BRB No. 10-0236 BLA

JOE K. RIGGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROSS MOUNTAIN COAL, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/20/2011
	)	
TENNESSEE COAL COMPANY	)	
	)	
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (2004-BLA-06493) of Administrative Law Judge Alice M. Craft awarding benefits on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with at least 11 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found that the evidence submitted since the prior denial established the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.204(b)(2)(ii), (iv). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's exclusion of Dr. Dahhan's March 10, 2005 report. *J.R.* [*Riggs*] *v. Tennessee Coal Co.*, BRB No. 07-0569 BLA, slip op. at 5 n.4 (Mar. 31, 2008)(unpub.). However, the Board reversed the administrative law judge's decision to exclude the depositions of Drs. Rosenberg and Dahhan pursuant to 20

[1] As employer and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant filed his claims prior to January 1, 2005.

[2] Claimant filed his first claim in June 1993. Director's Exhibit 1. It was denied by the district director on December 10, 1993 because claimant did not establish any of the elements of entitlement. *Id*. By letter dated February 8, 1994, claimant filed a request for modification. *Id*. On April 19, 1994, the district director denied claimant's request for modification because claimant did not establish a change in conditions or a mistake in a determination of fact with respect to any of the elements of entitlement. *Id*. The denial became final because claimant did not pursue the claim any further. Claimant filed this claim on May 30, 2003. Director's Exhibit 3.

C.F.R. §725.458, and remanded the case to the administrative law judge for reconsideration of the admissibility of their depositions on other grounds, and for compliance with the provisions of 20 C.F.R. §§725.456(b)(4) and 725.414(a)(3)(i). *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 4-5. Further, the Board affirmed the administrative law judge's findings that the new evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) and, thus, a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 6. Regarding the merits, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 7. However, 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). *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 9. The Board also vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. In light of its affirmance of the administrative law judge's finding that the existence of clinical pneumoconiosis was established at 20 C.F.R. §718.202(a)(1), the Board instructed the administrative law judge, on remand, that she need not reconsider the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Id*. Nevertheless, the Board instructed the administrative law judge to reconsider whether the evidence established that claimant is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) and whether each physician's opinion regarding the cause of claimant's lung disease *and* totally disabling respiratory impairment was reasoned and documented. *Id*. Additionally, the Board instructed the administrative law judge to examine the entirety of the medical opinion evidence, and set forth the rationale underlying her findings in accordance with the Administrative Procedure Act (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), 30 U.S.C. §932(a). *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 9-10.

On remand, the administrative law judge admitted Dr. Rosenberg's deposition, but excluded Dr. Dahhan's deposition because employer conceded that it was based on inadmissible evidence. Further, the administrative law judge found that the medical opinion evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law

judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a substantive response brief 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 rational, supported by substantial evidence, and 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Initially, we will address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Pharaoh,[4] Baker, Dahhan, and Rosenberg. Dr. Pharaoh concluded that there was "no definite pneumoconiosis." Director's Exhibit 1. Dr. Baker opined that claimant has coal workers' pneumoconiosis, chronic obstructive pulmonary disease (COPD) related to coal dust exposure, and hypoxemia related to coal dust exposure.[5] Director's Exhibit 10. Dr. Dahhan

[3] The record indicates that claimant's coal mine employment occurred in Tennessee. Director's Exhibits 1, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. S*ee Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] The administrative law judge gave no weight to Dr. Pharaoh's opinion because she found that "the [c]laimant's pulmonary condition has changed so significantly since Dr. Pharaoh's examination." 2009 Decision and Order on Remand at 13.

[5] Dr. Baker examined claimant on behalf of the Department of Labor (the Department) on July 19, 2003. In his report, Dr. Baker diagnosed coal workers' pneumoconiosis 1/0, chronic obstructive pulmonary disease (COPD) with a mild obstructive defect, severe resting arterial hypoxemia, and ischemic heart disease by history. Director's Exhibit 10. In response to the question on the Department's form concerning the etiology of claimant's cardiopulmonary conditions, Dr. Baker

opined that claimant does not have an occupational lung disease related to his coal dust exposure. Director's Exhibits 11, 12. Dr. Rosenberg opined that "[claimant] does not have [coal workers' pneumoconiosis] of the medical or legal variety."[6] Employer's Exhibit 1.

The administrative law judge found that Dr. Baker's opinion was documented and reasoned. 2009 Decision and Order on Remand at 15. In contrast, the administrative law judge found that the opinions of Drs. Dahhan and Rosenberg were not supported by the weight of the medical evidence[7] and were inconsistent with the premises underlying the regulations. *Id*. The administrative law judge therefore found that Dr. Baker's opinion outweighed the contrary opinions of Drs. Dahhan and Rosenberg. *Id*. Hence, the administrative law judge found that the medical opinion evidence established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer asserts that Dr. Baker's opinion is insufficient to establish the existence of clinical pneumoconiosis because it was based solely on a positive x-ray and an inflated history of coal dust exposure. In his report, Dr. Baker

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indicated that claimant's coal workers' pneumoconiosis was caused by coal dust exposure, his COPD was caused by "coal dust exposure/cigarette smoking," and that claimant's severe hypoxemia was caused by "cigarette smoking/coal dust exposure/?cardiac." *Id*. He indicated that each of the diagnosed conditions contributes "fully" to the impairment. *Id.*

[6] Dr. Rosenberg opined that claimant's restrictive impairment was not related to his past inhalation of coal dust exposure or the presence of medical coal workers' pneumoconiosis. Employer's Exhibit 1. Dr. Rosenberg also opined that claimant does not have COPD. *Id.*

[7] The administrative law judge stated: "[t]he only explanation [Dr. Dahhan] offered for excluding coal dust was that the [c]laimant's obstructive impairment was responsive to bronchodilators, and coal dust causes a fixed impairment. But the [c]laimant's obstruction was only partially reversible." 2009 Decision and Order on Remand at 15.

The administrative law judge also stated: "[Dr. Rosenberg] said that the blood gas studies did not show a drop in the PO2, which would indicate pneumoconiosis. But the only exercise study was performed in 1993, before the [c]laimant had developed any pulmonary impairment. Dr. Rosenberg said that the [c]laimant had developed restrictive disease due to excess weight. But Dr. Dahhan characterized the [c]laimant as only mildly obese." *Id*.

diagnosed "Coal Workers' Pneumoconiosis 1/0: an abnormal chest x-ray & coal dust exposure." Director's Exhibit 10. The administrative law judge gave probative weight to Dr. Baker's diagnosis of clinical pneumoconiosis at Section 718.202(a)(4), because she found that it was well-documented and well-reasoned. 2009 Decision and Order on Remand at 15. However, in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 575-6, 22 BLR 2-107, 1-120 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, agreed with an administrative law judge's assertion that a diagnosis of pneumoconiosis that was based on an x-ray and a history of coal dust exposure was not a reasoned medical opinion at Section 718.202(a)(4). Because Dr. Baker's opinion is insufficient to establish *clinical* pneumoconiosis, as it was based only on an x-ray reading and a history of coal dust exposure, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Cornett*, 227 F.3d at 575-6, 22 BLR at 1-120.

Employer also asserts that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis because Dr. Baker failed to provide any details for his conclusions.[8] In his report, Dr. Baker noted his observations on physical examination of claimant, noted claimant's histories of coal mine employment and cigarette smoking, and reported findings of mild obstructive ventilatory defect on pulmonary function study and severe resting hypoxemia on blood gas study. Director's Exhibit 10. Dr. Baker diagnosed COPD related to coal dust exposure and smoking, as well as hypoxemia related to coal dust exposure, smoking, and a questionable cardiac condition. *Id*. In a supplemental report, Dr. Baker checked the box marked "yes" to indicate that claimant has an occupational lung disease caused by his coal mine employment. *Id.*

In her Decision and Order dated February 26, 2007, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), based on Dr. Baker's opinion. 2007 Decision and Order at 14-15.

In our prior Decision and Order, we addressed employer's contention that the administrative law judge "impermissibly shifted the burden of proof" to employer to establish that coal dust exposure was not a factor in claimant's respiratory impairment. *J.R.* [*Riggs*], BRB No. 07-0569 BLA, slip op. at 9. We noted that, in contrast to the opinions of Drs. Dahhan and Rosenberg, Dr. Baker's report did not contain an explanation for his conclusion that coal dust exposure

[8] Employer asserts that "Dr. Baker did not even sufficiently address [claimant's] history of congestive heart failure in 2002, or how that condition may contribute to pulmonary impairment." Employer's Brief at 12.

was a contributing cause of claimant's COPD and hypoxemia. *Id*. Thus, we held that employer's contention had merit, based on "[the absence] of an explicit consideration of this factor." *Id*. Consequently, we vacated the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

Furthermore, because the administrative law judge relied on her weighing of the medical opinion evidence at Section 718.202(a)(4) to determine that claimant established total disability due to pneumoconiosis, we also vacated the administrative law judge's finding that Dr. Baker's opinion was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(c). *Id*. Moreover, because of the interrelationship between the definitions of legal pneumoconiosis and total disability due to pneumoconiosis, as well as the nature of the evidence in this case, we instructed the administrative law judge to determine whether each physician's opinion regarding the cause of claimant's lung disease and totally disabling respiratory impairment was reasoned and documented. *Id*. Lastly, we instructed the administrative law judge to examine the entirety of the medical opinion evidence and set forth the rationale underlying her findings in accordance with the APA. *Id*. at 9-10.

In her Decision and Order on Remand dated November 30, 2009, the administrative law judge reconsidered Dr. Baker's opinion. However, the administrative law judge did not reopen the record to allow for the submission of evidence that could further clarify Dr. Baker's opinion. Rather, the administrative law judge evaluated the medical tests that Dr. Baker relied on in his report and concluded that Dr. Baker's opinion of legal pneumoconiosis was documented and reasoned. The administrative law judge specifically stated:

> Despite the problems with his x-ray reading and pulmonary function testing, Dr. Baker's opinion was supported by the evidence available to him, consistent with the overall weight of the medical evidence regarding the presence of a disabling pulmonary impairment. Furthermore, Dr. Baker's attribution of the [c]laimant's pulmonary impairment to a combination of factors is consistent with the regulations, and sufficient to meet the requirement that coal dust be a contributing cause to the [c]laimant's impairment to diagnose legal pneumoconiosis.

2009 Decision and Order on Remand at 15. In our prior decision, however, we held that, as presented, Dr. Baker's opinion was insufficient to establish the existence of legal pneumoconiosis, based on the doctor's failure to provide explanations for his conclusions. Thus, because the administrative law judge did not seek clarification from Dr. Baker to cure the flaws in Dr. Baker's report with

regard to the issue of legal pneumoconiosis, we reverse the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Further, because the administrative law judge did not cure the flaws in Dr. Baker's report with regard to the issue of disability causation, and inasmuch as we herein reverse the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also reverse the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[9]

In light of our reversal of the administrative law judge's findings that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), essential elements of entitlement under 20 C.F.R. Part 718, we reverse the administrative law judge's award of benefits.[10] *Anderson*, 12 BLR at 1-112.

[9] In light of our disposition of the case at 20 C.F.R. §§718.202(a)(4) and 718.204(c), we decline to address employer's assertions regarding the administrative law judge's weighing of the opinions of Drs. Dahhan and Rosenberg.

[10] Further, in light of our disposition of the case on the merits, employer's request for reassignment of the case to a different administrative law judge on remand is moot.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge:

I respectfully dissent from the majority's decision to reverse the administrative law judge's Decision and Order on Remand awarding benefits. I would instead affirm the administrative law judge's Decision and Order on Remand awarding benefits because it is supported by substantial evidence. The majority believes that Dr. Baker's opinion is insufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). I disagree.

In her February 26, 2007 Decision and Order, the administrative law judge considered the opinions of Drs. Baker, Dahhan, and Rosenberg at Section 718.202(a)(4). The administrative law judge found that Dr. Baker's opinion, that claimant's chronic obstructive pulmonary disease (COPD) was related to coal dust exposure and cigarette smoking, and that his hypoxemia was related to coal dust exposure, cigarette smoking, and a possible cardiac condition, outweighed the contrary opinions of Drs. Dahhan and Rosenberg. Hence, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), based on Dr. Baker's opinion. In addition, the administrative law judge found that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), based on Dr. Baker's disability causation opinion. Accordingly, the administrative law judge awarded benefits.

In our prior decision, we agreed with employer's contention that the administrative law judge "impermissibly shifted the burden of proof" to employer to establish that coal dust exposure was not a factor in claimant's respiratory impairment, as she engaged in a less rigorous analysis of Dr. Baker's report, in finding that the doctor's opinion was documented and reasoned, than she applied to the reports of Drs. Dahhan and Rosenberg. Thus, we vacated the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Further, in light of the administrative law judge's reliance on her weighing of the medical opinion evidence at Section 718.202(a)(4) to determine that claimant established total disability due to pneumoconiosis at Section 718.204(c), we also vacated the administrative law judge's finding that Dr. Baker's opinion was sufficient to satisfy claimant's burden of proof under Section 718.204(c).

However, we remanded the case to the administrative law judge to reconsider whether claimant had established that he was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). We noted that the administrative law judge, on remand, need not reconsider whether claimant had established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as that element of entitlement had been established by the administrative law judge's appropriate finding that claimant proved the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Nevertheless, because of the interrelationship between the definitions of legal pneumoconiosis and total disability due to pneumoconiosis, and the nature of the evidence in this case, we instructed the administrative law judge to determine whether each physician's opinion concerning the cause of claimant's lung disease and totally disabling respiratory impairment was documented and reasoned. Furthermore, we instructed the administrative law judge to examine the entirety of the medical opinion evidence and set forth the rationale underlying her findings in accordance with the Administrative Procedure Act (APA). *J.R.* [*Riggs*] *v. Tennessee Coal Co.*, BRB No. 07-0569 BLA (Mar. 31, 2008)(unpub.).

In her November 30, 2009 Decision and Order on Remand, the administrative law judge reconsidered the opinions of Drs. Baker, Dahhan, and Rosenberg at 20 C.F.R. §§718.202(a)(4) and 718.204(c),[11] and found that claimant

[11] The administrative law judge also considered Dr. Pharaoh's opinion. The administrative law judge noted that claimant did not have a respiratory impairment when Dr. Pharaoh examined him in connection with his first claim in 1993. Hence, the administrative law judge gave no weight to Dr. Pharaoh's opinion because she found that "the [c]laimant's pulmonary condition has changed so significantly since Dr. Pharaoh's examination." 2009 Decision and Order on Remand at 13. Employer does not contest the administrative law judge's finding

was entitled to benefits.[12] At Section 718.202(a)(4), the administrative law judge found that claimant established the existence of legal pneumoconiosis, based on Dr. Baker's opinion. In his report, Dr. Baker noted his observations on physical examination of claimant, noted claimant's histories of coal mine employment and cigarette smoking, and reported findings of mild obstructive ventilatory defect on pulmonary function study and severe resting hypoxemia on blood gas study. Director's Exhibit 10. Dr. Baker diagnosed COPD and hypoxemia related to coal dust exposure. *Id*. In a supplemental report, Dr. Baker checked the box marked "yes" to indicate that claimant has an occupational lung disease caused by his coal mine employment. *Id.*

An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, the administrative law judge evaluated Dr. Baker's opinion with regard to the issue of legal pneumoconiosis in light of the objective testing conducted by the doctor. The administrative law judge stated:

> The pulmonary function test revealed a mild obstructive defect. The arterial blood gas study revealed severe resting arterial hypoxemia. Dr. Baker diagnosed…COPD with mild obstruction [sic] defect based upon the pulmonary function studies; severe arterial resting hypoxemia upon arterial blood gas studies; and possible ischemic heart disease by history. Dr. Baker attributed the…COPD to coal dust exposure and cigarette smoking; and arterial hypoxemia to coal dust exposure, cigarette smoking, and possibly a cardiac contributor.

2009 Decision and Order on Remand at 8-9. Further, despite noting that Dr. Baker's diagnosis of obstructive lung disease was undermined by an invalid pulmonary function study,[13] the administrative law judge stated:

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with regard to Dr. Pharaoh's opinion at Section 718.202(a)(4). I would affirm this finding as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[12] The administrative law judge noted that Drs. Baker, Dahhan and Rosenberg were well-qualified, given that they were Board-certified pulmonologists. 2009 Decision and Order on Remand at 13.

[13] In considering Dr. Baker's opinion at Section 718.202(a)(4), the administrative law judge noted that "Dr. Baker's pulmonary function testing was invalid, but the arterial blood gas testing was acceptable." 2009 Decision and

> Dr. Baker's opinion was supported by the evidence available to him, and consistent with the overall weight of the medical evidence regarding the presence of a disabling pulmonary impairment. Furthermore, Dr. Baker's attribution of the [c]laimant's pulmonary impairment to a combination of factors is consistent with the regulations, and sufficient to meet the requirement that coal dust be a contributing cause to the [c]laimant's impairment to diagnose legal pneumoconiosis.

Id. at 15.[14]

Contrary to employer's assertion, the administrative law judge's decision reflects that Dr. Baker provided details for his diagnoses. Thus, the administrative law judge acted within her discretion in finding that Dr. Baker's opinion was reasoned. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). Consequently, I would reject employer's assertion that the administrative law judge erred in finding that Dr. Baker's opinion of legal pneumoconiosis was reasoned because Dr. Baker failed to provide any details for his conclusions.[15]

Employer further asserts that Dr. Baker's opinion is not reasoned because Dr. Baker relied on an inflated history of coal dust exposure. In his report, Dr. Baker noted that claimant stated that he worked 19½ years in underground coal mine employment. Director's Exhibit 10. In her decision, however, the

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Order on Remand at 14. After noting that Dr. Baker's invalid pulmonary function study undermined his diagnosis of obstructive lung disease, the administrative law judge determined that the study was not repeated "perhaps because of the qualifying arterial blood gas study." *Id*.

[14] Although the administrative law judge found inconsistencies in the results of the pulmonary function testing of record, she noted that all of the doctors who examined claimant, or reviewed his records, agreed that he has some degree of obstructive lung disease. 2009 Decision and Order on Remand at 15.

[15] Employer additionally asserts that Dr. Baker's opinion is not reasoned because it was prepared on a pre-printed form of the Department of Labor (the Department) and contained several "checkmark" responses. Contrary to employer's assertion, the administrative law judge acted within her discretion in finding that Dr. Baker's opinion was documented and reasoned, as the use of a standardized format does not, by itself, render a physician's opinion unreliable. *See Hall v. Director, OWCP*, 12 BLR 1-133 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

administrative law judge found that claimant established at least 11 years of coal mine employment. 2007 Decision and Order at 15; 2009 Decision and Order on Remand at 14. The Board has consistently held that an administrative law judge must note a discrepancy between her findings regarding a claimant's history of coal mine employment and that relied on by a physician, and determine whether the discrepancy affects the credibility of that physician's opinion. *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Fitch v. Director, OWCP*, 9 BLR 1-45 (1986); *Long v. Director, OWCP*, 7 BLR 1-254 (1984). In this case, the administrative law judge considered the discrepancy in the histories of coal dust exposure that Dr. Baker relied on in his report and that she found in her decisions. The administrative law judge stated:

> Although [Dr. Baker] reported a longer history of coal mine employment than I have found, I conclude that the difference is not so great as to decrease the reliability of his opinion, as my finding of at least 11 years was a minimum – I credited the [c]laimant's testimony that some of his coal mine work was not reported to Social Security, but I was unable to calculate how many additional years that entailed. In any event, all three doctors who gave opinions in the claim used estimates of coal mine employment in the same range as Dr. Baker.

2009 Decision and Order on Remand at 14.[16] Thus, because the administrative law judge clearly identified, and accounted for, discrepancies in the record regarding claimant's length of coal mine employment, I would reject employer's assertion that the administrative law judge erred in finding that Dr. Baker's opinion of legal pneumoconiosis was reasoned because it was based on an inaccurate history of coal mine employment. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer additionally asserts that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Rosenberg because she found that they were inconsistent with the premises underlying the regulations. Specifically, employer argues that the administrative law judge erred in failing to consider the extent to which the contrary premises of Drs. Dahhan and Rosenberg affected their opinions regarding the issue of legal pneumoconiosis. Employer maintains that "[s]tanding alone, however, a physician's expression of a view that conflicts with

[16] Dr. Pharaoh reported a history of 17 years, Dr. Dahhan reported a history of 19½ years of coal mine employment, and Dr. Rosenberg reported a history of 17½ to 19 or 20 years. 2009 Decision and Order on Remand at 8, 9, 10, 15; Director's Exhibits 1, 11, 12; Employer's Exhibits 1, 2.

the Act is not sufficient to bar consideration of that opinion." Employer's Brief at 13.

Contrary to employer's assertion, the administrative law judge did not discount the opinions of employer's experts because she found that they were *contrary to the Act*. An administrative law judge may evaluate expert opinions in conjunction with the discussion by the Department of Labor (the Department) of sound medical science in the preamble to the revised regulations. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The preamble sets forth how the Department has chosen to resolve questions of scientific fact. 65 Fed. Reg. 79939-79942 (Dec. 20, 2000). A determination of whether a medical opinion is not supported by accepted scientific evidence, as determined by the Department, is a valid criterion in deciding whether to credit the opinion. Such a determination is different from finding an opinion hostile or contrary to the Act. *See Zeigler Coal Co. v. OWCP* [*Griskell*], 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007), *citing Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. If a doctor's opinion is premised on scientific evidence conflicting with the science credited by the Department, the administrative law judge may properly assign that opinion less weight. *See Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7.

Here, as discussed *supra*, the administrative law judge gave less weight to the opinions of Drs. Dahhan and Rosenberg because she found that they were inconsistent with the premises underlying the regulations.[17] The administrative law judge stated that "Dr. Dahhan's opinion is not consistent with the premises underlying the regulations that coal dust exposure and cigarette smoking have additive effects." 2009 Decision and Order on Remand at 15. In addition, the administrative law judge stated that "Dr. Rosenberg discussed medical studies showing that lower grades of pneumoconiosis do not cause a ventilatory impairment." *Id*. The administrative law judge further stated that "[Dr.

[17] The administrative law judge noted that the Department has taken the position that, even in the absence of fibrosis or complicated pneumoconiosis, coal dust exposure may induce obstructive lung disease. 2009 Decision and Order on Remand at 13. The administrative law judge also noted that the Department concluded that, even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis, and that the risk is additive with cigarette smoking. *Id*. The administrative law judge therefore stated that "[m]edical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, are therefore contrary to the premises underlying the regulations." *Id*. at 13-14.

Rosenberg] did not address the role of coal dust exposure in obstructive disease at all."[18] *Id*. Fundamentally, this case turns on whether substantial evidence supports the administrative law judge's findings regarding the credibility of the expert witnesses. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge permissibly determined that the opinions of Drs. Dahhan and Rosenberg were predicated on medical science at odds with that credited by the Department, *see Shores*, 358 F.3d at 490, 23 BLR at 2-26, I would reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Rosenberg because she found that they were inconsistent with the premises underlying the regulations.

Employer also asserts that the administrative law judge imposed a presumption of legal pneumoconiosis and shifted the burden of proof from claimant in her evaluation of the conflicting medical opinion evidence. Contrary to employer's assertion, Dr. Baker's opinion is sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §§718.201(a)(2), (b) and 718.202(a)(4). As discussed *supra*, Dr. Baker opined that claimant has COPD and hypoxemia related to coal dust exposure. Director's Exhibit 10. Section 718.201(a)(2) provides that "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). In addition, Section 718.201(b) provides that, for this section, a disease "arising out of coal mine employment" includes 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. §718.201(b). Because the administrative law judge properly found that Dr. Baker's opinion outweighed the contrary opinions of Drs. Dahhan and Rosenberg, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), I would reject employer's assertion that the administrative law judge imposed a presumption of legal pneumoconiosis and shifted the burden of proof in her evaluation of the conflicting medical evidence.

[18] During a deposition dated May 11, 2005, Dr. Rosenberg opined that, even if he were to assume that claimant has a "mild degree of category one simple [coal workers' pneumoconiosis], these articles and the research that have been done indicates [sic] that you don't get the severe restriction that is noted with respect to [claimant]." Employer's Exhibit 1 at 9. Dr. Rosenberg also opined that, "[i]f [claimant] truly had restrictive dysfunction related to coal workers' pneumoconiosis, one would have to correlate this and would expect on x-ray advanced findings of [coal workers' pneumoconiosis;] that's simply not the situation here." *Id.* at 10-11.

For these reasons, I would affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Turning to Section 718.204(c), the majority believes that Dr. Baker's opinion is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). I disagree.

The administrative law judge found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). In so finding, the administrative law judge considered the opinions of Drs. Baker, Dahhan, and Rosenberg.[19] After noting that all of these physicians agreed that claimant is disabled, the administrative law judge stated that "[o]nly Dr. Baker diagnosed clinical and legal pneumoconiosis, and said that the [c]laimant's disability is due to smoking and coal dust exposure." 2009 Decision and Order on Remand at 17. The administrative law judge gave probative weight to Dr. Baker's opinion because she found that it was documented and reasoned. In addition, the administrative law judge gave less weight to the opinions of Drs. Dahhan and Rosenberg because she found that they conflicted with her findings that claimant has clinical and legal pneumoconiosis. Moreover, the administrative law judge noted that "[Drs. Dahhan and Rosenberg] did not entirely agree with each other about the nature of the [c]laimant's pulmonary impairment, or its causes."[20] *Id*.

[19] The administrative law judge also considered the opinions of Drs. Isber and Pharaoh. The administrative law judge found that Dr. Isber did not render an opinion with respect to the issue of disability causation. Further, the administrative law judge gave no weight to Dr. Pharaoh's opinion because she found that "it was too remote in time to shed any light on the cause of the [c]laimant's more recent pulmonary disability." 2009 Decision and Order on Remand at 17. Employer does not contest the administrative law judge's findings with regard to the opinions of Drs. Isber and Pharaoh at Section 718.204(c). Therefore, I would affirm these findings as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[20] The administrative law judge noted that, while Dr. Dahhan attributed the pulmonary impairment to sleep apnea, chronic bronchitis, and drug-induced CO2 retention, characterized claimant as mildly obese, and did not identify a restrictive disease, Dr. Rosenberg diagnosed obstructive sleep apnea, obesity, bronchitis, and a restrictive disease due to the obesity. 2009 Decision and Order on Remand at 17. The administrative law judge also noted that Dr. Rosenberg did not mention either Dr. Dahhan's finding of drug-induced CO2 retention, or Dr. Dahhan's failure to diagnose a restrictive disease. *Id*. Further, the administrative law judge noted that Dr. Rosenberg did not offer an explanation for the differing results of

The administrative law judge therefore found that claimant established total disability due to pneumoconiosis, based on Dr. Baker's opinion.

Employer asserts that Dr. Baker's disability causation opinion was not reasoned because Dr. Baker failed to provide any details for his conclusions. In considering Dr. Baker's opinion, the administrative law judge stated, "I find that his opinion is documented and reasoned on the issue of cause of the [c]laimant's disability for the same reasons that I credited his diagnoses." 2009 Decision and Order on Remand at 17. As discussed *supra*, the administrative law judge's decision reflects that Dr. Baker provided details for his diagnoses. Thus, the administrative law judge acted within her discretion in finding that Dr. Baker's opinion was reasoned. *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. Consequently, I would reject employer's assertion that the administrative law judge erred in finding that Dr. Baker's disability causation opinion was reasoned because Dr. Baker failed to provide any details for his conclusions.

Employer also asserts that the administrative law judge erred in discounting the disability causation opinions of Drs. Dahhan and Rosenberg because she found that they were contrary to the Act. Contrary to employer's assertion, the administrative law judge did not discount the opinions of Drs. Dahhan and Rosenberg because they were contrary to the Act. Rather, as discussed *supra*, the administrative law judge acted within her discretion in discounting the opinions of Drs. Dahhan and Rosenberg because she found that they conflicted with her findings that claimant has clinical and legal pneumoconiosis. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (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).

Employer's assignments of error to the administrative law judge's credibility findings at 20 C.F.R. §718.204(c) amount to 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, 1-23 (1988). The determination of whether a medical opinion is documented and reasoned rests within the discretion of the administrative law judge, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22, as does the assessment of the weight and credibility to be accorded to the conflicting medical evidence. *See Martin v. Ligon Preparation*

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the pulmonary function testing, even though the doctor had access to all of the medical evidence. *Id*. Employer does not take issue with the administrative law judge's characterization of the disability causation opinions of Drs. Dahhan and Rosenberg.

Co., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Because the administrative law judge explained the bases for her credibility findings in accordance with the APA, and substantial evidence supports the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis, I would affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(c). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218, 20 BLR 2-360, 2-373 (6th Cir. 1996); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).[21]

In conclusion, therefore, I would affirm the administrative law judge's Decision and Order on Remand awarding benefits.

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BETTY JEAN HALL
Administrative Appeals Judge

[21] Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, I would reject employer's assertion that the case be remanded for reassignment to a different administrative law judge. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).