmonary disease diagnoses, nor does he explain how a combination of cigarette smoking and coal dust exposure caused those ailments." Decision and Order at 12. Claimant asserts that the administrative law judge treated Dr. Houser's opinion differently than the opinions of employer's physicians because the administrative law judge did not require employer's physicians to explain why coal dust exposure was not a contributing cause of claimant's emphysema. This contention is without merit, as the administrative law judge correctly characterized Dr. Houser's opinion and he determined that employer's doctors had adequately explained why they ruled out coal dust exposure as a cause of claimant's obstructive respiratory disease. Moreover, inasmuch as claimant has the burden of affirmatively proving that he has pneumoconiosis, the administrative law judge did not err in rejecting Dr. Houser's opinion for failure to explain the data and reasoning upon which his diagnoses were based. *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18, 1-22 (1994); *see also Clark*, 12 BLR at 1-151; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-8 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988).

The administrative law judge gave little weight to Dr. Prabhu's diagnosis of pneumoconiosis because the doctor restated an x-ray interpretation and did not link claimant's hypoxemia to his coal mine employment. Decision and Order at 12; Employer's Exhibit 8. Claimant contends that Dr. Prabhu's opinion should have been given greater weight on the grounds that Dr. Prabhu performed his examination of claimant at the request of the Department of Labor (DOL) and is identified as a Board-certified internist and pulmonologist by the American Board of Medical Specialties (ABMS) and because hypoxemia is consistent with legal pneumoconiosis. These contentions are also without merit. The administrative law judge acted within his discretion in according diminished weight to Dr. Prabhu's diagnoses, as the doctor restated an x-ray interpretation and did not explain the causal connection between hypoxemia and coal dust exposure. In addition, Dr. Prabhu's credentials are not of record and the administrative law judge was not required to take judicial notice of the ABMS directory. Finally, contrary to claimant's view, the decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992), does not stand for the proposition that the opinion of the physician who performs the DOL exam is entitled to special

weight.[2] In *Railey*, the court merely referred to the report of a DOL examination prepared by a pulmonary specialist as an example of the type of evidence that it would be irrational for an administrative law judge to overlook in favor of a blanket preference for the opinion of a treating physician, who is often not a specialist. *Railey*, 972 F.2d at 182, 16 BLR at 2-126.

Regarding Dr. Cohen's diagnoses of clinical and legal pneumoconiosis, the administrative law judge determined that they were not well reasoned and well documented because Dr. Cohen relied upon positive x-ray readings, pulmonary function studies, which the administrative law judge considered not diagnostic of pneumoconiosis, claimant's recitation of symptoms, and Dr. Cohen's own interpretation of a computerized tomography (CT) scan, despite the fact that he is not a Board-certified radiologist. The administrative law judge also found that Dr. Cohen did not explain how the pulmonary function study results support his finding of pneumoconiosis. Decision and Order at 10-11; Claimant's Exhibits 13, 26. Claimant alleges that the administrative law judge erred in determining that Dr. Cohen did not explain how the pulmonary function studies of record support his diagnosis of legal pneumoconiosis and asserts that the administrative law judge applied a more stringent standard of review to Dr. Cohen's opinion than to the opinions of Drs. Renn, Repsher, Tuteur, and Fino. These contentions have merit.

Dr. Cohen set forth in detail the reasoning and documentation underlying his opinion that support his conclusion that the obstructive impairment, severe diffusion impairment, and severe gas exchange impairment revealed on claimant's pulmonary function studies and blood gas studies are related to both smoking and coal dust exposure. Claimant's Exhibit 13, 26. Dr. Cohen also cited medical studies and journal articles in support of his views and offered rebuttal of the criticisms of his opinion made by Dr. Tuteur and attempted to refute Dr. Fino's opinion regarding the link between coal dust exposure and obstructive lung disease. *Id*. The administrative law judge did not consider these aspects of Dr. Cohen's opinion. In addition, as claimant contends, the administrative law judge stated summarily that the opinions of the physicians who found that claimant does not have pneumoconiosis were supported by the nonqualifying pulmonary function studies, while dismissing Dr. Cohen's reference to these same tests because the administrative law judge deemed them irrelevant to the diagnosis of

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's last year of qualifying coal mine employment occurred in Illinois. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis.[3] In addition, the administrative law judge indicated that Dr. Cohen's opinion was entitled to little weight because he relied upon claimant's recitation of symptoms. *See* Decision and Order at 10-11. However, in neither of his reports did Dr. Cohen cite claimant's symptoms as providing support for his diagnoses. *See* Claimant's Exhibits 13, 26.

We must, therefore, vacate the administrative law judge's findings with respect to Dr. Cohen's diagnosis of legal pneumoconiosis and remand this case to the administrative law judge for reconsideration of Dr. Cohen's opinion along with the opinions in which Drs. Renn, Repsher, Dahhan, Tuteur, and Fino stated that claimant does not have pneumoconiosis. *Wright v. Director, OWCP*, 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). The administrative law judge must determine whether each opinion is reasoned and documented on the issues of both legal and clinical pneumoconiosis, and must ascertain whether the physicians' diagnoses accord with the definitions of pneumoconiosis contained in the amended regulations.[4] *See* 20 C.F.R. §718.201(a); *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004)*; Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge is also required by the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), to set forth his findings in detail, including the rationale underlying them. Finally, the administrative law judge must apply the same level of scrutiny to all of the opinions and must resolve conflicts between the physicians on the key issue of whether coal dust exposure is a contributing cause of claimant's obstructive lung disease consistent with the definition of legal pneumoconiosis set forth in Section 718.201(a)(2).

---

[3] The administrative law judge's reliance on *Burke v. Director, OWCP*, 3 BLR 1-410 (1981) for this principle was misplaced. *Burke* involved a Part 727 claim in which the claimant benefited from a presumption that he was totally disabled due to pneumoconiosis. The Board held that the employer could not rebut the presumption by pointing to non-qualifying pulmonary function studies as proof that the claimant did not have pneumoconiosis, because such tests alone were not diagnostic of the absence of pneumoconiosis. *Burke*, 3 BLR at 1-414. By contrast, the question in this case is whether claimant has demonstrated by a reasoned medical opinion that he suffers from pneumoconiosis as defined in 20 C.F.R. §718.201. The regulations require a physician to base any such diagnosis on "objective medical evidence such as . . . pulmonary function studies . . . ." 20 C.F.R. §718.202(a)(4).

[4] Pulmonary function studies that reveal the presence of an impairment can be relevant to the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2).

With respect to the administrative law judge's consideration of the CT scan evidence, claimant alleges that the administrative law judge erred in summarily accepting the negative CT scan readings by Drs. Fino and Tuteur while discrediting Dr. Cohen's positive reading when all three physicians are Board-certified pulmonologists and B readers. Although the administrative law judge did not explicitly render a finding as to whether the CT evidence, as a whole, was negative or positive for pneumoconiosis, his decision to accord little weight to Dr. Cohen's positive interpretation of the CT scan dated September 9, 1999 does not constitute error requiring remand. Decision and Order at 11; Claimant's Exhibit 13. Even if the administrative law judge fully credited Dr. Cohen's positive reading, the remaining CT scan interpretations, including one by Dr. Wiot, who is a Board-certified radiologist and B reader, were negative. Director's Exhibits 30, 38; Employer's Exhibits 1, 2. Thus, the administrative law judge's determination that Dr. Cohen's positive reading is unpersuasive is rational and supported by substantial evidence and we decline to disturb it. *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

We will now turn to the issue of total disability under Section 718.204(b)(2)(iv). The administrative law judge considered the relevant opinions and determined that the opinions in which Drs. Repsher, Renn, and Tuteur stated that claimant does not have a totally disabling respiratory or pulmonary impairment outweighed the contrary opinions of Drs. Prabhu, Cohen, Houser, and Fino. Decision and Order at 17. Claimant alleges that the administrative law judge erred in discrediting the opinions in which the physicians found him to be suffering from a totally disabling pulmonary impairment.

Regarding the opinion of Dr. Prabhu, who examined claimant at DOL's request on February 18, 1999, the administrative law judge stated that his diagnosis of totally disabling resting hypoxemia was refuted, in part, by the presence in the record of subsequent, nonqualifying blood gas studies. Decision and Order at 15. Claimant contends that the administrative law judge erred in discrediting Dr. Prabhu's opinion. We disagree. In this instance, the administrative law judge rationally determined that the credibility of Dr. Prabhu's diagnosis of a totally disabling impairment was undermined by the presence in the record of subsequent resting blood gas studies which were interpreted as normal by the administering physicians. *Carson*, 19 BLR at 1-22; *see also Clark*, 12 BLR at 1-151; *McMath*, 12 BLR at 1-8; *Dillon*, 11 BLR at 1-114.

Claimant argues that the administrative law judge erred in crediting Dr. Repsher's determination that he is not totally disabled, as Dr. Repsher did not explain his conclusion and was not aware of the nature of claimant's last coal mine employment. Dr. Repsher diagnosed mild, clinically insignificant obstructive abnormalities and stated that they are not totally disabling. Employer's Exhibits 19, 29. Dr. Repsher further explained that the

objective tests, as a whole, supported a finding of mild impairment. However, the administrative law judge focused upon whether the objective studies of record were qualifying and, therefore, did not consider whether Dr. Repsher's diagnosis of a mild impairment could support a finding of total disability in light of the exertional requirements of claimant's last job as a roof bolter.[5] Dr. Repsher reported incorrectly that claimant was last employed as a welder on the surface and made no comparison of claimant's job duties to claimant's functional capacity. *Id.* The Seventh Circuit held in *Killman v. Director, OWCP*, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005), that:

> There is no hard and fast requirement that an ALJ make an explicit finding about the claimants' exertional requirements, but . . . an ALJ may not reasonably rely on medical opinions that are predicated on a misunderstanding of the claimant's job requirements.

415 F.3d at 719, 23 BLR at 2-258-2-259. We must vacate, therefore, the administrative law judge's findings regarding Dr. Repsher's opinion. On remand, the administrative law judge must reconsider whether Dr. Repsher's opinion supports a finding of total disability under Section 718.204(b)(2)(iv). In so doing, the administrative law judge must compare the exertional requirements of claimant's usual coal mine employment with a medical opinion regarding claimant's work capability if the physician's opinion is not stated in terms that accord with Section 718.204(b)(2)(iv). *Id.*; *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990).

Claimant further contends that the administrative law judge mischaracterized Dr. Renn's opinion when stating that Dr. Renn found that claimant is not totally disabled. Claimant is correct. Dr. Renn diagnosed a mild obstructive impairment and further stated in his report dated June 19, 2001, that the blood gas study dated August 8, 2000 suggested that claimant has totally disabling exercise hypoxemia. Employer's Exhibit 9. Dr. Renn indicated in a subsequent report, dated June 19, 2002, that because a blood gas study performed on October 19, 2000 had normal post-exercise values, the condition that caused the hypoxemia was transient. Employer's Exhibit 11. At his deposition, however, Dr. Renn acknowledged that the significance of the October 19, 2000 exercise

---

[5] Claimant testified at the hearing that he was required to repeatedly lift bolts, plates, and boards which had a total weight of approximately twenty pounds. Hearing Transcript at 14. Claimant reported to Dr. Cohen that he had to lift and carry bundles of bolts weighing twenty pounds and boards weighing thirty pounds approximately thirty feet. He also indicated that he was required to shovel coal spills approximately once a week and that he had to lift a fifty-pound shovel once or twice daily. Claimant's Exhibit 13.

study could not be ascertained, as claimant's heart rate and respiration were not recorded. Employer's Exhibit 34 at 35-36, 69-70. The administrative law judge did not discuss this aspect of Dr. Renn's opinion. In addition, the administrative law judge did not consider whether Dr. Renn was familiar with claimant's last job in the mines. Dr. Renn's description of claimant's employment history is somewhat imprecise, but appears to indicate incorrectly that claimant last worked as a welder on the surface. Employer's Exhibit 9. Because the administrative law judge did not adequately address all aspects of Dr. Renn's opinion, we vacate the administrative law judge's decision to credit Dr. Renn's statement that claimant is not totally disabled. *Anderson*, 12 BLR at 1-113 (1989); *Worley*, 12 BLR at 1-23. The administrative law judge must reconsider Dr. Renn's opinion on remand.

Concerning the administrative law judge's treatment of the opinion in which Dr. Tuteur diagnosed a mild obstructive impairment that is not totally disabling, claimant alleges that the administrative law judge erred in giving this opinion "substantial weight," Decision and Order at 17, as Dr. Tuteur was not aware of the nature of claimant's usual coal mine employment. In a report dated March 12, 2001, Dr. Tuteur indicated that claimant had worked as a welder, a repairman, and roof bolter, but did not identify which job claimant last performed on a regular basis. Employer's Exhibit 16. The administrative did not address these factors when considering Dr. Tuteur's opinion. We vacate, therefore, the administrative law judge's finding that Dr. Tuteur's opinion supports a finding that claimant is not totally disabled and instruct the administrative law judge to reconsider this opinion if he finds that claimant has established the existence of pneumoconiosis on remand. *Anderson*, 12 BLR at 1-113 (1989); *Worley*, 12 BLR at 1-23.

The administrative law judge discredited Dr. Cohen's diagnosis of a totally disabling pulmonary impairment on the grounds that Dr. Cohen did not explain how the "consistently nonqualifying" pulmonary function studies supported his diagnosis of a moderate obstructive impairment and did not discuss the nonqualifying BGSs of record. Decision and Order at 14. The administrative law judge also noted that Dr. Cohen did not "incorporate" claimant's lengthy smoking history into his disability findings. *Id*. Claimant contends that the administrative law judge erred in focusing upon whether the objective studies of record produced qualifying values when weighing Dr. Cohen's opinion on the issue of total disability. This contention has merit, as a diagnosis of a mild impairment can support a finding of total disability depending upon the exertional requirements of a miner's last job. *Killman*, 415 F.3d at 719, 23 BLR at 2-258-2-259; *Poole*, 897 F.2d at 894, 13 BLR at 2-356. In addition, until the administrative law judge resolves the conflict between the exercise blood gas study obtained by Dr. Cohen and the most recent exercise blood gas study obtained by Dr. Paul, and whether the other pulmonary function studies of record support the diagnosis of a diffusion impairment notwithstanding nonqualifying MVV, FEV1, and FVC values, the extent to which Dr.

Cohen's total disability diagnosis is documented cannot be determined. Finally, the issue of whether Dr. Cohen adequately addressed claimant's smoking history is not relevant to the inquiry at Section 718.204(b)(2)(iv). We vacate, therefore, the administrative law judge's findings regarding Dr. Cohen's opinion. The administrative law judge must reconsider this opinion on remand if he reaches the issue of total disability.

With respect to Dr. Houser's opinion, the administrative law judge determined that it did not contain a diagnosis of total disability, as Dr. Houser merely advised claimant to avoid further coal dust exposure. Decision and Order at 15. Claimant maintains that the administrative law judge mischaracterized Dr. Houser's opinion. This is correct. Although Dr. Houser did not state that claimant is totally disabled, he diagnosed a mild impairment, which the administrative law judge did not compare to the exertional requirements of claimant's usual coal mine work. Claimant's Exhibit 8. Thus, we vacate the administrative law judge's finding regarding Dr. Houser's opinion and instruct the administrative law judge to reconsider it on remand if he reaches the issue of total disability. *Killman*, 415 F.3d at 719, 23 BLR at 2-258-2-259; *Poole*, 897 F.2d at 894, 13 BLR at 2-356.

The administrative law judge gave little weight to Dr. Fino's diagnosis of total disability due to an oxygen transfer abnormality and severe diffusion impairment revealed on the pulmonary function study and blood gas study administered by Dr. Cohen, because Dr. Fino did not explain how the more recent objective studies of record supported his diagnosis. Decision and Order at 17; Employer's Exhibits 2, 18. Claimant argues that the administrative law judge erred in neglecting to compare Dr. Fino's diagnosis of a mild obstructive impairment to the exertional requirements of claimant's job as a roof bolter and in finding that his diagnosis of two distinct totally disabling impairments is inadequately documented.

These contentions have merit. The administrative law judge did not assess whether the mild obstructive impairment diagnosed by Dr. Fino could be totally disabling in light of the nature of claimant's work as a roof bolter. *Killman*, 415 F.3d at 719, 23 BLR at 2-258-2-259; *Poole*, 897 F.2d at 894, 13 BLR at 2-356. Dr. Fino noted that several physicians had reported that this was claimant's last coal mine job, but he did not describe the level of exertion that this job required. Employer's Exhibits 2, 18. In addition, absent a resolution of the conflict between the physicians regarding the significance of the most recent exercise blood gas study obtained by Dr. Paul, and whether the other pulmonary function studies of record support the diagnosis of a diffusion impairment, the extent to which Dr. Fino's total disability diagnosis is documented cannot be determined. Thus, we vacate the administrative law judge's findings regarding Dr. Fino's opinion. The administrative law judge must reconsider Dr. Fino's opinion on remand if he reaches the issue of total disability.

If the administrative law judge determines on remand that claimant has established the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(b), he must then consider whether claimant has established that pneumoconiosis is a contributing cause of his total disability pursuant to 20 C.F.R. §718.204(c) in accordance with the Seventh Circuit's decision in *Shores*. *Shores*, 358 F.3d 486, 23 BLR 2-18.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge