BRB No. 03-0520 BLA

MILDRED M. KIRBY (Widow of ROBERT A. KIRBY)	)	
Claimant-Respondent	)	
v.	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 05/19/2004
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling Gilbert & Davis), Chicago, Illinois, for claimant.

Dorothea J. Clark, Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

BEFORE: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2000-BLA-0309) of Administrative Law Judge Rudolf L. Jansen rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Based on the filing date of April 23, 1999, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R Part 718. Director's Exhibit 2. Based on the parties' stipulation, and his review of the record, the administrative law judge found that the miner had twenty years of coal mine employment. The administrative law judge also found that the existence of clinical pneumoconiosis had been established in the miner's case, and had not been challenged by

employer.[1] The administrative law judge further found the evidence of record in the survivor's claim established the existence of legal pneumoconiosis, that the miner's clinical and legal pneumoconiosis arose out of coal mine employment, and that the miner's death was hastened by his clinical and legal pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established that the miner's chronic obstructive pulmonary disease (copd) was due to both coal mine employment and smoking and therefore erred in finding that the miner's death was hastened by pneumoconiosis. Claimant responds, asserting that employer is merely requesting a reweighing of the evidence which the Board is not empowered to do and urges affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this case.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement in a survivor's claim, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). In a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Zeigler Coal Company v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-582 (7th

[1] The miner was awarded Black Lung benefits on August 7, 1996 pursuant to a living miner's claim filed on March 28, 1999. He died on March 28, 1999 and thereafter claimant timely filed the instant survivor's claim.

Cir. 2002); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992).[2]

At the outset, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Oesterling and Naeye who explained that the autopsy evidence established that the miner's minimal amount of simple coal workers' pneumoconiosis was too mild to have had any effect, either in causing or hastening death. We need not entertain this argument, however, since the administrative law judge also found that legal pneumoconiosis caused the miner's death. Thus, whether or not simple coal worker's pneumoconiosis was too mild to have hastened death would not affect the administrative law judge's finding that the miner's death was hastened by legal pneumoconiosis, *i.e.*, emphysema and chronic bronchitis which arose out of coal mine employment. *See Underhill v. Peabody Coal Co.*, 687 F.2d 217, 223 n.10, 4 BLR 2-142, 2-150 n.10 (7th Cir. 1982); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer also contends that the administrative law judge erred in finding that the miner's obstructive lung disease (primarily emphysema) was related in part, to coal mine employment, rather than related solely to the miner's extensive history of cigarette smoking. Specifically, employer argues that the administrative law judge erred in "mechanically" discrediting the assessments of Drs. Oesterling, Naeye, Tuteur, Renn, Fino, Dahhan and Repsher, who opined that the miner's death was due to smoking, not coal mine employment, because their opinions regarding the presence of legal pneumoconiosis, *i.e.*, emphysema arising out of coal mine employment, conflicted with the scientific evidence cited in the regulations promulgated by the Department of Labor (DOL). Instead, employer contends that these opinions' assessment of the cause of the miner's legal pneumoconiosis did not conflict with the regulations, but were well-reasoned and well documented explanations as to why the miner's death was solely attributable to his 100 pack year smoking history. Employer contends that the administrative law judge's analysis of the evidence created an unsupportable presumption that all chronic obstructive lung disease is due to coal mine employment, when it was claimant's burden to prove that his obstructive lung disease was due to coal mine employment. Employer also contends that the administrative law judge failed to consider the credentials of employer's physicians.

Section 718.202(a) defines pneumoconiosis as encompassing both clinical and legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2). Legal pneumoconiosis is any chronic dust disease of the lung and its sequelae, including respiratory and pulmonary

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

impairments, arising out of coal mine employment. 20 C.F.R. §718.201(a). Legal pneumoconiosis is further defined to include any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 30 U.S.C. §902(b); 20 C.F.R. §718.202(a)(2); *Underhill*, 687 F.2d 217, 223 n.10, 4 BLR 2-142, 2-150 n.10. The comments to the regulations further define chronic obstructive pulmonary disease to include chronic bronchitis, emphysema and asthma; the comments also include a discussion of the literature and background material which support DOL's inclusion of emphysema, as well as bronchitis and asthma, within the definition of legal pneumoconiosis. 65 Fed. Reg. 79939-41, 79969-72, 79941-42 (Dec. 20, 2000).

In considering the medical opinions, the administrative law judge did not ignore the fact that physicians opined that emphysema was due solely to smoking. Instead, the administrative law judge addressed each physician's opinion and discussed why he found it credible or not credible. Decision and Order at 19-23. The administrative law judge also addressed the credentials of all the physicians of record. Decision and Order at 6-14. The administrative law judge ultimately accorded less weight to the opinions of Drs. Naeye, Tuteur, Renn, Fino, Dahhan and Oesterling because he found them inconsistent with the position of DOL, that a causal relationship may exist between coal mine dust exposure and emphysema. This was rational. 65 Fed. Reg. 79939-42-79969-72 (Dec. 20, 2000); *see e.g.*, *Midland Coal Co. v. Director, OWCP [Shores]*, 2004 WL 302390 (7th Cir., Feb. 18, 2004); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). He also accorded little weight to the opinions of Drs. Caffrey and Fino because he found them to be vague and equivocal, and he accorded little weight to the opinion of Dr. Guariglia because he found that it was not well-documented. This was rational. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We address employer's specific argument concerning each doctor's opinion below.

Specifically, employer contends that the administrative law judge erred in discrediting Dr. Oesterling's opinion without any discussion of Dr. Oesterling's conclusions. Employer contends that the administrative law judge erred in discrediting Dr. Oesterling's opinion "as divergent from the studies accepted by the Department of Labor," Decision and Order at 21; Employer's Brief at 15. Employer asserts that Dr. Oesterling discussed only panlobular emphysema and that he did not discuss centrilobular emphysema, the specific type of emphysema contemplated by the regulations. The record, however, belies this assertion. In his report, Dr. Oesterling stated:

> The employment records indicate that this gentleman had retired from the mining industry in January 1992, the post mortem exam having been conducted in 1999. Obviously this is 7 years following his retirement from the mines, and any component of bronchitis due to occupational

> exposure would have long since subsided. Therefore another agent must be considered in the evolution of the this gentleman's chronic small airway disease and the resultant centrilobular and panlobular emphysema.

Employer's Exhibit 19 at 4.

This statement reflects both that Dr. Oesterling diagnosed centrilobular emphysema and that he refused to consider coal dust exposure as a cause since that exposure had ceased seven years prior to the diagnosis. The administrative law judge properly discredited Dr. Oesterling's opinion because it was premised on a scientific view rejected by DOL. *See* 65 Fed. Reg. 79970-71 (Dec. 20, 2000)(scientific studies have shown that obstructive forms of pneumoconiosis can be progressive, even after retirement). It was rational for the administrative law judge to discount a medical opinion because it conflicted with accepted scientific literature identified by DOL in the comments to the regulations. *See Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 898, 22 BLR 2-409, 426-427 (7th Cir. 2002); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

Employer also argues that the administrative law judge erred in disposing of Dr. Naeye's assessment as unreasoned and conflicting with studies accepted by DOL because he did not state that obstructive lung disease can never be caused by the inhalation of coal mine dust. The administrative law judge found, however, that Dr. Naeye had stated that his review of relevant studies indicated that "mine dust has no role or only an insignificant role in the genesis of centrilobular emphysema…in US miners of bituminous coal." Director's Exhibit 18. The administrative law judge, therefore, reasonably concluded that Dr. Naeye's opinion was in conflict with the comments to the regulations which state that coal dust exposure can lead to the development of centrilobular emphysema, and he accorded the opinion little weight. 65 Fed. Reg. 79941-79942 (Dec. 20, 2000). *See Shores*, 2004 WL 302390; *Summers*, 272 F.3d 473, 22 BLR 2-265.

In addition, employer argues that the administrative law judge erred in discrediting Dr. Tuteur's opinion as divergent from the view of DOL regarding the relationship between emphysema and coal mine employment since Dr. Tuteur conceded that it was possible for coal mine dust inhalation to cause both panlobular and centrilobular emphysema and he did not state that coal mine dust can never cause centrilobular emphysema. Again, employer misreads the administrative law judge's decision. The administrative law judge accorded little weight to Dr. Tuteur's report because the doctor opined that panlobular or centrilobular emphysema could be present only when there was progressive massive fibrosis, *i.e.*, complicated pneumoconiosis, not mild coal workers' pneumoconiosis, Employer's Exhibit 21 at 23; this view is disputed by the studies accepted by DOL which found that simple pneumoconiosis can cause centrilobular emphysema. The administrative law judge, therefore, rationally accorded little weight to

the opinion of Dr. Tuteur because it diverged from the premise accepted by DOL. 65 Fed. Reg. 79941-79942 (Dec. 20, 2000); *see Shores*, 2004 WL 302390; *Summers*, 272 F.3d 473, 22 BLR 2-265.

Likewise, employer contends that it was error for the administrative law judge to discredit Dr. Renn's opinion since he acknowledged that coal dust can cause obstructive lung disease, but nonetheless found that, in this miner's case, the centrilobular emphysema was caused by smoking tobacco, not exposure to coal dust. The language in Dr. Renn's opinion, however, supports the administrative law judge's according little weight to the opinion, and we cannot substitute our own inferences. *Anderson*, 12 BLR at 1-113. As the administrative law judge found, Dr. Renn was inconsistent with the position of DOL when he stated: that coal mine dust exposure caused focal emphysema, but not centrilobular or panlobular emphysema; that any industrial bronchitis caused by coal dust exposure would disappear six months after the cessation of coal mine employment; and that if the miner's bronchitis continued after his retirement, it would not have been caused by coal mine employment. *See* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79939-41, 79969-72 (Dec. 20, 2000); *Shores*, 2004 WL 302390.

Additionally, employer contends that the administrative law judge erred in according little weight to Dr. Fino's assessment because he found it to be equivocal. The administrative law judge found Dr. Fino to be equivocal because Dr. Fino opined that while it was "possible" for a mild amount of pneumoconiosis to cause an impairment, he then definitively stated that the amount of coal workers' pneumoconiosis in the miner's case was too mild to have caused emphysema or chronic obstructive pulmonary disease. Further, employer contends that the administrative law judge erred in discrediting Dr. Fino's assessment as contrary to the position of DOL since Dr. Fino had recognized that coal mine dust inhalation could cause both emphysema and chronic bronchitis.

In according little weight to Dr. Fino's opinion, the administrative law judge permissibly found his reasoning equivocal and permissibly assigned his opinion diminished weight because the doctor did not explain how he could state that it was possible that pneumoconiosis could cause a breathing impairment even when undetectable by x-ray, but also state that the miner's breathing impairment was not pneumoconiosis because pneumoconiosis is only diagnosable at autopsy and could not, therefore, have caused significant obstruction. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Justice*, 11 BLR 1-91. Likewise, the administrative law judge permissibly accorded diminished weight to Dr. Fino's opinion because it was not in keeping with the studies relied on by DOL. *See* 65 Fed. Reg. 79936-79942, 79968-72 (Dec. 20, 2000); *Summers*, 272 F.3d 473, 22 BLR 2-265.

Employer also contends that the administrative law judge erred in according little weight to Dr. Dahhan's opinion because it diverged from DOL's position since Dr.

Dahhan never stated that centrilobular emphysema could not be caused by the inhalation of coal mine dust or that obstructive disorders could not be caused by coal dust exposure. Employer's Brief 21. Employer has misstated the administrative law judge's grounds for discrediting Dr. Dahhan's opinion. As the administrative law judge found, Dr. Dahhan opined that coal dust inhalation causes only focal emphysema, not the centrilobular and panlobular emphysema the miner had, and the administrative law judge correctly observed that this view is at odds with scientific views adopted by DOL as is Dr. Dahhan's opinion that the miner's chronic bronchitis and emphysema were not due to coal dust exposure because his coal mine employment ended in 1992. Decision and Order at 21; Employer's Exhibits 8, 13; *see* 65 Fed. Reg. 79939-79942, 79968-72 (Dec. 20, 2000); *Shores*, 2004 WL 302390.

Similarly, employer contends that the administrative law judge erred in according little weight to Dr. Repsher's assessment that coal dust exposure can cause only focal emphysema not centrilobular and panlobular as rejected by the studies relied by DOL. For the same reasons the administrative law judge gave regarding the other doctors opinions, however, the administrative law judge also properly accorded little weight to Dr. Repsher's opinion. *Id*.

Employer also contends that the administrative law judge erred in discrediting the opinion of Dr. Caffrey as vague. Dr. Caffrey had opined that the miner's emphysema and chronic bronchitis were due to the miner's smoking history, but the doctor did not explicitly state that coal dust exposure made no contribution to the miner's emphysema or chronic bronchitis. Employer contends that Dr. Caffrey's opinion was not vague because his statement that emphysema and chronic bronchitis were "definitely" due to cigarette smoking encompasses a finding that they were not due to coal mine dust exposure. As the administrative law judge found, however, Dr. Caffrey never opined that coal dust exposure made no contribution to the miner's emphysema or chronic bronchitis; he stated only that it would not by itself have caused a pulmonary disability. Since that is not the question in determining whether legal pneumoconiosis contributed to disability and ultimately hastened death, the administrative law judge permissibly accorded little weight to Dr. Caffrey's opinion. *See Stein*, 294 F.3d 885, 22 BLR 2-409; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Summers*, 272 F.3d 473, 22 BLR 2-265; *Pancake v. Amax Coal Co.*, 858 F.2d 1250 (7th Cir. 1988); *Lucostic*, 8 BLR 1-46. Likewise, the administrative law judge accorded little weight to Dr. Caffrey's finding that minimal coal workers' pneumoconiosis (clinical pneumoconiosis) would not cause disabling emphysema or chronic bronchitis as it was inconsistent with DOL findings showing that coal dust exposure itself can lead to emphysema and does not require that there be a showing of pneumoconiosis. *See* 65 Fed. Reg. 79941-79942 (Dec. 20, 2000).

Finally, employer contends that the administrative law judge erred in crediting the opinions of Drs. Green, Cohen, Heidingsfelder, Hinkamp and Koenig. The administrative law judge concluded that only the opinions of Drs. Cohen, Heidingsfelder, Hinkamp and Koenig were entitled to full weight because they were well documented and reasoned; the administrative law judge found the opinion of Dr. Green was entitled to great weight due to his superior qualifications as an expert in the field of occupational lung disease. The administrative law judge properly credited the opinion of Dr. Heindingsfelder that the miner's chronic obstructive pulmonary disease was due to a combination of coal dust exposure and cigarette smoking, the effects of which are not always separable, because it is not necessary that the effects be apportioned for the administrative law judge to credit that evidence as showing that chronic obstructive pulmonary disease was due in part to coal mine employment. *Stein*, 294 F.3d 885, 22 BLR 2-409; *McCandless*, 255 F.3d 465, 22 BLR 2-311; *Summers*, 272 F.3d 473, 22 BLR 2-265; *Pancake*, 858 F.2d 1250.

Regarding Dr. Green's opinion, employer argues that the administrative law judge erred in finding it well-reasoned and documented because: 1) the studies he relied on in relating coal mine employment to emphysema were performed on underground miners and claimant's husband was employed for only two years in underground mining, the remaining eighteen years he was employed in surface mining and studies have shown that surface miners have considerably less dust exposure than underground miners; 2) the administrative law judge accorded Dr. Green's opinion greater weight based on his credentials, without discussing the credentials of the other physicians in his analysis of the evidence.

In according great weight to the opinion of Dr. Green that smoking and coal dust exposure both contributed to the miner's emphysema and chronic bronchitis, the administrative law judge found that Dr. Green's opinion was based on an autopsy report, review of the record, and review of research and studies which he and other experts performed. The fact that the studies in question dealt mostly with the effects of coal dust on underground miners, not surface miners, did not preclude Dr. Green's consideration of this research to find that the miner's chronic obstructive pulmonary disease was caused in part by coal mine employment. Nor did the administrative law judge err in according greater weight to the opinion of Dr. Green based on his superior credentials. The administrative law judge's decision reflects the credentials of each of the physicians of record as well as the administrative law judge's reasons for finding Dr. Green's credentials exceptional:

> Dr. Green has devoted his professional career to occupational lung disease, with emphasis on pneumoconiosis suffered by coal miners. He is the author of a textbook on occupational lung disease as well as numerous articles addressing pneumoconiosis from 1979 until the present. Several of

> Dr. Green's studies have been accepted by the Department of Labor. 65 Fed. Reg. 79939-79942 (2000).

Decision and Order at 22; *Anderson*, 12 BLR at 1-113; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). We reject employer's contention that the administrative law judge should have given Dr. Naeye's opinion the same weight as Dr. Green's. While the administrative law judge was aware of Dr. Naeye's credentials, Decision and Order at 8, he found Dr. Green's credentials to be superior; this was within his discretion as fact-finder. *Anderson*, 12 BLR at 1-113; *Dillon*, 11 BLR at 1-114.

Employer next argues that the administrative law judge did not adequately explain why he credited Dr. Cohen's opinion. Employer contends that while Dr. Cohen opines that coal mine dust exposure can cause obstructive lung disease, Dr. Cohen fails to explain why the miner's exposure to coal mine dust caused him to develop his lung disease. The administrative law judge credited Dr. Cohen's opinion that the miner's emphysema and chronic bronchitis were caused by both coal mine employment and smoking, based on Dr. Cohen's review of the medical evidence of record and citation to several published studies. Additionally, the administrative law judge found Dr. Cohen's opinion entitled to great weight based on his substantial experience in pulmonary medicine and concentration on pneumoconiosis. Decision and Order at 22. This was reasonable. *See Stein*, 294 F.3d 885, 22 BLR 2-409; *McCandless*, 255 F.3d 465, 22 BLR 2-311; *Summers*, 272 F.3d 473, 22 BLR 2-265; *Pancake*, 858 F.2d 1250.

Employer also contends that the administrative law judge failed to provide an adequate rationale for crediting the opinion of Dr. Hinkamp because the doctor failed to explain why he concluded that chronic obstructive pulmonary disease was due to both occupational coal dust exposure and tobacco abuse. Contrary to employer's argument, Dr. Hinkamp did not rely on the miner's history of coal mine dust exposure alone to find that claimant's chronic obstructive pulmonary disease was due to both coal mine employment and cigarette smoking. As the administrative law judge noted, Dr. Hinkamp considered, in addition to the miner's history of coal mine employment, his history of cigarette smoking, physical findings, and other medical records at arriving at his diagnosis. The administrative law judge, therefore, rationally credited the opinion of Dr. Hinkamp, and employer's argument is no more than a request that we reweigh the evidence which we are not allowed to do. *See Anderson*, 12 BLR at 1-113.

Likewise, we reject employer's argument that the administrative law judge failed to provide a rationale for crediting Dr. Koenig's opinion. The administrative law judge stated that he found Dr. Koenig's opinion was based on the medical evidence of record as well as on the miner's coal mine employment and smoking histories, and studies discussing the relationship between coal mine employment and emphysema. Thus, the administrative law judge credited the medical opinions finding that the miner's

emphysema and chronic bronchitis were caused by coal dust exposure and that these conditions hastened the miner's death. This was reasonable. *Villain*, 312 F.3d 332, 22 BLR 2-582; *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994); *Railey*, 972 F.2d 178, 16 BLR 2-121; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, 12 BLR at 1-113. Employer's appeal constitutes no more than a request to reweigh the evidence which the Board is not empowered to do. *Summers*, 14 F.3d at 1225, 18 BLR at 2-113; *Anderson*, 12 BLR at 1-113

Finally, employer argues that the administrative law judge abused his discretion in granting claimant's motion to strike the opinion of Dr. Jeffrey Kahn. February 24, 2003 Order Striking Evidence. Employer contends that the administrative law judge erred in finding Dr. Kahn's opinion to be in violation of the twenty-day rule, 20 C.F.R. §725.456, inasmuch as it was submitted as soon as it was discovered and that the administrative law judge erred in striking it as cumulative evidence. We disagree.

The administrative law judge acted within his discretion in striking Dr. Kahn's opinion. Employer's mere assertion that Dr. Kahn's report was submitted as soon as it was discovered by employer is insufficient to establish the necessary "good cause" for the administrative law judge to admit the opinion. Nor has employer shown how the administrative law judge has abused his discretion in striking it. Accordingly, the administrative law judge properly struck the opinion as violative of the twenty-day rule, 20 C.F.R. §725.456; *see Clark*, 12 BLR 1-149; *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985); *Farber v. Island Creek Coal Co.*, 7 BLR 1-428, 1-429 (1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); *Conn v. White Deer Coal Co.*, 6 BLR 1-979 (1984); *Adams v. Island Creek Coal Co.*, 6 BLR 1-677 (1983); *see also Jennings v. Brown Badgett, Inc.*, 9 BLR 1-94 (1986), *rev'd on other grounds sub nom. Brown Badgett Inc. v. Jennings*, 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988). Additionally, the administrative law judge properly struck the opinion as cumulative. Dr. Kahn merely stated that claimant had mild to moderate quantities of coal dust in his lungs and the doctor found significant emphysema, as did several other physicians, who addressed the quantity of coal dust in the miner's lungs. Employer has failed to demonstrate that the administrative law judge erred in striking Dr. Kahn's opinion as cumulative evidence. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge