BRB No. 10-0288 BLA

JOHN B. OSLONIAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
METEC, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 01/31/2011
OLD REPUBLIC INSURANCE 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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Nagle P.S.C.), Barbourville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Maia S. Fisher (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.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5960) of Administrative Law Judge Alice M. Craft, with respect to a claim filed on September 26, 2006, 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). After crediting claimant with at least eighteen years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant's work as an equipment salesperson for employer met the definition of a miner pursuant to 20 C.F.R. §§725.101(a)(19); 725.202(a). In addition, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §718.202(a)(4), and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant's work as a salesman qualified as the work of a miner and did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant, in response, states that the administrative law judge properly determined his status as a miner and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this appeal.[1]

By Order dated April 16, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[2] *Oslonian v. Metec, Inc.*, BRB No. 10-0288 BLA (Apr. 16, 2010)(unpub. Order). Claimant, the Director and employer have responded.

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[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] Relevant to this claim, Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

The Director states that Section 1556 will not affect this case if the Board affirms the administrative law judge's award of benefits. However, the Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), and for the possible submission of additional evidence, would be required, as the present claim was filed after January 1, 2005, and the administrative law judge credited the miner with more than fifteen years of coal mine employment. Claimant asserts that the award of benefits would not be altered by the application of the amendments, as he is entitled to the presumption that he is totally disabled due to pneumoconiosis, based on the administrative law judge's findings that claimant has more than fifteen years of coal mine employment and is totally disabled due to a respiratory impairment. Employer indicates that the recent amendments do not apply to this claim because, although it was filed after January 1, 2005, and was pending on March 23, 2010, whether claimant had at least fifteen qualifying years of coal mine employment is disputed. However, employer contends that if the Board determines that the amendments apply, it should be permitted to develop evidence addressing the new standards.

To determine whether this case must be remanded for consideration of invocation of the rebuttable presumption of total disability due to pneumoconiosis, we will first address employer's allegations of error regarding the administrative law judge's finding that claimant is a miner and his findings at 20 C.F.R. §§718.202(a)(4), 718.204(c).

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has 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; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

I. Status as a Miner

A. The Relevant Evidence

At his deposition on November 16, 2006, claimant testified that he worked in employer's sales department, demonstrating surface mining equipment to clients at working mine sites. Director's Exhibit 16. Claimant stated that an average appointment with a client would last from two to eight hours and that he was exposed to coal dust during that time. *Id*. Claimant also prepared a written statement, dated March 14, 2007, indicating that, from September 1983 through December 1987, he worked in employer's machinery sales department, where he spent eighty to ninety percent of each month demonstrating equipment to clients at working mine sites. Director's Exhibit 5. In addition, claimant stated that from January 1988 through October 1989, he was the supervisor of the machinery sales department, where he spent at least fifty percent of each month demonstrating equipment. *Id*.

At the hearing on August 28, 2008, claimant testified that his work as a salesperson involved demonstrating mining equipment at mine sites to operators, who were interested in purchasing or leasing the equipment from employer or contracting with employer to mine their land. Hearing Transcript at 21, 42. Claimant stated that, as a salesman, he worked three to five days a week at a mine and that his demonstrations of the equipment involved him being in the cab of the machine with the operator, watching the machine dig coal, and getting down on the ground next to the machine while it was running, which resulted in claimant being covered in coal dust. *Id*. at 21-22. Claimant also testified that he would infrequently help miners at the site when there was a shortage of workers. *Id*. at 22.

B. The Administrative Law Judge's Findings

The administrative law judge determined that the facts in this case were similar to the facts in *Tobin v. Director, OWCP*, 8 BLR 1-115 (1985), a case in which the Board held that the claimant's job as a service manager, whose duties included repairing and demonstrating equipment in mines, constituted the work of a miner. Decision and Order at 6-7. The administrative law judge noted that the Board concluded that, "because the claimant worked in or around a coal mining site, his work satisfied the situs requirement, and that his work was integral to the coal production process." *Id*. at 7. Accordingly, the administrative law judge found, based on the Board's holding in *Tobin*, that claimant's work as a salesman satisfied both the situs and function requirements and, therefore, he was a miner pursuant to 20 C.F.R. §§725.101(a)(19), 725.202(a).

The administrative law judge found that the "best evidence" in the record concerning the dates claimant spent as a salesperson for employer was in claimant's

written statement, appearing at Director's Exhibit 5, but he also considered claimant's deposition and hearing testimony and an affidavit from one of claimant's former co-workers.[4] Decision and Order at 7. The administrative law judge determined that:

> [A]n average of [four] days per week, or 80% of the [c]laimant's time as a salesman from September 1983 to December 1987 (except for his [six] month stint as a mine foreman in Grundy, Virginia, which I have counted at 100%), and 50% of his time from January 1988 to October 1989, should be counted as time as a miner.

Id. Therefore, the administrative law judge found that claimant had approximately five years of coal mine employment between September 1983 and October 1989.[5] *Id*.

C. Arguments on Appeal

Employer asserts that the administrative law judge focused solely on the situs requirement in determining whether claimant's job as a salesperson qualified as work as a miner pursuant to 20 C.F.R. §§725.101(a)(19), 725.202(a). Employer further argues that, to the extent that the administrative law judge considered the function requirement, she relied exclusively on *Tobin* and did not consider the specific facts of this case or explain how claimant's work as a salesman was integral to the production of coal, but rather assumed that sales work automatically met the function requirement. Employer contends that such an error was not harmless because the administrative law judge relied on this finding when calculating the length of claimant's coal mine employment, which is relevant to the weighing of the medical opinions and whether claimant is entitled to the presumption at 20 C.F.R. §718.203.

The regulations set forth two definitions of a miner. Pursuant to 20 C.F.R. §725.101(a)(19), a miner is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 20 C.F.R. §725.101(a)(19). Under 20 C.F.R. §725.202(a), a miner is "any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine

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[4] Melvin Bolton submitted an affidavit in which he stated that he has known claimant for several years, both in the community and while they both worked for employer. Director's Exhibit 6. Mr. Bolton indicated that claimant was not employed at the mine in Grundy, Virginia, after January 1988. *Id*.

[5] This is the only portion of claimant's coal mine employment history that has been contested.

construction or maintenance in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a situs-function test in determining whether an individual is a miner under the Act. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The situs portion of the test requires that a person's work occurred in or around a coal mine or coal preparation facility. *Id*. An individual meets the function requirement if his or her work was necessary and integral to the extraction or preparation of coal. *Id*. The Sixth Circuit has also held that "[t]hose whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as 'miners.'" *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989). In *Tobin*, the case on which the administrative law judge relied, the Board stated that the claimant's work "demonstrating mining equipment, although not performed in the employ of a coal company, was performed at a covered situs, clearly contributed to the extraction of coal and was integral to the coal production process." *Tobin*, 8 BLR at 1-117.

In the present case, the administrative law judge addressed both the situs and the function requirements, when determining whether claimant's work as a salesperson met the definition of a miner pursuant to 20 C.F.R. §§725.101(a)(19), 725.202(a). In addressing the function requirement, contrary to employer's assertion, the administrative law judge did not merely reiterate the Board's holding in *Tobin*, but instead, considered the evidence of record regarding the nature of claimant's work with employer. Decision and Order at 6-7. The administrative law judge indicated correctly that, at times, claimant's duties as a salesperson required him to travel to mines to demonstrate mining equipment, which included being in the cab of the machine with the operator and standing near the machine, while it was in use. *Id*. at 6; Hearing Transcript at 21-22.

The administrative law judge rationally found that these aspects of claimant's sales work were nearly identical to the duties that the Board held, in *Tobin*, were necessary to the extraction of coal and integral to the coal production process. *Tobin*, 8 BLR at 1-117; Decision and Order at 6-7. Therefore, the administrative law judge permissibly relied upon the Board's decision in *Tobin* to determine that part of claimant's sales work met the function requirement. *Tobin*, 8 BLR at 1-117; *see Clemons*, 873 F.2d at 922, 12 BLR at 2-278; Decision and Order at 7. The administrative law judge also acted within her discretion in calculating the percentage of claimant's sales work that was coal mine employment, based on her finding that a portion of claimant's sales duties constituted the work of a miner. *Tobin*, 8 BLR at 1-117; Decision and Order at 7. Accordingly, we affirm the administrative law judge's determination that claimant's duties demonstrating mining equipment at mine sites constituted the work of a miner, as defined in 20 C.F.R. §§725.101(a)(19), 725.202(a).

II. 20 C.F.R. §§718.202(a)(4), 718.204(c)

A. The Administrative Law Judge's Findings

In determining whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4), and total disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge considered the opinions of Drs. Baker, Hays, Dahhan and Rosenberg. At 20 C.F.R. §718.202(a)(4), the administrative law judge initially determined that all of the medical opinions were reasoned and documented. Decision and Order at 21. The administrative law judge accorded "probative weight" to Dr. Baker's opinion, that claimant has legal pneumoconiosis, because she found that it was supported by the evidence. *Id*.; Director's Exhibit 11. The administrative law judge noted that, although Dr. Baker relied on smoking and coal mining histories greater than she found, "these discrepancies [went] only to the relative roles played by these two risk factors in causing the [c]laimant's obstructive impairment."[6] Decision and Order at 21. The administrative law judge found that Dr. Baker's opinion, that claimant's obstructive disease was due to a combination of factors, was consistent with the premises underlying the regulations and sufficient to meet the requirement that coal dust exposure be a contributing cause of claimant's impairment. *Id*. However, the administrative law judge indicated that Dr. Baker's diagnosis of clinical pneumoconiosis was undermined by her finding that the x-ray he relied on was negative. *Id*. The administrative law judge further stated that Dr. Baker did not address whether claimant had a restrictive impairment, in addition to an obstructive impairment, or whether obesity contributed to claimant's impairment. *Id*.

The administrative law judge also accorded "probative weight" to Dr. Hays's opinion, that pneumoconiosis contributed to claimant's impairment, because, as claimant's treating physician, Dr. Hays had a lengthy relationship with claimant and had reviewed Dr. Baker's opinion. Decision and Order at 22; Claimant's Exhibit 2. The administrative law judge determined that, although Dr. Hays's report was not specific as to whether claimant has clinical or legal pneumoconiosis, his conclusions were

[6] The administrative law judge determined that claimant had at least eighteen years of coal mine employment and a twenty-five pack year smoking history. Decision and Order at 5, 7. Dr. Baker relied on a coal mine employment history of twenty-two years and a smoking history of thirty to forty-five pack years. Director's Exhibit 11. Dr. Dahhan reported a twenty-two year coal mine employment history and a smoking history of twenty pack years. Director's Exhibit 13. Dr. Rosenberg stated that claimant had "[twenty-two] years or so of surface coal mine employment" and "smoked cigarettes starting in the late 1960s or early 1970s, a pack of cigarettes/day or a pack and a half of cigarettes/day, up until 1992." Employer's Exhibit 1.

sufficiently broad to encompass both. Decision and Order at 21. The administrative law judge also found that, despite Dr. Hays's many years as claimant's physician, he did not have any credentials to justify giving his opinion added weight. *Id*. at 21-22. In addition, the administrative law judge indicated that Dr. Hays did not address any other risk factors that could have caused, or contributed to, claimant's pulmonary impairment. *Id*. at 22.

The administrative law judge gave less weight to Dr. Dahhan's opinion, that claimant's impairment was not due to coal dust exposure, because his "explanation that coal mine dust usually does not cause a significant drop in the FEV1 value is contrary to the premises underlying the current regulations." Decision and Order at 22; Director's Exhibit 13; Employer's Exhibits 6-7. The administrative law judge found that Dr. Dahhan did not adequately explain why claimant's coal mine employment did not contribute to claimant's chronic obstructive pulmonary disease (COPD), especially "in light of the prevailing medical opinion accepted by the Department of Labor that coal dust and smoking have additive effects." Decision and Order at 22. In addition, the administrative law judge discounted Dr. Dahhan's opinion because he was the only physician to attribute "claimant's performance on pulmonary function testing almost entirely to his restrictive impairment," despite having access to Dr. Rosenberg's pulmonary function testing, which showed a severe obstruction but only mild restriction. *Id*. at 22-23.

Similarly, the administrative law judge accorded less weight to Dr. Rosenberg's opinion, that claimant's impairment was not due to coal dust exposure, because he did not adequately explain why coal dust exposure is not a contributing cause of his impairment. Decision and Order at 23; Employer's Exhibits 1, 8. The administrative law judge discounted Dr. Rosenberg's opinion because she determined that his "explanation that a significant drop in the FEV1/FVC ratio shows that the [c]laimant's COPD was caused by smoking alone is contrary to the premises underlying the regulations, which allow a claimant to establish disability due to pneumoconiosis by showing such a drop." Decision and Order at 23.

The administrative law judge concluded that she did not discredit any of the medical opinions of record but, rather, found that Dr. Baker's opinion was entitled to the greatest weight, because it was credible and well-reasoned, despite the fact that Dr. Baker did not address the claimant's restrictive disease and obesity. Decision and Order at 23. The administrative law judge also indicated that Dr. Baker's opinion, as supported by Dr. Hays's opinion, outweighed the contrary opinions of Drs. Dahhan and Rosenberg. *Id*. The administrative law judge reiterated her determination that the opinions of Drs. Dahhan and Rosenberg were inconsistent with the premises underlying the regulations. *Id*. Therefore, the administrative law judge concluded that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

At 20 C.F.R. §718.204(c), the administrative law judge determined that the opinions of Drs. Dahhan and Rosenberg, that coal dust exposure did not cause or contribute to claimant's respiratory impairment, were based upon their finding that claimant did not have legal pneumoconiosis, which was contrary to the administrative law judge's finding. Decision and Order at 26. Therefore, relying on the opinions of Drs. Baker and Hays, the administrative law judge concluded that claimant established total disability causation at 20 C.F.R. §718.204(c). *Id*.

B. Arguments on Appeal

Employer argues initially that the administrative law judge's reliance on the preamble to the revised regulations "to add or subtract weight from the evidence in the record denied [employer] due process of law by ambushing it with non-record . . . evidence." Employer's Brief at 8. Further, employer contends that, although in drafting the revised version of 20 C.F.R. §718.201, the DOL recognized that coal dust exposure can cause obstructive lung disease, the regulation does not establish a presumption that it does so in every case. Employer states that, even if the administrative law judge did not violate 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), by relying on the preamble, she misapplied it in this case. Employer argues that the preamble is not binding and is not entitled to deference. In addition, employer indicates that it was error for the administrative law judge to rely on the preamble from 2000, instead of the DOL's comments in the 2003 Federal Register, which clearly state that there is no presumption that a miner's obstructive lung disease was caused by coal dust exposure.[7]

Employer's allegations of error are without merit. The preamble sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). An administrative law judge may evaluate expert opinions, therefore, in conjunction with the DOL's discussion of sound medical science in the preamble. *See J.O.* [*Obush*] *v. Helen*

[7] Additionally, employer states that the United States Courts of Appeals for the District of Columbia, the Sixth and Tenth Circuits, have rejected the notion that, because the effects of smoking and coal dust can be additive, a finding of entitlement is required in any individual case. Employer's Brief at 14, *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

Mining Co., 24 BLR 117 (2009). In addition, contrary to employer's suggestion, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Accordingly, we hold that the administrative law judge did not err in citing the preamble to the amended regulations when weighing the medical opinions relevant to the issue of legal pneumoconiosis.

Employer further contends that the administrative law judge erred in crediting Dr. Baker's opinion, that claimant's impairment was due to coal dust exposure and cigarette smoking, as consistent with the regulations because the preamble is not evidence that a specific claimant's impairment is due to coal dust exposure. Employer asserts that the administrative law judge did not consider whether Dr. Baker's opinion is reasoned and documented and notes that Dr. Baker did not definitively diagnose legal pneumoconiosis. In addition, employer argues that, to the extent that Dr. Baker explained the basis for his diagnosis of legal pneumoconiosis, he relied on a positive x-ray that the administrative law judge found to be negative. Further, employer states that the administrative law judge substituted her opinion for that of Dr. Baker by concluding that his reliance on inflated cigarette smoking and coal mine employment histories was insignificant. Employer also indicates that the administrative law judge erred in crediting Dr. Hays's opinion, on the basis that he treated claimant for forty years, because a doctor's status as a treating physician is not a substitute for a reasoned medical opinion.

Employer's contentions have merit, in part. Contrary to employer's argument, the administrative law judge did not substitute her opinion for that of Dr. Baker when she determined that Dr. Baker's reliance upon inflated coal mine employment and smoking histories was insignificant. The administrative law judge's statement that the discrepancies were unimportant because they "go only to the relative roles played by these two factors," is in accordance with law, as a physician is not required to specifically apportion the extent to which various causal factors contribute to a totally disabling respiratory or pulmonary impairment in order to provide a credible opinion regarding disability causation, and his failure to do so does not render his opinion insufficiently reasoned. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Rather, a doctor's opinion, stating that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition, is sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability. *Gross*, 23 BLR at 1-18-19.

However, we agree with employer that the administrative law judge did not provide an adequate explanation for her finding that Dr. Baker's diagnosis of legal pneumoconiosis is well-reasoned. The administrative law judge did not address the equivocal language in Dr. Baker's statement that claimant has "possible legal

pneumoconiosis" or the significance of the fact that Dr. Baker cited a positive x-ray interpretation in support of his alleged diagnosis of legal pneumoconiosis, which the administrative law judge found to be negative.[8] *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-113 (6th Cir. 1995). Thus, the administrative law judge's consideration of Dr. Baker's opinion does not accord with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1988). We vacate, therefore, the administrative law judge's determination that Dr. Baker's diagnosis of legal pneumoconiosis is well-reasoned.

Because we have vacated the administrative law judge's decision to credit Dr. Baker's opinion, we must also vacate the administrative law judge's finding that Dr. Hays's opinion is well-reasoned, as Dr. Hays based his conclusions on Dr. Baker's report. In addition, we agree with employer that the administrative law judge did not properly address Dr. Hays's status as claimant's treating physician. Under 20 C.F.R. §718.104(d) the administrative law judge is required to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the administrative law judge must take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the administrative law judge's decision to give that physician's opinion controlling weight, the weight he or she accords must also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In addition, the Sixth Circuit has held that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *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, 513, 22 BLR 2-625, 2-646 (6th Cir. 2003). Because the administrative law judge did not consider the factors set forth in 20 C.F.R. §718.104(d) and did not render a valid finding that Dr. Hays's opinion is well-reasoned, we must vacate his determination that the length of his relationship with claimant lends some weight to Dr. Hays's opinion.

Regarding the administrative law judge's weighing of the opinions of Drs. Dahhan and Rosenberg under 20 C.F.R. §§718.202(a)(4) and 718.204(c), employer argues that the administrative law judge erred in finding that the opinions of Drs. Dahhan and Rosenberg, that claimant's impairment was not due to coal dust exposure, are contrary to

[8] Dr. Baker stated that given claimant's "x-ray showing a significant degree of clinical pneumoconiosis of 1/1, he has probably had a significant dust load as well and this has been contributory to some extent." Director's Exhibit 11.

the principles underlying the regulations. Employer asserts that the administrative law judge impermissibly relied on unpublished Board cases to discredit their medical opinions, as unpublished cases are not controlling and the administrative law judge did not explain how they applied in this case. Employer indicates that nothing in Dr. Rosenberg's opinion is contrary to the statements made in the preamble concerning the FEV1/FVC ratio. Further, employer contends that the administrative law judge's decision to reject Dr. Dahhan's opinion for attributing claimant's respiratory impairment almost entirely to a restrictive disease was in error. Employer maintains that the administrative law judge's references to the nature of claimant's impairment were not rational, as he credited the opinions of Drs. Baker and Hays, after noting that Dr. Baker did not diagnose any restriction and Dr. Hays did not indicate whether claimant has an obstructive or restrictive impairment.

We reject employer's contention that the administrative law judge erred in finding that the opinions of Drs. Dahhan and Rosenberg are contrary to the premises underlying the current regulations. The administrative law judge rationally accorded little weight to Dr. Dahhan's opinion[9] because he opined that coal mine dust exposure does not cause a clinically significant drop in FEV1 values, a position contrary to the findings accepted by the DOL when drafting the revised definition of legal pneumoconiosis to include "any chronic . . . obstructive pulmonary disease arising out of coal mine employment."[10] 20

[9] Contrary to employer's assertion, the administrative law judge did not merely reiterate the holdings of the Board in other cases when weighing the opinion of Dr. Dahhan. Instead, she properly evaluated his opinion, based on the facts of this case and permissibly cited to *Kirkling v. Peabody Coal Co.*, BRB No. 06-0712 BLA (June 29, 2007)(unpub.) and *R.G.* [*Gilliam*] *v. Arch Coal Co.*, BRB No. 08-0369 BLA (Feb. 25, 2009)(unpub.), as support for her credibility determinations.

[10] The Department of Labor concluded that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. *The risk is additive with cigarette smoking.*" 65 Fed. Reg. at 79,940 (emphasis added). Citing to studies and medical literature reviews conducted by the National Institute for Occupational Safety and Health (NIOSH), the Department quoted the following from NIOSH:

> COPD may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC. *Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.*

65 Fed. Reg. at 79,943 (emphasis added).

C.F.R. §718.201(2)(b); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002). The administrative law judge also permissibly found Dr. Rosenberg's opinion, that smoking-related forms of obstructive lung disease are associated with a reduction in the FEV1/FVC ratio, while impairments related to coal dust exposure generally do not affect this value, to be contrary to the regulations. Decision and Order at 23. In support of her finding, the administrative law judge stated, "Dr. Rosenberg's explanation that a significant drop in the FEV1/FVC ratio shows that the [c]laimant's COPD was caused by smoking alone is contrary to the premises underlying the regulations, which allow a claimant to establish disability due to pneumoconiosis by showing such a drop."[11] *Id.*, *citing M.A.* [*McCray*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009)(unpub.); *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008)(unpub.). Because the administrative law judge provided valid rationales for according less weight to the opinions of Drs. Dahhan and Rosenberg under 20 C.F.R. §§718.202(a)(4) and 718.204(c), we affirm her findings and decline to address employer's additional allegations of error regarding the administrative law judge's consideration of these opinions. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983).

However, in light of the flaws in the administrative law judge's decision to credit the opinions of Drs. Baker and Hays, which support claimant's burden under 20 C.F.R. §§718.202(a)(4) and 718.204(c), we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis under 20 C.F.R. §§718.202(a)(4) and 718.204(c), and the award of benefits. This case is remanded to the administrative law judge for reconsideration of claimant's entitlement to benefits.

Because we have vacated the award of benefits, we direct the administrative law judge to initially consider, on remand, whether claimant is entitled to invocation of the rebuttable presumption that his disability is due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge should allow for the submission of evidence by the parties to address the change in law. *See Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990);

[11] Contrary to employer's assertion, the administrative law judge did not merely reiterate the Board's holdings with regard to the discrediting of Dr. Rosenberg's opinion in other cases. Rather, she properly evaluated Dr. Rosenberg's opinion based on the facts of this case and permissibly cited to *M.A.* [*McCray*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009)(unpub.) and *Y.D.* [*Dyke*] *v. Diamond May Coal Co.*, BRB No. 08-0176 BLA (Nov. 26, 2008)(unpub.), as support for her credibility determination.

Tackett v. Benefits Review Board, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Further, any additional evidence submitted must be consistent with the evidentiary limitations. 20 C.F.R. §725.414. If evidence exceeding those limitations is offered, it must be justified by a showing of good cause. 20 C.F.R. §725.456(b)(1). If the administrative law judge finds that claimant has established invocation of the presumption at Section 411(c)(4), she should then consider whether employer has satisfied its burden to rebut the presumption.

When weighing the medical opinion evidence on remand, the administrative law judge must specifically reconsider whether the opinions of Drs. Baker and Hays are adequately reasoned and documented, based on a review of the entirety of their opinions. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). If the administrative law judge determines that claimant is not entitled to the presumption that he is totally disabled due to pneumoconiosis, she must place the burden on claimant to establish, pursuant to 20 C.F.R. §718.202(a)(4), that he has legal pneumoconiosis, i.e., that his obstructive impairment is significantly related to, or substantially aggravated by dust exposure in coal mine employment, in accordance with 20 C.F.R. §718.201(a)(2). The administrative law judge must also place the burden on claimant to establish that he is totally disabled due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Finally, the administrative law judge must resolve all issues of fact or law and set forth her findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge