BRB No. 09-0421 BLA

PAUL D. PAULEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANNING COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/24/2010
	)	
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 on Remand – Award of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (03-BLA-5600) of Administrative Law Judge Joseph E. Kane 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). This case is before the Board for the

third time. In its most recent Decision and Order, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as the administrative law judge's determination, that the opinions of Drs. Alam, Baker, and Caudill were well-reasoned and well-documented on the issue of the existence of legal pneumoconiosis,[1] did not comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).[2] *P.P.* [*Pauley*] *v. Manning Coal Corp.*, BRB No. 06-0976 BLA (Sept. 24, 2007), slip op. at 5. In light of the Board's decision to vacate the administrative law judge's weighing of the medical opinions of Drs. Alam, Baker, and Caudill under Section 718.202(a)(4), it also vacated the administrative law judge's finding that these opinions

[1] The regulations provide separate definitions of clinical and legal pneumoconiosis. Clinical pneumoconiosis is defined as "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 dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[2] Specifically, the Board rejected employer's contention that Dr. Alam did not indicate that claimant's lung disease was caused by coal dust exposure, but found merit in employer's contention that Dr. Alam did not provide any rationale for his opinion regarding the causes of claimant's lung conditions. *P.P.* [*Pauley*] *v. Manning Coal Corp.*, BRB No. 06-0976 BLA (Sept. 24, 2007), slip op. at 5. In addition, the Board held that employer was correct in asserting that Dr. Baker expressed his opinion, regarding the cause of claimant's chronic obstructive pulmonary disease (COPD) and impairment, in equivocal terms. *Pauley*, BRB No. 06-0976 BLA, slip op. at 5. At his deposition, Dr. Baker indicated that he "thought that [claimant's] coal dust exposure probably contributed" to his COPD. Claimant's Exhibit 8 at 8. Dr. Baker further stated that there is no method for precisely identifying the portion of an impairment caused by coal dust exposure, "but it's felt that cigarette smoking and coal dust exposure are probably about equal in a susceptible individual." *Id*. at 8-9. Similarly, Dr. Caudill acknowledged that there is "no way of sorting out" the cause of COPD when a person has smoked and has been exposed to coal dust. Claimant's Exhibit 2 at 14-15. Dr. Caudill also stated that he was not aware of "medical proof of either conclusion" in this case. *Id*. The Board instructed the administrative law judge, on remand, to consider these aspects of the opinions of Drs. Alam, Baker, and Caudill when determining whether they are well-reasoned and well-documented on the issue of the existence of legal pneumoconiosis. *Pauley*, BRB No. 06-0976 BLA, slip op. at 5.

established that claimant's totally disabling impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Pauley*, BRB No. 06-0976 BLA, slip op. at 6. The Board instructed the administrative law judge to reconsider this issue if he determined that claimant established the existence of pneumoconiosis on remand.

On remand, the administrative law judge credited the opinions of Drs. Alam, Baker, and Caudill, that claimant suffers from legal pneumoconiosis, over the contrary opinions of Drs. Broudy and Rosenberg, to find that the medical opinion evidence established the existence of legal pneumoconiosis. Based upon this determination, the administrative law judge further credited the opinions of Drs. Alam, Baker, and Caudill to find that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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

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

Relevant to the issue of the existence of pneumoconiosis, the record contains the opinions of Drs. Alam, Baker, and Caudill, who diagnosed legal pneumoconiosis, and Drs. Rosenberg and Broudy, who indicated that claimant does not have either clinical or legal pneumoconiosis. Dr. Alam examined claimant on July 13, 2001, at the request of the Department of Labor. On Form CM-988, Dr. Alam diagnosed coal workers' pneumoconiosis caused by coal dust exposure and cigarette smoking. Dr. Alam also

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

indicated that claimant is suffering from a moderate respiratory impairment and does not retain the respiratory capacity to perform his usual coal mine employment or comparable and gainful employment. Dr. Alam attributed 40-50 percent of claimant's impairment to coal workers' pneumoconiosis. In response to a questionnaire appended to this form, Dr. Alam indicated that claimant's pulmonary impairment was caused by "coal dust." Director's Exhibit 9. Dr. Baker examined claimant on November 17, 2000, and diagnosed chronic obstructive pulmonary disease (COPD) and a moderate respiratory impairment caused by both cigarette smoking and coal dust exposure. Dr. Baker further indicated that claimant is totally disabled by his respiratory impairment. Claimant's Exhibit 1. Dr. Baker testified at his deposition that there is no way to distinguish between smoking and coal dust exposure when assessing the source of claimant's impairment. Claimant's Exhibit 8 at 8-9. Dr. Caudill, claimant's treating physician, stated that claimant has COPD caused by coal dust exposure. Claimant's Exhibit 2 at 9. Dr. Caudill indicated that smoking may have been a contributing factor, but that there is no method for definitively distinguishing between the effects of coal dust exposure and cigarette smoking. *Id*. at 14-15.

Dr. Broudy examined claimant on October 4, 2001 and prepared a report in which he referred to the results of two additional examinations of claimant that he had performed in conjunction with a claim for state workers' compensation benefits. Director's Exhibit 28. Dr. Broudy also prepared a report dated August 25, 2003, in which he reviewed Dr. Baker's examination report and records from Dr. Caudill. Employer's Exhibit 4. Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis or any other dust-related lung disease. Director's Exhibit 28 at 13. Dr. Rosenberg examined claimant on July 28, 2003 and diagnosed a mild impairment caused by hypoventilation that Dr. Rosenberg indicated is most likely related to claimant's obesity. Employer's Exhibits 1, 7.

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Alam, Caudill, and Baker are reasoned and documented with respect to their diagnoses of legal pneumoconiosis. Employer specifically contends that Dr. Alam did not provide any rationale for his diagnoses, and that the administrative law judge "disregarded the Board's directive to consider the opinion in that regard." Employer's Brief at 12. Contrary to employer's arguments, the administrative law judge specifically considered Dr. Alam's opinion in light of the Board's statement that "Dr. Alam did not provide any rationale for his opinion regarding the causes of Claimant's lung conditions." *Pauley*, BRB No. 06-0976 BLA, slip op. at 5; Decision and Order on Remand at 4. The administrative law judge noted, however, that in response to a question asking Dr. Alam to give the basis for his conclusion that claimant suffered from an occupational lung disease caused by his coal mine employment, Dr. Alam responded: "PFT/ABG/[chest x-ray] p[atien]t clinical sign[s] and symptoms," and he added, "All points towards lung disease. P[atien]t needs to be on home O2 with his current PO2." Decision and Order on

Remand at 4-5; Director's Exhibit 9. The administrative law judge permissibly found that, because Dr. Alam indicated that he based his opinion upon the results of his physical examination and objective testing, and the factors set forth in 20 C.F.R. §718.202(a)(4),[4] the physician's opinion was sufficiently reasoned and documented to receive probative weight. 20 C.F.R. §718.202(a)(4); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order on Remand at 5. The administrative law judge concluded, however, as was within his discretion, that Dr. Alam's failure to explain how these factors caused him to reach his diagnosis rendered his opinion less persuasive. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6**;** Decision and Order on Remand at 5. We, therefore, reject employer's contention that the administrative law judge failed to consider that Dr. Alam did not explain his diagnosis. Employer's Brief at 12. Because the administrative law judge's determination is rational and supported by substantial evidence, we affirm the administrative law judge's credibility determination. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Employer next asserts that, in considering Dr. Baker's opinion, the administrative law judge impermissibly "dismissed [the Board's] directive" to consider that Dr. Baker's opinion was expressed in equivocal terms. Employer's Brief at 13. Employer also asserts that Dr. Baker's opinion cannot constitute a reasoned medical judgment sufficient to meet claimant's burden of proof. Employer's Brief at 15-18. Employer's contentions lack merit.

Contrary to employer's argument, in crediting Dr. Baker's opinion that claimant suffers from legal pneumoconiosis, the administrative law judge fully addressed the equivocal aspects of Dr. Baker's testimony that claimant's coal dust exposure "probably contributed" to his COPD, that, based on medical studies, the effects of cigarette smoking and coal dust exposure are "probably about equal" in a susceptible individual, and that there is no way to distinguish between smoking and coal dust exposure when assessing the source of a miner's impairment. Claimant's Exhibit 8 at 8-9; Decision and Order on Remand at 5. The administrative law judge noted, correctly, that the United States Court of Appeals for the Sixth Circuit has held that a physician's opinion that a miner's impairment "could all be due to cigarette smoking or could be due to a combination of

[4] The regulation at 20 C.F.R. §718.202(a)(4) provides that a medical opinion "shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories."

cigarette smoking and coal dust exposure" and that coal dust exposure "probably contributes to some extent in an undefineable proportion," can constitute substantial evidence sufficient to support a claimant's burden of proving the existence of legal pneumoconiosis. Decision and Order on Remand at 6, quoting *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007). The administrative law judge permissibly found that Dr. Baker's use of the word "probably," taken in context with his additional statements that coal dust exposure was a "significant factor" that "cause[d] part of [claimant's] disease more than likely," simply expressed Dr. Baker's opinion that both coal dust exposure and smoking caused claimant's impairment, and that it was impossible to identify the exact proportional effect of each factor. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order on Remand at 6. The administrative law judge permissibly concluded that, as Dr. Baker's opinion was based on medical studies, objective medical data, and other criteria enumerated at 20 C.F.R. §718.202(a)(4), Dr. Baker's diagnosis of legal pneumoconiosis was "well-reasoned and well-documented" and entitled to significant weight. *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Trumbo*, 17 BLR at 1-88-89 and n.4; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order on Remand at 6. In asserting that Dr. Baker's opinion is not well-reasoned, employer essentially asks the Board to examine the credibility of the doctor's opinion, which we are not authorized to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge's determination is rational and supported by substantial evidence, we affirm it. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Caudill, who, employer asserts, did not provide a reasoned opinion and merely relied upon an assumption that claimant's coal dust exposure played a role in causing his COPD. Employer's Brief at 18-19. Employer further maintains that the administrative law judge erred in according additional weight to Dr. Caudill's opinion based on his status as claimant's treating physician. Employer's Brief at 19. We disagree.

The administrative law judge initially found, correctly, that Dr. Caudill's acknowledgment, that there is no method for definitively distinguishing between the effects of coal dust and smoking in a miner with COPD, did not preclude Dr. Caudill's opinion from being credited. *See Barrett*, 478 F.3d at 358, 23 BLR at 2-483; Decision and Order on Remand at 6; Claimant's Exhibit 2 at 14-15. The administrative law judge further found, as was within his discretion, that while Dr. Caudill's reliance on clinical findings, objective test results, and claimant's history of coal mine employment rendered his opinion sufficiently reasoned to support claimant's burden of proof, Dr. Caudill's failure to more fully explain the basis of his opinion detracted from its value. *See Rowe*,

710 F.2d at 255 n.6, 5 BLR at 2-103 n.6. Finally, contrary to employer's argument, the administrative law judge specifically declined to accord Dr. Caudill any additional weight based on his status as claimant's treating physician, finding that there was "no reason why the nature and duration of the relationship between Dr. Caudill and Claimant or the frequency and extent of treatment provided by Dr. Caudill furnished him with any additional insight into the cause of Claimant's COPD." Decision and Order on Remand at 7; *see* 20 C.F.R. §718.104(d)(5); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). We, therefore, affirm the administrative law judge's credibility determination with respect to Dr. Caudill's opinion.

Regarding the administrative law judge's evaluation of employer's physicians' opinions, we first address employer's argument that the administrative law judge erred in discounting, on remand, the opinions of Drs. Broudy and Rosenberg, as inadequately reasoned, when the administrative law judge previously found their opinions well-reasoned and documented. Employer's Brief at 20. Contrary to employer's argument, in light of the Board's prior determination to vacate the award of benefits, on remand, the administrative law judge permissibly reevaluated all of the medical opinions of record. *See Williams*, 338 F.3d at 513, 22 BLR at 647; *Bartley v. L&M Coal Co.*, 901 F.2d 1311, 1313, 13 BLR 2-414, 2-417 (6th Cir. 1990); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 7-9. We also reject employer's contention that the administrative law judge erred in discrediting the opinion of Dr. Broudy, that coal dust exposure could not be a cause of the miner's severe respiratory impairment because there was no evidence of coal workers' pneumoconiosis on either the chest x-ray or computerized tomography scan. Employer's Brief at 21. Contrary to employer's contention, the administrative law judge acted within his discretion in according little weight to Dr. Broudy's opinion, in part, because he permissibly interpreted Dr. Broudy's testimony as requiring the miner's severe impairment to occur with clinical pneumoconiosis before it could constitute a respiratory impairment significantly related to coal dust exposure, *i.e.*, legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2); 65 Fed. Reg. 79939 (Dec. 20, 2000); Decision and Order on Remand at 8; Director's Exhibit 28 at 17; Employer's Exhibit 6 at 8, 13-15. The administrative law judge further permissibly concluded that Dr. Broudy's statements, that studies show that any decrease in lung function due to coal dust exposure would be less than five percent, implied that his opinion was based, in part, on the assumption that coal dust does not cause severe impairment, an assumption inconsistent with the findings by the Department of Labor. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); Decision and Order on Remand at 8-9; Director's Exhibit 28 at 16-18. As the administrative law judge provided valid reasons for discrediting the opinion of Dr. Broudy, we need not address employer's remaining

allegations of error with respect to Dr. Broudy's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

We next address employer's contention that the administrative law judge erred in discrediting the opinion of Dr. Rosenberg, that the miner does not have COPD, but suffers from a purely restrictive impairment due to obesity, hypoventilation, and pleural changes, and unrelated to coal dust exposure. Employer's Brief at 24-26; Decision and Order on Remand at 9-10. The administrative law judge noted, correctly, that Dr. Rosenberg's opinion was based, in part, on the physician's conclusion that the symmetrical decrease in claimant's FEV1 and FVC values is indicative of purely restrictive disease. Decision and Order on Remand at 9; Employer's Exhibit 7 at 29. The administrative law judge further noted, correctly, that a review of the pulmonary function studies of record revealed that, with the exception of Dr. Alam's study, all of the studies produced substantially consistent results, with claimant's FEV1/FVC ratio remaining consistent over three years of testing. Decision and Order on Remand at 9-10. Based on these observations, the administrative law judge reasoned that, because all of the physicians reviewed similar studies, yet only Dr. Rosenberg diagnosed a purely restrictive impairment,[5] Dr. Rosenberg's interpretation of the pulmonary function study evidence was "incorrect." Decision and Order on Remand at 10.

Initially, we agree with employer that it appears that the administrative law judge did not fully understand Dr. Rosenberg's opinion regarding the significance of the symmetrical decrease in claimant's FEV1 and FVC values.[6] However, the administrative law judge further found, correctly, that Dr. Rosenberg's opinion stands alone, in that "Dr. Rosenberg diagnosed purely restrictive lung disease, while every other physician diagnosed obstructive lung disease or COPD in addition to restrictive lung disease," including Drs. Alam, Baker, and Caudill, whose opinions the administrative law judge permissibly credited as supportive of a finding of legal pneumoconiosis. Decision and

[5] Dr. Alam diagnosed moderate airflow restriction and moderate obstruction. Director's Exhibit 9. Dr. Baker diagnosed COPD with a moderate obstructive defect and a mild restrictive defect. Claimant's Exhibit 1. Dr. Caudill diagnosed moderate restrictive and moderate obstructive lung disease. Claimant's Exhibit 9. Dr. Broudy diagnosed chronic obstructive airways disease. Employer's Exhibit 6 at 8.

[6] Dr. Rosenberg stated that the symmetrical reduction in claimant's FEV1 and FVC values to 59 and 60 percent of normal, respectively, indicated that the drop in values was due to the decrease in the size of claimant's lungs, associated with restriction, and not with obstruction. Employer's Exhibit 7 at 29. Thus, Dr. Rosenberg was not concerned with the ratio of FEV1 to FVC results, but with the amount of reduction in the FEV1 relative to the reduction in the FVC.

Order on Remand at 10; *see Kozele*, 6 BLR at 1-382-83 n.4. Thus, even assuming that the administrative law judge erred in concluding that Dr. Rosenberg's interpretation of the pulmonary function study evidence was "incorrect," substantial evidence supports the administrative law judge's conclusion that the weight of the medical opinion evidence establishes the existence of legal pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Clark*, 12 BLR at 1-155; *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Lucostic*, 8 BLR at 1-47; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 10. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis in the form of a chronic respiratory impairment arising out of coal mine employment.[7]

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's contention has no merit. The administrative law judge rationally discounted the opinions of Drs. Broudy and Rosenberg because they did not diagnose legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order on Remand at 11. Moreover, as the administrative law judge rationally relied on the opinions of Drs. Alam, Baker, and Caudill to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on their opinions, that claimant's totally disabling impairment is due in part to coal dust exposure, to find that claimant is totally disabled due to legal pneumoconiosis. *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

[7] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge concluded, correctly, that he was not required to separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order on Remand at 10.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.[8]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[8] On March 10, 2009, claimant's counsel filed an attorney fee petition requesting legal fees for services performed before the Board in conjunction with the prior appeals. The Board will address claimant's counsel's fee petition in a separate Order.