U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0021 BLA

CANDITA GOODE (o/b/o THE ESTATE OF BRUCE E. GOODE)	)	
Claimant-Respondent	)	
v.	)	
AMERICAN ENERGY, LLC	)	**NOT-PUBLISHED**
and	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 02/25/2021
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Petition for Modification in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.[1]

[1] Claimant is the widow of the Miner, who died on November 26, 2017. She is pursuing the Miner's claim on his behalf. Hearing Transcript at 4.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Cynthia Liao (Elena S. Goldstein, Deputy Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry S. Merck's Decision and Order Granting Petition for Modification in a Subsequent Claim (2018-BLA-05019) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves an initial miner's claim filed on June 11, 2013.[2]

In a September 23, 2016 Decision and Order Denial of Benefits, Administrative Law Judge Daniel F. Solomon found the Miner established total disability but not pneumoconiosis. The Miner timely requested modification and the case was assigned to Judge Merck (the administrative law judge), whose decision is the subject of this appeal.

The administrative law judge credited the Miner with 12.61 years of coal mine employment[3] and accepted Employer's stipulation that the Miner had clinical pneumoconiosis[4] arising out of coal mine employment and was totally disabled. 20 C.F.R.

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[2] Judge Merck mistakenly captioned this case as a subsequent claim. Employer's Brief at 3 n.2.

[3] Employer stipulated to 12.61 years of coal mine employment. Because Claimant concedes the Miner had fewer than fifteen years of coal mine employment, Hearing Transcript at 12, she is unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

§§718.202(a), 718.203, 718.204(b)(2); Employer's Closing Argument Brief at 3. The administrative law judge further found Claimant established the existence of legal pneumoconiosis,[5] total disability due to both clinical and legal pneumoconiosis, and modification based on a change in conditions since the prior denial. 20 C.F.R. §§718.202(a)(4), 718.204(c); 725.310. Accordingly, he awarded benefits.

On appeal, Employer argues that the administrative law judge erred in conflating the issues of legal pneumoconiosis and disability causation, and in crediting Dr. Perper over its medical experts. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), asserts that if the Benefits Review Board affirms the administrative law judge's finding that the Miner had legal pneumoconiosis, it may also affirm the administrative law judge's finding that legal pneumoconiosis substantially contributed to the Miner's respiratory disability.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant to establish these elements when certain conditions are met, but failure to establish any one precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Employer challenges the administrative law judge's findings on legal pneumoconiosis and disability causation.

Legal Pneumoconiosis

In order to establish legal pneumoconiosis, Claimant must prove the Miner had a "chronic pulmonary disease or respiratory or pulmonary impairment significantly related

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6] Because the Miner's last coal mine employment occurred in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 35 at 5.

to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The administrative law judge considered seven medical opinions. Decision and Order at 14-17. Drs. Cordasco, Johnson, Copley, and Perper diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, which they attributed to both coal mine dust exposure and cigarette smoking. Director's Exhibit 9; Claimant's Exhibits 4. 5, 14. Drs. Fino, Sargent, and McSharry also diagnosed COPD/emphysema but attributed it solely to cigarette smoking. Employer's Exhibits 1, 9. 12, 22-24. The administrative law judge found Dr. Perper's opinion reasoned and documented and entitled to the most weight.[7] Decision and Order at 20.

Smoking History

Employer first contends the administrative law judge erred in concluding the Miner had a fifty-seven pack-year smoking history, which affected his weighing of Dr. Johnson's and Dr. Copley's diagnoses of legal pneumoconiosis. Employer's Brief at 7. While the administrative law judge referenced multiple documents to support his determination, Employer alleges he erred by not specifically addressing treatment records indicating the Miner may have had a smoking history that ranged from sixty to eighty pack-years. Employer's Brief at 10, *citing* Director's Exhibits 10, 11, Claimant's Exhibits 6, 10, 12, 13; Employer's Exhibit 14.

The administrative law judge, however, noted the conflict in the evidence, the smoking histories all seven physicians in the record relied on, and also indicated he had considered the Miner's treatment records, which include the exhibits Employer identifies. Decision and Order at 4. The administrative law judge did not ignore that some evidence suggests the Miner may have had a smoking history of up to eighty pack-years. *Id*. (noting Dr. Fino's "review of the medical evidence" indicates "the Miner's smoking history approached eighty years"). Rather, after providing a detailed summary of the Miner's testimony and the physicians' smoking histories, he specifically found that while it is "unclear how many pack-years the Miner smoked, it was substantial." *Id*. Relying on the Miner's hearing testimony and the documentary evidence, the administrative law judge found the Miner "began smoking in 1973 but quit in 2010, and smoked between one–to-two packs–per-day during this thirty-seven-year time period." Decision and Order at 4.

[7] The administrative law judge noted that Drs. Johnson, Cordasco, and Copley did not have the opportunity to review the pathological findings and their reports are not as detailed as Dr. Perper's report, but he found they supported Dr. Perper's opinion. Decision and Order at 20.

He further noted "the Miner's own statements show that he began smoking 0.5 packs-per-day again in 2013 or 2014 until shortly before he died in November 2017." *Id*. The administrative law judge acted well within his discretion in crediting the Miner's statements regarding his smoking history. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (it is the administrative law judge's role to weigh the evidence and determine witness credibility).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the Miner had a fifty-seven pack-year smoking history.[8] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (the length and extent of a miner's smoking history is a factual determination for the administrative law judge); Decision and Order at 4.

Dr. Perper's Opinion

Employer next contends that Dr. Perper's opinion is legally insufficient to satisfy Claimant's burden of proof because he based his opinion "entirely on the fact that the miner has a history of coal dust exposure, and epidemiological studies have shown that coal dust exposure can cause or contribute to obstructive lung disease." Employer's Brief at 6. Employer also alleges his reference to epidemiological studies is an admission that he "cannot tell, on a case to case basis, whether coal dust contributed to a given miner's impairment." *Id*. We disagree, as Employer misconstrues Dr. Perper's opinion and overlooks significant portions of his forty-five page report.

Dr. Perper did not rely solely on general references to literature and epidemiological studies. Nor did he "admit" an inability to determine whether coal dust contributed to the Miner's impairment. In specifically diagnosing legal pneumoconiosis, he supported his opinion by both referencing medical and epidemiological studies and discussing the Miner's specific condition. He explained that "the symptomatology, pulmonary

[8] Moreover, even had the administrative law judge erred, remand is not required for reconsideration of Dr. Johnson's and Dr. Copley's opinions. As explained below, the administrative law judge permissibly gave greatest weight to Dr. Perper's diagnosis of legal pneumoconiosis and rejected the contrary opinions of Employer's experts. Further discrediting Dr. Johnson's and Dr. Copley's diagnoses of legal pneumoconiosis for relying on sixty and sixty-seven pack-year smoking histories, respectively, would not change the fact that Dr. Perper's uncontradicted, credited opinion satisfies Claimant's burden of proof. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how "error to which he points could have made any difference").

dysfunction[,] and pathology are virtually identical" with COPD caused by smoking or coal mine dust exposure, and "unless either the smoking or the [coal] dust exposure is minimal or very minor[,] the *respective contribution* cannot be assessed." Claimant's Exhibit 14 at 42 (emphasis added). He noted that the Miner had a significant smoking history but also a "long standing occupational exposure to airborne mixed coal dust containing silica and other pulmonary toxic agents" as a "rock driller coal miner" for twelve years. *Id*. at 41, 43, 45. Further, he observed the Miner had a type of emphysema/COPD (centrilobular) which is "well recognized to be a type of legal pneumoconiosis" and the Miner's impairment did not respond significantly to bronchodilators, which "supported a coal dust etiology" for the COPD. *Id*. at 45. Consequently, his opinion was based on the increased risk due to the Miner's particular job "mostly coal rock drilling" and his "failure to improve significantly with bronchodilators." *Id*. at 41, 45. We therefore reject Employer's arguments and hold Dr. Perper's opinion is legally sufficient as a basis for a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 311-12 (4th Cir. 2012) (physician's opinion that lung disease arose from "a combination of" coal mine dust exposure and smoking sufficient to establish legal pneumoconiosis); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); Claimant's Exhibit 14 at 43.

Further, the administrative law judge permissibly found Dr. Perper's opinion reasoned and documented because it was "based on his actual examination of the Miner's lung tissue," with references as to how the pathological findings supported a diagnosis of COPD, as well as medical studies, the Miner's work history, objective testing and symptoms. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Lucostic v. U. S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 20, 22. We also see no error in the administrative law judge's finding Dr. Perper's opinion is more persuasive than the contrary opinions because it is consistent with the Department of Labor's position that the effects of smoking and coal mine dust exposure may be additive in causing COPD. 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017). We therefore affirm the administrative law judge's crediting of Dr. Perper's opinion that the Miner had legal pneumoconiosis. Decision and Order at 17, 20, 22.

Employer's Experts

We also reject Employer's assertions that the administrative law judge improperly discredited its medical experts regarding the cause of the Miner's disabling COPD. As the administrative law judge accurately noted, Dr. Fino opined the Miner's "disabling

pulmonary condition can be explained by cigarette smoking." Employer's Exhibit 12 at 8. He opined coal mine dust exposure was not a clinically significant factor in the Miner's disabling COPD because "[t]he severity of the obstruction, the blood gas results over time, and the overall rapid decline of [the Miner] from a respiratory standpoint points to a smoking-related abnormality." *Id*. The administrative law judge permissibly discounted Dr. Fino's opinion because he did not did not adequately explain why the Miner's coal mine dust exposure and smoking were not additive in causing his disabling COPD. *See* 65 Fed. Reg. at 79,940; *Stallard*, 876 F.3d at 674; Decision and Order at 20.

Dr. Sargent also opined the Miner did not have legal pneumoconiosis based on "the absence of significant radiographic findings of pneumoconiosis." Employer's Exhibit 22 at 2. The administrative law judge permissibly discredited Dr. Sargent's opinion because it is inconsistent with the regulations which provide "[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray" and that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. at 79,940-43; *see Looney*, 678 F.3d at 313; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 21.

Dr. McSharry concluded the Miner did not have legal pneumoconiosis because his "disproportionate reduction in the FEV1/FVC ratio with hyperinflation of the lungs on lung volume testing and reductions in diffusion capacity is an extremely common impairment pattern seen in long-term cigarette smokers." Employer's Exhibit 9 at 5. He stated "[a]ll symptoms and physiologic testing are explained by tobacco-related lung disease alone." *Id*. We see no error in the administrative law judge's finding that "Dr. McSharry's reliance on the Miner's symptoms and test results being typical of tobacco-related obstructive lung disease does not adequately explain why they could not also be due to coal mine dust exposure." Decision and Order at 22; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Contrary to Employer's assertion, the administrative law judge did not apply a presumption that all obstructive impairments are due to coal mine dust exposure or unfairly weigh its experts' opinions. The administrative law judge thoroughly reviewed each of the medical opinions of record and permissibly concluded that Dr. Perper provided the most persuasive opinion based on the totality of the evidence available to him, including his review of the pathology evidence and the medical record, and the explanations he gave for his medical conclusions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. He further considered the opinions of Employer's experts and permissibly found their explanations lacking for various reasons, including: Dr. Fino's failure to adequately explain why he believed the Miner's twelve years of coal dust exposure could not have contributed along with smoking to his impairment; Dr. Sargent's reliance on a negative chest x-ray to exclude a diagnosis of legal pneumoconiosis; and Dr. McSharry's failure to explain why a reduced

FEV1/FVC ratio that is "common" for smoking supports his exclusion of coal dust as a contributor.[9]

Conclusion on Legal Pneumoconiosis

As the trier of fact, the administrative law judge determines the credibility of the evidence and whether a physician's opinion is adequately reasoned. *See Mays*, 176 F.3d at 762 n.10. We consider Employer's arguments to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge acted within his discretion in giving greatest weight to Dr. Perper's opinion and in rejecting Drs. Fino's, Sargent's, and McSharry's opinions.[10] *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

[9] Our dissenting colleague's assessment that the administrative law judge based his opinion entirely on the preamble to the revised regulations is belied by the administrative law judge's actual findings. He did not credit Dr. Perper based on "mere consistency" with the preamble but, rather, found his opinion well-documented and well-reasoned based on several factors already discussed herein. And, while our dissenting colleague appears to take issue with *any* reference to the preamble to discredit Employer's experts, the federal circuits have routinely held an administrative law judge may consult the preamble in determining the credibility of a medical opinion and reject opinions that are inconsistent with the medical and scientific premises the Department relies on in the preamble. *See, e.g., Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1125-28 (9th Cir. 2014); *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-62 (10th Cir. 2015).

[10] Because we affirm the administrative law judge's crediting of Dr. Perper's opinion on legal pneumoconiosis, we need not address Employer's assertion that he erred in failing to consider that Drs. Johnson, Cordasco, and Copley relied on a coal mine employment history of twenty-four years, "which is double the employment history found by the administrative law judge." Employer's Brief at 7; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We also see no reason to remand this case as our dissenting colleague suggests for consideration of the opinions of Drs. Johnson, Cordasco, or Copley, since Dr. Perper's opinion supports the administrative law judge's finding of legal pneumoconiosis and any error he made in weighing their opinions is harmless. *See Larioni*, 6 BLR at 1-1278. Further, as the administrative judge gave valid reasons for discrediting the opinions of Drs. Fino, Sargent, and McSharry, we need not address all of his findings

Thus, we affirm the administrative law judge's finding that Claimant established the Miner had legal pneumoconiosis as it is supported by substantial evidence. 20 C.F.R. §718.202(a); Decision and Order at 17, 22.

Disability Causation

To establish disability causation, Claimant must prove that the Miner's legal pneumoconiosis was a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis was a substantially contributing cause if it had "a material adverse effect on the [M]iner's respiratory or pulmonary condition," or if it "[m]aterially worsen[ed] a totally disabling respiratory or pulmonary impairment which [was] caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii).

Employer contends the administrative law judge erroneously conflated the legal standards for establishing legal pneumoconiosis and disability causation. Employer states that "[i]nstead of focusing on the contribution that legal pneumoconiosis makes to [the Miner's] total respiratory disability at 20 C.F.R. §718.204(c)(l), the administrative law judge revisited the question of the extent to which [his] respiratory impairment [was] attributable to coal mine dust exposure, which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4)." Employer's Brief at 13, *citing* Decision and Order at 18-22.

The physicians agree, however, that the Miner was totally disabled by COPD and Employer also does not allege the Miner was totally disabled by a respiratory condition other than COPD.[11] Thus, the only issue in this case is the etiology of the Miner's disabling COPD and whether it constitutes legal pneumoconiosis. Because the administrative law

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with regard to these physicians. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

[11] Our dissenting colleague suggests that the evidence is not clear that the Miner's disability was caused by COPD and could be due to other causes, which precludes affirmance of the administrative law judge's decision based on his finding that the Miner's COPD constitutes legal pneumoconiosis. However, Employer's own experts uniformly diagnose a disabling obstructive impairment/COPD which they attribute solely to smoking and do not identify any other conditions that disabled the Miner. While it may be that the Miner's clinical pneumoconiosis added to his respiratory disability, our opinion rests on the clear evidence in this case that he also suffered from severe, disabling COPD, and therefore the etiology of that condition is the sole issue presented for resolution in determining whether Claimant is entitled to benefits.

judge applied the correct legal standard in finding the Miner had legal pneumoconiosis, we reject employer's assertion of error. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013) (where all the medical experts agreed COPD caused the miner's total disability, the legal pneumoconiosis inquiry "completed the causation chain from coal mine employment to legal pneumoconiosis which caused [the miner's] pulmonary impairment that led to his disability"); *see Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (death causation satisfied where the court found the miner's COPD was legal pneumoconiosis and all medical experts agreed that COPD contributed to the miner's death); *Hawkinberry v. Monongalia Cnty. Coal Co.*, 25 BLR 1-249, 255-56 (2019).

Because the administrative law judge permissibly credited Dr. Perper's opinion that the Miner's disabling COPD constitutes legal pneumoconiosis, we also affirm the administrative law judge's finding that legal pneumoconiosis "substantially contributed to [the Miner's] total disability."[12] Decision and Order at 23; *see Collins,* 751 F.3d at 186-87; *Ramage*, 737 F.3d at 1062. Further, Drs. Fino, Sargent, and McSharry offered no explanation for why the Miner was not totally disabled due to legal pneumoconiosis other than their belief that the Miner did not have the disease, contrary to the administrative law judge's finding. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) ("such opinions can carry little weight" and may not be credited absent "specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon her disagreement with the ALJ's finding" as to the presence of pneumoconiosis). We therefore affirm the administrative law judge's determination that

[12] Our dissenting colleague asserts Dr. Perper did not specifically address the issue of disability causation. As an initial matter, we disagree that Dr. Perper was silent as to whether the Miner's COPD/legal pneumoconiosis is disabling. He provided a detailed review and summary of the Miner's medical records and other physicians' examinations; noted on several occasions the Miner's severe and disabling COPD; identified severe emphysema, severe congestion, and chronic inflammation on the Miner's lung tissue; and specifically concluded the Miner had severe emphysema/COPD/legal pneumoconiosis with "corresponding clinical symptomology of shortness of breath," "pulmonary function showing severe obstructive lung disease," "multiple exacerbations of COPD, many requiring hospitalization," "was oxygen dependent for several years prior to his death," and "suffered of acute on chronic respiratory failure for a number of years prior to his death." Claimant's Exhibit 14 at 1-40, 42, 44-45. But, even if our dissenting colleague's assessment were accurate, it is of no consequence to the outcome of this case, as it is undisputed the Miner had disabling COPD and Dr. Perper's opinion focused on the cause of that COPD. Having credibly opined that the Miner's COPD (which even Employer's experts agree is disabling) was significantly related to his coal mine dust exposure, Dr. Perper's opinion establishes that the disabling COPD *is* legal pneumoconiosis. Thus, legal pneumoconiosis caused the Miner's total disability.

Claimant established the Miner was totally disabled due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 22. Consequently, we affirm the administrative law judge's finding that Claimant established modification and entitlement to benefits in the Miner's claim.[13] 20 C.F.R. §725.310; Decision and Order at 23.

Accordingly, the administrative law judge's Decision and Order Granting Petition for Modification in a Subsequent Claim is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues to affirm the administrative law judge's award of benefits. In this case, the administrative law judge made an unaffirmable finding of legal pneumoconiosis and failed to properly analyze the evidence in determining disability causation. The majority would rescue the administrative law judge's opinion by considering portions of his analysis relating to disability causation as analyses and determinations relating to legal pneumoconiosis. They then would ignore his analysis of disability causation for the purposes intended. However, it is our job to review

[13] We affirm, as unchallenged, the administrative law judge's finding that granting modification renders justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

opinions, not to rewrite them. Two sets of legal error do not add up to an affirmance. Consequently, I would remand this case for the required analyses and determinations.

The regulations treat the issues of the existence of legal pneumoconiosis and total disability due to the disease separately. To establish the existence of legal pneumoconiosis, Claimant must prove by a preponderance of the evidence that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2), (b). To establish that he is totally disabled due to pneumoconiosis, Claimant must prove that his "pneumoconiosis is a substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1) (emphasis added).

In finding legal pneumoconiosis established, the administrative law judge based his determination entirely on the preamble to the regulations.[14] The administrative law judge noted Drs. Fino, Sargent, and McSharry each attribute the Miner's impairment to his lengthy smoking history rather than coal dust exposure, but discredited their opinions because "[t]he Preamble concludes that exposure to coal dust is clearly associated with severe respiratory impairments even in the absence of smoking" and that "[s]mokers who mine have additive risk for developing significant obstruction." Decision and Order at 17, *quoting* 65 Fed. Reg. 79920, 79940 (Dec. 20, 2000). Without further analysis he found their opinions inconsistent with the preamble and worthy of little weight. Decision and Order at 17. Conversely the administrative law judge found "Drs. Johnson, Copley, and Perper attributed the etiology of the Miner's legal pneumoconiosis to both his coal mine employment and smoking histories, and recognized the contribution of the Miner's coal mine dust exposure to his pulmonary impairment." *Id*. Without considering whether the opinions of Drs. Johnson, Copley, and Perper were credible based on the specific facts of the Miner's case, he stated simply they "are consistent with the Preamble; therefore, they

[14] The administrative law judge considered only the medical opinion evidence in his determination of legal pneumoconiosis, although confusingly he has a paragraph in his discussion of "weighing the evidence on legal pneumoconiosis" in which he accords the treatment records and pathological reports little weight on the issue of total disability. Decision and Order at 16-17. There is no objection to his focus solely on the physician opinion evidence in this regard. However, Employer correctly objects to his failure to consider all relevant evidence in his determination of the Miner's smoking history, and to apply a properly determined smoking history in evaluating the medical opinions. *See* 30 U.S.C. §923(b); *Sellards v. Director, OWCP,* 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Employer's Brief at 6-8.

are accorded full probative weight on the issue of whether the Miner suffers from legal pneumoconiosis"[15] and found legal pneumoconiosis established. *Id*.

The administrative law judge is required, however, to determine whether each physician provided a reasoned and documented opinion, with Claimant bearing the burden of proof to establish by a preponderance of the evidence that the Miner suffered from a "chronic lung disease or impairment" that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2), (b). Mere consistency with the preamble does not equate to a finding that a medical opinion is reasoned and documented.[16] *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002).

As Employer correctly asserts, the administrative law judge failed to properly address whether each physician had an accurate understanding of the Miner's work and

[15] The administrative law judge found Dr. Cordasco "did not opine whether the [M]iner's impairment is significantly related to, or substantially aggravated by, his coal mine employment," and thus provided insufficient detail regarding whether the Miner suffered from legal pneumoconiosis. Decision and Order at 15. Accordingly, he gave Dr. Cordasco's opinion less weight.

[16] Employer also correctly asserts the administrative law judge held its doctors to a higher standard than Claimant's doctors. Employer's Brief at 11. Claimant has the burden of proof and must establish that in this particular case coal dust exposure was additive to smoking in causing the Miner's respiratory or pulmonary impairment. While the science cited in the preamble indicates an additive risk, Claimant is not entitled to a presumption that the two factors were additive in this case. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000)("[E]ach miner bear[s] the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment "); *see also Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002)("[T]he preamble itself states that the revised definition [of pneumoconiosis] does not alter the requirement that individual miners must demonstrate that their obstructive lung disease arose out of their work in the mines."). The administrative law judge improperly assumed the two factors of smoking and coal dust exposure were additive in causing the Miner's respiratory impairment, rather than requiring Claimant's physicians to establish that they were. He then required Employer's physicians to disprove the additive effects of those factors, thereby holding Employer's physicians to a higher standard and improperly shifting the burden of proof.

smoking histories,[17] the specific rationales for their conclusions regarding whether the Miner suffered from a "chronic lung disease or impairment" that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," and the documentation underlying their opinions.[18] 20 C.F.R. §718.201; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Employer's Brief at 12. Thus, the administrative law judge's credibility findings with regard to the physicians' opinions and his determination that Claimant established legal pneumoconiosis cannot be affirmed.

With respect to the disability causation section of the decision, Employer is correct that the administrative law judge conflated legal pneumoconiosis and disability causation.[19] Employer's Brief at 9. Although he used the standard for disability causation in stating his conclusion, he discussed the medical opinions in terms of the effect of coal dust on the Miner's impairment, rather than whether pneumoconiosis caused or substantially contributed to the Miner's total disability, and stated "I accord greater weight to the physicians who concluded the Miner's pulmonary impairment from chronic obstructive pulmonary disease was due to both his history of cigarette smoking and his history of

[17] Drs. Johnson, Copley, and Cordasco believed the Miner worked in coal mine employment for twenty-four years, when the administrative law judge found 12.61 years established. Director's Exhibit 9; Claimant's Exhibits 4, 5.

[18] The administrative law judge must consider the specific explanations given by Employer's physicians for why the Miner's coal mine dust exposure did not play a significant role in his respiratory impairment, and address whether Claimant's physicians based their opinions on facts specific to the Miner's case as opposed to generalities. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

[19] Employer's argument that the administrative law judge erred in crediting Dr. Perper's opinion on disability causation also has merit. Employer's Brief at 13. Dr. Perper addressed only whether the Miner had simple or complicated pneumoconiosis, the etiology of the Miner's COPD, and death causation. Claimant's Exhibit 14 at 41-45.

coal mine dust exposure."[20] Decision and Order at 20.[21] Moreover, for the reasons set forth *supra*, he also erred by according greater weight to the medical opinions based on

[20] The administrative law judge appears also to have improperly equated emphysema/COPD with legal pneumoconiosis in this portion of his opinion. For example, he stated, "Dr. Sargent, Dr. Fino, and Dr. McSharry all agreed, after reviewing the pathological reports, that the Miner did have clinical and legal pneumoconiosis." Decision and Order at 20. Emphysema/COPD constitutes legal pneumoconiosis only when those diseases are significantly related to or substantially aggravated by coal dust exposure in coal mine employment. 20 C.F.R. §718.201. Drs. Sargent, Fino, and McSharry diagnosed emphysema/COPD unrelated to coal dust exposure so they did not diagnose legal pneumoconiosis as the administrative law judge stated, although they agreed the Miner had clinical pneumoconiosis. Employer's Exhibits 9, 12, 22.

[21] The majority errs in treating the administrative law judge's analyses of the medical opinions in the disability causation section of his opinion as an analysis and determination of legal pneumoconiosis. Even though, in the disability causation section, he discussed the medical opinions in terms of whether coal dust exposure played a role in the Miner's impairment, he did not evaluate the opinions supporting entitlement using the definition of legal pneumoconiosis (significant relationship to, or substantial aggravation of, a respiratory or pulmonary impairment). In other words, he never weighed the opinions using the standard for legal pneumoconiosis. Thus, for this reason alone the majority's substitution of his conflated analysis in the disability causation section to support affirming his legal pneumoconiosis determination fails to pass muster. The majority also selectively focuses on his references to COPD in this section, when the administrative law judge's findings here also rely on other conditions that may have disabled the Miner. Those other conditions are not explained by the administrative law judge or the physicians as legal pneumoconiosis. That is, having rewritten the administrative law judge's decision to find legal pneumoconiosis based on the disability causation section references to Dr. Perper's legal pneumoconiosis opinion, the majority finds that the COPD constituted the Miner's disabling impairment and since it was legal pneumoconiosis no more is required. In so doing, it selectively focuses on the administrative law judge's references to Dr. Perper and COPD, ignoring that the administrative law judge based his finding of disability causation on COPD in conjunction with other conditions (and by implication found the disabling impairment constituted more than COPD). In addition, the majority ignores other facts: Dr. Perper never opined the Miner's COPD was disabling and did not offer an opinion as to disability causation; moreover, the parties' stipulation of total disability, which was the basis for the administrative law judge's finding that the Miner was totally disabled, did not specify the Miner's disabling impairment was COPD.

whether they were consistent with the preamble.[22] Thus, because the administrative law judge applied the wrong legal standards and did not give proper reasons for his credibility determinations, his finding that Claimant established disability causation also cannot be affirmed.

Consequently, I would remand the case for the administrative law judge to properly address, with adequate explanation, whether Claimant established legal pneumoconiosis and disability causation. When rendering his findings, the administrative law judge is required to address the physicians' qualifications and the extent to which their opinions are reasoned and documented. *See Collins v. J & L Steel*, 21 BLR 1-181, 189 (1999); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). He should be instructed to consider "the explanations for [the physicians'] conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses." *Hicks*, 138 F.3d at 533. He also should be instructed to adequately explain how he resolves the conflict in the medical opinions and the bases for all his findings of fact and conclusions of law in accordance with the Administrative Procedure Act.[23] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). For these reasons, I therefore dissent from the majority opinion to award benefits in this case.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

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[22] Further, in the legal pneumoconiosis section of his opinion, the administrative law judge specifically gave "less weight" to Dr. Cordasco's finding of legal coal worker's pneumoconiosis because he "failed to opine whether the Miner's impairment is significantly related to, or substantially aggravated by, his coal mine dust exposure." Decision and Order at 17. However, in his analysis of disability causation, he credited, Dr. Cordasco's opinion as supporting a finding that the Miner was totally disabled due to legal pneumoconiosis. *Id*. at 22. The administrative law judge's findings with regard to Dr. Cordasco's opinion are inconsistent and not affirmable. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[23] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).