BRB Nos. 12-0645 BLA
and 12-0669 BLA

DELORIS ROTHROCK (o/b/o and as Widow of HUBERT W. ROTHROCK)	)	
Claimant-Respondent	)	
v.	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 08/30/2013
and	)	
THE TRAVELERS COMPANIES, INCORPORATED	)	
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 Awarding Benefits on the miner's claim, the Decision and Order Awarding Benefits on the survivor's claim and the Employer's Motion for Reconsideration of the award of benefits on both claims of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenburg Traurig, LLP), Washington, D.C., for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (10-BLA-5137) on a miner's claim, the Decision and Order Awarding Benefits (10-BLA-5138) on a survivor's claim, and the Order Denying the Employer's Motion for Reconsideration of the awards of benefits in both the miner's and the survivor's claims of Administrative Law Judge Alice M. Craft (the administrative law judge) on claims[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a miner's subsequent claim filed on July 5, 2006, and a survivor's claim filed on October 27, 2008.[2]

In considering the miner's 2006 subsequent claim,[3] the administrative law judge found that claimant failed to establish that at least fifteen of the miner's forty years of coal mine employment in surface mines constituted qualifying coal mine employment. Consequently, the administrative law judge found that the miner's claim was not eligible for consideration pursuant to Section 411(c)(4), 30 U.S.C. §921(c)(4).[4]

[1] By Order dated October 19, 2012, the Board consolidated the appeals in the miner's and survivor's claims.

[2] The miner died on October 4, 2008. Director's Exhibit 27. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[3] The miner's previous claim, filed on August 12, 1988, was denied by the district director for failure to establish any element of entitlement. The claim was dismissed by Administrative Law Judge J. Michael O'Neill on December 10, 1991 when the miner failed to appear at the hearing. Director's Exhibits 1 at 1, 13.

[4] Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to the miner's claim, Section 1556 of Public Law No. 111-148 reinstated the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4). Pursuant to Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847, 24 BLR 2-385, 2-395 (7th Cir. 2011).

The administrative law judge considered, therefore, whether entitlement to benefits was established in the miner's claim pursuant to 20 C.F.R. Part 718.[5] She first found that, although the new evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), it did establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, she concluded that since one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final, a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d).[6] Turning to the merits of the case, the administrative law judge found the existence of legal pneumoconiosis, total disability and disability causation established pursuant to 20 C.F.R. §§718.202(a), 718.204(b), and 718.204(c).[7] Accordingly, she awarded benefits on the miner's claim.

With regard to the survivor's claim, the administrative law judge noted that the 2010 amendments revived Section 932(*l*) of the Act, which provides that the survivor of a miner, who was determined to be eligible to receive benefits at the time of his or her death, is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). Because claimant filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010,

[5] In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

[6] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's last claim was denied because the miner did not establish any of the elements of entitlement. Decision and Order at 3; Director's Exhibit 2. Consequently, to obtain review of the merits of the miner's claim, new evidence must be submitted establishing one of the elements of entitlement. 20 C.F.R. §725.309(d)(2), (3).

[7] A finding that pneumoconiosis arose out of coal mine employment is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201.

and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge automatically awarded benefits on the survivor's claim pursuant to Section 932(*l*).

On appeal, employer challenges the administrative law judge's findings that the new evidence establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, a change in an applicable condition of entitlement pursuant to Section 725.309(d). Employer also challenges the administrative law judge's findings that legal pneumoconiosis, total respiratory disability and disability causation were established pursuant to Sections 718.202(a)(4), 718.204(b)(2)(iv), and 718.204(c) on the merits in the miner's claim.[8] Specifically, employer contends that the administrative law judge erred in using the preamble to the 2001 amended regulations as guidance in evaluating the medical opinion evidence,[9] that she substituted her own opinion for those of medical experts, and that she failed to comply with the requirements of the Administrative Procedure Act (the APA). 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). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge acted within her discretion in consulting the preamble to assess the credibility of the medical opinion evidence and that, accordingly, the administrative law judge's use of the preamble has not denied it due process.[10] The Director also contends that employer is liable for these claims.[11] In its reply brief, employer reiterates its argument concerning

[8] As the Director, Office of Workers' Compensation Programs (the Director) observes, employer's brief addresses only the merits of the miner's claim. Consequently, if the Board affirms the award of benefits on the miner's claim, the survivor would automatically be entitled to survivor's benefits pursuant to 30 U.S.C. §932(*l*). *See* Director's Brief at 1 n.1; *accord* Employer's Reply Brief at 1 n.1.

[9] In so doing, employer asserts that the administrative law judge improperly "create[d] an irrebuttable presumption that all obstruction/emphysema must be related to coal dust exposure," thus denying employer due process. Employer's Brief at 18. Further, employer argues that the administrative law judge's reliance on the preamble was error "in the case of a surface miner, [as here]." *Id*. at 12.

[10] The Director takes no position on the administrative law judge's use of the preamble "beyond asserting she did not treat it as binding authority for her evidentiary findings." Director's Brief at 4 n.4, 5 n.5. Moreover, the Director urges the Board to reject employer's argument that consideration of the preamble is inappropriate in cases involving claims by surface miners.

[11] The administrative law judge reiterated her findings that: (1) she has no jurisdiction to decide the dispute between the Director and employer regarding which of

the administrative law judge's use of the preamble and again asserts its due process argument.[12]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are supported by substantial evidence, rational, and in accordance with applicable law.[13] 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).

The Miner's Claim
Application of the Preamble

At the outset, we reject employer's various challenges to the administrative law judge's use of the preamble as guidance in evaluating the medical opinion evidence. The administrative law judge properly consulted the preamble in evaluating the medical opinion evidence, as she properly found it to be an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-225-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004), *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); 65 Fed. Reg. 79,939-79,942 (Dec. 20, 2000). She did not, contrary to employer's contention, create an irrebuttable presumption that all obstructive impairments are due to coal dust exposure. Rather, she properly exercised her discretion, as fact-finder, to consider the medical opinion evidence in light of the preamble. *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009); Employer's Brief at 18. Further, contrary to employer's contention, the preamble is not a legislative ruling requiring notice and comment. *See Maddaleni v.*

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two existing surety bonds is liable for the payment of benefits, and (2) employer is the responsible operator in these claims. *See* Decision and Order at 6; Director's Brief at 2; Employer's Brief at 2 & n. 1.

[12] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had forty years of surface coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[13] The record reflects that the miner's last coal mine employment was in Indiana. Decision and Order at 4; Director's Exhibits 2 at 1, 4, 6. Accordingly, we will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

The Pittsburg & Midway Coal Mining Co., 14 BLR 1-135, 139 (1990). Lastly, we agree with the Director that employer's argument, that consideration of medical opinions in light of the preamble is barred in cases of surface miners, is unfounded. As the Director contends, there is no requirement under Part 718 that a surface miner be treated differently from an underground miner. *See* 65 Fed. Reg. 79,940-45 (Dec. 20, 2000). Director's Brief at 4 n.4; *see* Employer's Brief at 11-12; Employer's Reply Brief at 3 & n.2. Accordingly, we reject employer's assertion that the administrative law judge erred in using the preamble as guidance in evaluating the medical opinion evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

20 C.F.R. §718.202(a)(4)
Legal Pneumoconiosis

In finding that the medical opinion evidence[14] established the existence of legal pneumoconiosis[15] pursuant to Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Murthy and Niazi,[16] who attributed the miner's chronic

[14] The administrative law judge stated that some of the medical opinion evidence was contained in the miner's treatment records showing that he was diagnosed with an obstructive respiratory impairment as early as 1985, and noting the miner's history of coal mine employment, smoking, and cardiac problems. Decision and Order at 38-39. The administrative law judge observed that the miner's treatment records included medical opinions attributing the miner's obstructive impairment to coal mine employment in 2007, but also discussing the miner's smoking history and heart condition. Decision and Order at 39. Ultimately, the administrative law judge's finding of legal pneumoconiosis was based on her consideration of the opinions of Drs. Murthy, Niazi, Repsher and Rosenberg.

[15] Legal pneumoconiosis is defined to include "any chronic lung disease or impairment and its sequelae arising out of coal mine employment[,] ... include[ing], but … not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.202(a)(2). Further, a disease "arising out of coal mine employment" is defined to include "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.202(b).

[16] Dr. Murthy, a Board-certified pulmonologist, succeeded Dr. Lombard as the miner's treating pulmonologist in December 2007. Dr. Murthy took the miner's smoking and coal mine employment histories, conducted a physical examination, and reviewed the miner's pulmonary function testing. He reported histories of 40 years of coal mine employment and 110 pack-years of smoking. After the miner's first visit, Dr. Murthy attributed the miner's chronic obstructive pulmonary disease (COPD) and chronic bronchitis to his cigarette smoking. However, after obtaining additional pulmonary

obstructive pulmonary disease (COPD) to both smoking and coal mine employment over the opinions of Drs. Repsher and Rosenberg, who attributed it to smoking alone.[17] The administrative law judge found that the opinions of Drs. Murthy and Niazi were documented and reasoned. Specifically, regarding the opinion of Dr. Murthy, she found that he diagnosed "COPD-chronic bronchitis secondary to a combination of cigarette smoking and exposure to coal dust," based on the miner's histories, physical examination and objective testing.[18] *See* Employer's Brief at 17; Decision and Order at 25-26, 40.

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function testing and conducting another physical examination, Dr. Murthy diagnosed COPD and chronic bronchitis due to a combination of cigarette smoking and exposure to coal dust. Decision and Order at 39-40; Employer's Exhibit 23.

Dr. Niazi, a Board-certified pulmonologist, performed a pulmonary evaluation of the miner in September 2006 at the request of the Department of Labor and diagnosed legal pneumoconiosis, specifying that both smoking and coal dust contributed to the miner's obstructive disease. Decision and Order at 40, 42; Director's Exhibit 10.

[17] Dr. Repsher, a Board-certified pulmonologist, performed a pulmonary evaluation and reviewed various medical records in March 2007 at the request of employer and diagnosed coronary artery disease with a heart attack, angina pectoris and congestive heart failure, and other conditions, which would not be due to coal dust exposure. He attributed the miner's respiratory symptoms to congestive heart failure and sleep apnea, with possible contribution from anemia. He observed physical findings and results suggesting severe COPD, although he opined that because the miner's pulmonary function testing was invalid, he could not estimate the severity of the obstruction. He attributed the obstructive disease entirely to smoking, and stated that the miner had only very mild and clinically insignificant COPD from coal dust. Decision and Order at 40-41; Employer's Exhibits 5, 6, 7 at 26, 31-32.

Also, at employer's request, Dr. Rosenberg, a Board-certified pulmonologist, performed a medical records review, including the miner's history of coronary artery disease, myocardial infarction, diabetes, atrial fibrillation, and ischemic cardiomyopathy. He opined that the miner had a significant degree of obstruction due to smoking, decreased diffusion capacity related to emphysema and interstitial disease, and no restriction. Decision and Order at 41-42; Employer's Exhibits 8, 24.

[18] We reject as meritless employer's assertion that the administrative law judge improperly credited Dr. Murthy's "unexplained" change from attributing the miner's COPD and chronic bronchitis to smoking alone, to both smoking and coal dust exposure, as the administrative law judge noted that Dr. Murthy explained that the change in his finding was based on additional testing and examination of the miner. Decision and Order at 39-40; Employer's Exhibit 23.

She assigned "probative weight" to Dr. Niazi's opinion, attributing the miner's obstructive disease to a "combination of factors," including coal dust exposure, because it was based on underlying documentation and because it was consistent with the regulations, requiring that coal dust need only be a "contributing cause" of the miner's respiratory impairment to constitute a diagnosis of legal pneumoconiosis. 20 C.F.R. §718.201. Decision and Order at 40; Director's Exhibit 10 at 4.

Employer contends, however, that the administrative law judge did not properly evaluate this evidence. First, employer contends that the administrative law judge "did not evaluate the explanations or determine whether there was any objective support for the opinions she credited," and instead relied "exclusively" on the preamble to weigh the evidence. This argument is belied by the fact that the administrative law judge evaluated and discussed this evidence fully, finding it supported by its underlying documentation. *See Clark*, 12 BLR at 1-155; Decision and Order at 25-28, 38-41, 42. Additionally, contrary to employer's assertion, the administrative law judge properly assigned greater weight to Dr. Murthy's determination that the miner's obstructive condition resulted from both cigarette smoking and coal dust exposure as he was both the miner's *treating* pulmonologist;[19] and a Board-certified pulmonologist. 20 C.F.R. §718.104(d); *Dillon v.*

[19] Employer asserts that the administrative law judge's designation of Dr. Murthy as the miner's treating physician, "failed to consider that Dr. Murthy only saw [the miner] twice." Employer's Brief at 18. We disagree. First, finding that Dr. Murthy took over as treating pulmonologist from Dr. Lombard in December 2007, the administrative law judge detailed Dr. Murthy's review of the miner's objective testing medical records, his successive dates of treatment of the miner, his ordering of additional objective testing, and his completion of a second pulmonary examination. Decision and Order at 39-40; Employer's Exhibit 23. Also, Dr. Etherton's treatment note, consistent with the chronology summarized by the administrative law judge, showed that as of October, 2007, the miner "was already under the care of a pulmonologist [Dr. Murthy] who was his primary provider for his respiratory issues." Decision and Order at 28-29; Employer's Exhibit 23. Hence, as the record demonstrates that Dr. Murthy was directing the course of the miner's pulmonary treatment, his designation as the treating pulmonologist was rational.

Further, while the fact-finder need not give added weight to the opinions of treating physicians, *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2011), the administrative law judge clearly explained her rationale for doing so here. Thus, she properly considered Dr. Murthy's status as a treating pulmonologist as one of various appropriate factors in weighing the probative value of his opinion. Decision and Order at 42; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 473, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *see also McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318; *Collins v. J&L Steel*, 21 BLR 1-182 (1999).

Peabody Coal Co., 11 BLR 1-113 (1988). In addition, the administrative law judge properly accorded great weight to the opinion of Dr. Murthy because it was consistent with the preamble, which states that COPD can be caused by both coal mine employment and smoking or a combination of both, and because it was supported by the conclusions of Dr. Niazi. 65 Fed. Reg. 79,939-79,942 (Dec. 20, 2000); Decision and Order at 28, 42; Employer's Exhibit 23 at 27-29.

Based on the foregoing, and consistent with her discretion to weigh the evidence, draw inferences and determine credibility, *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988), we conclude that the administrative law judge properly found that the medical opinions of Drs. Murthy and Niazi, that "both coal dust and smoking contributed to the miner's COPD,"[20] supported a finding of legal pneumoconiosis. *Id*. at 40, 42; *see Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002); *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Clark*, 12 BLR at 1-155; *Dillon*, 11 BLR at 1-114.

Turning to the opinions of Drs. Repsher and Rosenberg, the administrative law judge accorded less weight to them because they were inconsistent with the premise underlying the preamble to the regulations, namely that both smoking and coal-dust exposure could cause an obstructive respiratory impairment. Employer contends, however, that the administrative law judge erred in rejecting them as inconsistent with the preamble. Employer also contends that the administrative law judge mischaracterized their opinions and impermissibly substituted her own opinion for theirs. Employer's Brief at 11-13. We disagree.

[20] Employer asserts that Dr. Niazi's opinion of legal pneumoconiosis was credited "based on party affiliation." Employer's Brief at 18. On the contrary, the administrative law judge's statement that Dr. Niazi's opinion was "given in connection with the Department of Labor evaluation" merely identified Dr. Niazi's opinion. Employer does not provide any support for its argument that Dr. Niazi's opinion was accorded greater weight based on "party affiliation." *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991). The administrative law judge properly considered appropriate factors in determining that Dr. Niazi's opinion was documented and reasoned, namely, his Board-certification in pulmonology, the miner's work and health histories, the objective studies supporting his diagnoses, and the consistency of his reasoning with the regulations. *See* Decision and Order at 40, 42; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 22 BLR 2-35, 2-37 (7th Cir. 2007); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-358 (7th Cir. 1990).

The record does not demonstrate that the administrative law judge mischaracterized the opinions of Drs. Repsher and Rosenberg, or that she erred in finding that neither doctor "adequately explained why forty years of coal dust exposure was not a factor in the miner's obstructive disease." *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 40-42. Rather, she acted within her discretion, as fact-finder, in identifying her specific reasons for discounting their opinions. She properly found that Dr. Repsher's "conclusory" statement that coal dust exposure would not cause significant obstruction based, in part, on the miner's negative x-ray, denoted an improper focus on the absence of clinical pneumoconiosis. 20 C.F.R. §718.201. *Id*. at 41. A medical opinion that focuses on the absence of clinical pneumoconiosis may be assigned less weight in determining whether a miner had legal pneumoconiosis pursuant to Section 718.202(a)(4), *See Summers*, 272 F.3d at 483, 22 BLR at 2-281. The administrative law judge also rationally found that Dr. Repsher's opinion failed to adequately explain why the miner's forty years of coal mine employment was not a factor in the development of his obstructive impairment. Consequently, she properly accorded it less weight than the contrary opinions of Drs. Murthy and Niazi. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103.

Similarly, the administrative law judge rationally found that Dr. Rosenberg's reliance on a reduced FEV_1/FVC ratio to attribute the miner's obstructive disease to smoking, rather than to coal dust exposure, was inconsistent with the regulations which allow miners to establish a respiratory impairment due to coal dust exposure based on a reduced FEV_1/FVC ratio.[21] 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 41; Employer's Exhibits 8 at 9-10, 24 at 6-7, 10-13.

Additionally, the administrative law judge properly found that Dr. Rosenberg's view that pneumoconiosis causes only focal emphysema demonstrates that he was focused on the effects of clinical pneumoconiosis rather than legal pneumoconiosis, in a manner contrary to the regulations' premise that "coal dust exposure can cause clinically significant obstructive disease even in the absence of clinical pneumoconiosis, and by the same mechanism as smoking." *See Summers*, 272 F.3d at 483, 22 BLR at 2-281; Decision and Order at 41-42. Additionally, the administrative law judge rationally found

[21] Dr. Rosenberg stated that "while the FEV_1 decreases in relationship to coal mine dust exposure, the ratio of FEV_1/FVC, also termed the FEV_1%, generally is preserved. In contrast, this respiratory parameter of FEV_1% characteristically decreases in relationship to smoking-related forms of COPD." He also opined that when emphysema occurs in relationship to coal mine dust exposure, it begins as focal emphysema … [and] with focal emphysema, the diffusing capacity is preserved. In contrast, with smoking-related forms of emphysema, the diffusing capacity is reduced." *See* Employer's Exhibits 8 at 10, 24 at 6-7, 12-13.

that Dr. Rosenberg's view that dust-induced emphysema and smoke-induced emphysema occur through different mechanisms and, therefore, can be distinguished, is at odds with the recognition by DOL that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." *See* 65 Fed. Reg. at 79,943; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26; Decision and Order at 41-42. Hence, considering Dr. Rosenberg's statement that the miner's obstructive disease was not caused or aggravated by his past coal mine dust exposure, but instead "developed consequent to his long smoking history," the administrative law judge rationally concluded that Dr. Rosenberg failed to adequately explain, in view of the record evidence and the premises underlying the regulations, why the miner's forty years of coal mine employment was not a factor in the development of his obstructive disease. Decision and Order at 41, 42; Employer's Exhibit 24 at 7, 13; *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 & n.7, 22 BLR at 281 & n.7; *Clark*, 12 BLR at 1-155.

In sum, the administrative law judge rationally rejected the opinions of Drs. Repsher and Rosenberg excluding coal dust exposure as a cause of claimant's obstructive impairment,[22] 20 C.F.R. §718.201(a); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990), and properly assigned them "less weight," than the better reasoned opinions of Drs. Murthy and Niazi. Decision and Order at 41-42; *see Greene*, 575 F.3d at 628-29, 24 BLR at 2-215-16; *Stalcup*, 477 F.3d at 484, 22 BLR at 2-37; *Poole*, 897 F.2d at 893-94, 13 BLR at 2-354. As the administrative law judge's findings are rational and supported by the substantial evidence in the record, they are affirmed. *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 & n.7, 22 BLR at 2-281 & n.7; *Clark*, 12 BLR at 1-155.

In light of the foregoing, we affirm the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, a change in an applicable condition of entitlement pursuant to Section 725.309(d). We also affirm the administrative law judge's finding that the medical opinion evidence, based on his review of the record as a whole, establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) on the merits.

[22] *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-411, 2-426-27 (7th Cir. 2002)([T]here is overwhelming scientific and medical evidence that exposure to coal dust can cause, aggravate, or contribute to obstructive lung diseases. 65 Fed. Reg. at 79,944 (Dec. 20, 2000).

Section 718.204(b)
Total Respiratory Disability

The administrative law judge found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii) based on the preponderance of non-qualifying pulmonary function and blood gas studies of record. Further, the administrative law judge found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure in the record.

The administrative law judge determined, however, that total respiratory disability was established by the medical opinion evidence pursuant to Section 718.204(b)(2)(iv). Finding that, "[t]he [m]iner's last job in the mines required heavy exertion[,]"[23] Decision and Order at 46, the administrative law judge accorded greater weight to the opinion of Dr. Etherton that the miner had a totally disabling respiratory impairment,[24] because his opinion was better reasoned than the contrary opinions of Drs. Repsher and Rosenberg and, because he was a "treating" doctor.[25] Further, in weighing all of the relevant

[23] As this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

[24] The administrative law judge noted that Dr. Etherton, the miner's "family doctor" was the miner's only treating physician who gave an opinion on whether the miner was disabled by a pulmonary or respiratory impairment. Dr. Etherton saw the miner seven times between October 2007 and August 2008, performing a physical examination at every visit. He diagnosed emphysema, COPD, and black lung. He stated that the miner was unable to walk even short distances without becoming significantly short of breath, which he concluded made the miner totally disabled. Decision and Order at 44; Director's Exhibit 23.

[25] Dr. Repsher examined the miner in March 2007 and concluded that the miner could perform his usual coal mine employment or similarly arduous work. Dr. Repsher suggested that the miner might have COPD based on the findings of his physical examination and pulmonary function study results, but he could not determine its severity. Dr. Repsher also opined that the miner *might* be disabled, but that without valid pulmonary function study results, he could not be certain. Decision and Order at 45-46; Employer's Exhibit 7.

Dr. Rosenberg reviewed the miner's medical data and concluded, based on the miner's pulmonary function study results that the miner had a moderate obstruction and COPD. He found, however, that he could not conclude that the miner had a disabling respiratory impairment because the pulmonary function studies he reviewed were invalid. Decision and Order at 45-46; Employer's Exhibit 24.

evidence together, the administrative law judge found that it established total respiratory disability pursuant to Section 718.204(b) overall.

Employer contends, however, that the administrative law judge erred in crediting the opinion of Dr. Etherton, arguing that the opinion is unexplained and equivocal. Employer also contends that the administrative law judge erred in rejecting the opinions of Drs. Repsher and Rosenberg because of their reliance on the miner's lack of valid qualifying pulmonary function studies.

Contrary to employer's argument, the administrative law judge properly credited Dr. Etherton's opinion over the opinions of Drs. Repsher and Rosenberg, because she found it better reasoned. Specifically, the administrative law judge noted that "Dr. Etherton's observations were based on appropriate histories, physical examinations and objective testing." Decision and Order at 45. She, therefore, rationally found that Dr. Etherton's opinion on the issue of total respiratory disability was documented and reasoned. *Clark*, 12 BLR at 1-155. Further, she properly found his opinion entitled to greater weight, because Dr. Etherton was a treating doctor who saw the miner seven times between October of 2007 and August of 2008, conducting a physical examination at every visit. *See* 20 C.F.R. §718.104(d).

Regarding the opinions of Drs. Repsher and Rosenberg, the administrative law judge properly accorded them less weight. Specifically, she properly found that Dr. Repsher's opinion was "inconsistent and equivocal" because Dr. Repsher acknowledged that the miner's "pulmonary function testing suggested that the [m]iner had COPD, although he could not determine its severity" and opined "that the [m]iner *might* have been disabled[,]" if his pulmonary function studies had been valid. Decision and Order at 45. (emphasis added). *See Stanley v. Eastern Assoc. Coal Corp.*, 6 BLR 1-1157 (1984). Regarding Dr. Rosenberg's opinion, that the miner did not have a disabling respiratory impairment, the administrative law judge properly rejected it as it was based solely on the absence of valid qualifying pulmonary function studies. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In conclusion, therefore, the administrative law judge rationally credited the opinion of Dr. Etherton over the contrary opinions of Drs. Repsher and Rosenberg, because it was better reasoned and because Dr. Etherton was a "treating" physician. Decision and Order at 46; *see McCandless*, 255 F.3d at 465, 468-69, 22 BLR at 2-318; *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir 1990); *Clark*, 12 BLR 1-155. The administrative law judge's determination that the medical opinion evidence established a total respiratory disability pursuant to Section 718.204(b)(iv) is, therefore, affirmed. Her finding that the relevant evidence, when weighed together, established total respiratory disability pursuant to Section 718.204(b) overall is likewise affirmed.

Section 718.204(c)
Disability Causation

In finding disability causation established pursuant to 20 C.F.R. §718.204(c), the administrative law judge credited the opinions of physicians who found, consistent with the administrative law judge's finding, that the miner had legal pneumoconiosis over the opinions that he did not. Specifically, referring to the opinions of Drs. Repsher and Rosenberg, the administrative law judge concluded:

> they did not believe that coal dust contributed to the [m]iner's obstructive disease in any clinically significant way. I can find no specific and persuasive reasons for concluding that their judgment that exposure to coal dust did not cause or contribute to the [m]iner's [disability] did not rest upon their disagreement with my finding that the [m]iner had legal pneumoconiosis.

Decision and Order at 47. Accordingly, the administrative law judge rationally discounted the opinions of Drs. Repsher and Rosenberg on the issue of disability causation, because neither physician diagnosed the existence of legal pneumoconiosis, contrary to her own finding pursuant to Section 718.202(a)(4).[26] Moreover, the administrative law judge properly credited the medical opinions of doctors who found that the miner had legal pneumoconiosis. *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *McCandless*, 255 F.3d at 468-69, 22 BLR at 2-318. We, therefore, affirm the administrative law judge's finding that the more reasoned medical opinion evidence established disability causation pursuant to Section 718.204(c). *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 335, 22 BLR 2-581, 2-589 (7th Cir. 2002); Decision and Order at 47.

Because we affirm the administrative law judge's findings that the existence of legal pneumoconiosis, total respiratory disability and disability causation were established pursuant to Sections 718.202(a)(4), 718.204(b) and 718.204(c) on the merits, we affirm the administrative law judge's award of benefits on the miner's claim. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

The Survivor's Claim

[26] Contrary to employer's general contention, the administrative law judge properly found that the correct legal standard for determining whether disability causation is established is whether pneumoconiosis is a "substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1).

Employer contends that the resolution of the survivor's claim "rests on the errors identified in the miner's claim." Employer's Reply Brief at 1 n.1. In light of our affirmance of the administrative law judge's award of benefits in the miner's claim, employer's only argument in regard to the survivor's claim is moot.[27] Therefore, the administrative law judge's determination that claimant is automatically entitled to survivor's benefits pursuant to amended 30 U.S.C. §932(*l*) is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on the miner's claim, her Decision and Order Awarding Benefits on the survivor's claim, and her denial of Employer's Motion for Reconsideration of the award of benefits on both claims are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[27] Because the administrative law judge determined that the miner was eligible to receive benefits on his lifetime claim at the time of his death, she found that claimant is automatically entitled to benefits pursuant to amended Section 932(*l*). 30 U.S.C. §932(*l*). Claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*).