

BRB No. 02-0700 BLA

FREDITH KEATON)
)
 Claimant-Respondent)
)
 v.)
)
 G & M TRUCKING COMPANY) DATE ISSUED: 07/23/2003
)
 and)
)
 WEST VIRGINIA COAL WORKERS=)
 PNEUMOCONIOSIS FUND)
)
 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 of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert Weinberger (West Virginia Coal-Workers= Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Carrier appeals the Decision and Order (01-BLA-0205) awarding benefits of Administrative Law Judge Fletcher E. Campbell, Jr. on a duplicate 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).¹ The administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(b), (c).² Accordingly, the administrative law judge awarded benefits.

The procedural history of this case is as follows: On September 21, 1971, claimant filed his first claim for benefits with the Social Security Administration. Director=s Exhibit 42. On January 22, 1980, following implementation of the 1977 Amendments to the Act, the Department of Labor (DOL) finally denied the claim on the basis that none of the elements of entitlement was established. *Id.* On April 10, 1991, claimant filed a second claim with DOL. Director=s Exhibit 43. On September 6, 1991, DOL informally denied the claim on the basis that none of the elements of entitlement was established. *Id.* Claimant took no further action on this claim and the denial became final. On July 5, 1994, claimant filed his third claim with DOL. Director=s Exhibit 44. On December 1, 1994, DOL informally denied the claim because the district director found that none of the elements of entitlement was established. *Id.* Claimant took no further action on that claim and the denial became final. On September 20, 1999, claimant filed his fourth claim with DOL. Director=s Exhibit 1. On June 5, 2002, following a hearing, the administrative law judge issued a Decision and Order awarding benefits on the basis that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ' ' 718.202(a)

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The provision pertaining to total disability, previously set out at 20 C.F.R. ' 718.204(c), is now found at 20 C.F.R. ' 718.204(b), while the provision pertaining to total disability causation, previously set out at 20 C.F.R. ' 718.204(b), is now found at 20 C.F.R. ' 718.204(c).

and 718.203 and established total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(b), (c). Carrier filed the instant appeal with the Board.

On appeal, carrier initially challenges the administrative law judge=s finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4). Carrier also challenges the administrative law judge=s finding that the evidence establishes that claimant=s total disability is due to pneumoconiosis pursuant to Section 718.204(c). Claimant has not filed a response brief. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that he will not file a response brief.

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, we note that the administrative law judge stated that:

Under 20 C.F.R. 725.310 (sic), Claimant is entitled to modification if he can show a Amaterial change in condition@ in the form of new evidence establishing an element of entitlement previously denied. *Lisa Lee Mines v. Director, OWCP*, 86 F. 3d 1358 (4th Cir. 1996). Here, Employer concedes that Claimant has demonstrated a Amaterial change in condition@ (brief at 4).

Decision and Order at 7.

The administrative law judge was mistaken: the instant case constitutes a duplicate claim, rather than a request for modification. As previously noted, claimant filed his fourth claim on September 20, 1999, Director=s Exhibit 1, following a denial of his previous claim dated December 1, 1994. Director=s Exhibit 44. Because claimant=s fourth claim was not filed within one year of the previous denial, 20 C.F.R. '725.310 (2000) does not apply. Notwithstanding the administrative law judge=s misstatement, he correctly relied upon the material change in conditions standard set forth at 20 C.F.R. '725.309(d)(2000), and *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), as the precedent applicable in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Because carrier has not challenged the administrative law judge=s finding that claimant has established a material change in conditions, we affirm it. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Carrier challenges the administrative law judge's finding that the newly submitted evidence of record establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Carrier contends that the opinions of Drs. Sherman and Rasmussen, finding legal pneumoconiosis, are not well-reasoned and should not have been credited by the administrative law judge. Carrier specifically argues that Dr. Sherman's opinion, Director's Exhibit 19, is internally inconsistent because he opined that claimant's totally disabling respiratory impairment was due to smoking and pneumoconiosis, but later stated that it was not possible to apportion the extent to which the obstruction was caused by each factor. We disagree. Contrary to carrier's assertion, we find no inconsistency in Dr. Sherman's determination, on the one hand, that both smoking and pneumoconiosis caused claimant's total disability, but on the other hand, that it is not possible to determine with specificity the extent to which each factor contributed to the obstruction. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

In regard to Dr. Rasmussen's opinion, Claimant's Exhibit 2, carrier asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion at 20 C.F.R. ' 718.202(a)(4), as the physician relied only upon a ten-year coal mine employment history and an x-ray interpretation that the administrative law judge had rejected. Contrary to carrier's assertion, Dr. Rasmussen based his written report upon his physical examination of the miner, complete histories, an x-ray, a pulmonary function study, a blood gas study and an EKG. Director's Exhibit 12. At deposition, Dr. Rasmussen stated that the factors he relied upon to render his opinion were his physical examination of the miner, a medical history, an x-ray, a Spirometric study, and an EKG. Claimant's Exhibit 2 at 5-6. Moreover, the administrative law judge noted that while Dr. Rasmussen did not fully explain his conclusion that claimant suffered from pneumoconiosis within his report, the administrative law judge reasonably found that Dr. Rasmussen fully explained and justified his findings at deposition. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985). Thus, we affirm the administrative law judge's reliance on Dr. Rasmussen's opinion at Section 718.202(a)(4), as within a reasonable exercise of his discretion. As carrier has identified no other issues with respect to Section 718.202(a)(4), we affirm the administrative law judge's finding that the newly submitted evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Carrier next challenges the administrative law judge's finding that the evidence establishes total disability due to pneumoconiosis pursuant to Section 718.204(c). Carrier argues that the administrative law judge should have credited Dr. Fino's opinion, Director's Exhibit 36, because it is consistent with the objective evidence of record. Yet carrier does not demonstrate that Dr. Rasmussen's opinion is inconsistent with the objective evidence of record; carrier does not even assert that it is inconsistent. Carrier's argument is merely a request that the Board reweigh the medical opinion evidence. We decline to do so. *See Cox*

v. Benefits Review Board, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

The administrative law judge credited Dr. Rasmussen's opinion, because the reasoning for his opinion was sound. *Trumbo, supra*; *Clark, supra*; *Hunley, supra*. We reject carrier's contention that the administrative law judge was obligated to credit Dr. Fino's opinion at Section 718.204(c) because he possesses superior credentials. An administrative law judge is not required to give additional weight or deference to an opinion by a doctor with superior qualifications.³ See *Zeigler Coal Co. v. Director, OWCP*, [Villain] 312 F.3d 332, 335, BLR , (7th Cir. 2002); *Trumbo, supra*; *Clark, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). The administrative law judge reasonably credited the opinion of Dr. Rasmussen. As the Seventh Circuit observed regarding a similar opinion, 'there is 'overwhelming scientific and medical evidence' supporting [the doctor's] opinion that exposure to coal dust can cause, aggravate, or contribute to obstructive lung diseases.' *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 895, 22 BLR 2-409, 2-426-427 (7th Cir. 2002), citing 65 Fed.Reg. at 79,944 (citing *Freeman United Coal Mining Co. v. OWCP*, 957 F.2d 302, 303 (7th Cir. 1992); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985).

Even though carrier has not raised the issue, our dissenting colleague asserts that we are obligated to address the propriety of the administrative law judge's discrediting of Dr. Fino's opinion because '[c]entral to the administrative law judge's conclusion under [20 C.F.R. ' 718.202(a)(4) and 718.204(c)] is his rejection of Dr. Fino's opinion.' Decision and Order at . In other words, the arguments which carrier raises on appeal must all fail unless we address the propriety of the administrative law judge's consideration of Dr. Fino's opinion. That is true, but that is not justification for the Board to disregard its statutory mandate: 'The Board shall be authorized to hear and determine appeals *raising a substantial question* of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof.' 33 U.S.C. ' 921 (b)(3), (emphasis added). Nor is the Board justified in disregarding the well-established doctrine of waiver. See *Armco, Inc. v. Martin*, 277 F.3d 468, 476, 22 BLR 2-334, 2-347 (4th Cir. 2002); see also *United States v. Curtis*, 328 F.3d 141, 144 (4th Cir. 2003); *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 225 (4th Cir. 2002). Because carrier

³ Carrier cites *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998); and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997) in support of its contention that the administrative law judge may not completely ignore the opinions of the reviewing physicians and that qualifications are an important factor for the administrative law judge to consider. Since the administrative law judge discredited Dr. Fino's opinion, and therefore, never weighed it against the conflicting medical opinions of record, the court's teaching in *Hicks* and *Akers* is inapplicable to the instant case.

has never specifically questioned the propriety of the administrative law judge's discrediting of Dr. Fino's opinion, any error with respect to that finding has been waived. *Armco, Inc.*, 277 F.3d at 476, 22 BLR at 2-347.

In any event, we disagree with our dissenting colleague's statement that the administrative law judge did not provide a proper basis for discrediting Dr. Fino's opinion that claimant's disabling chronic obstructive pulmonary disease (COPD) was not significantly aggravated by coal mine employment. Dr. Fino opined:

Obstructive lung disease may also arise from coal workers' pneumoconiosis when significant fibrosis is present. The fibrosis results in the obstruction. In this case, although obstruction can be seen in coal workers' pneumoconiosis, the obstruction is unrelated to coal mine dust exposure.

Director Exhibit 36 at 6. This excerpt makes clear that Dr. Fino's conclusion that claimant's COPD was unrelated to his coal mine employment was based on the absence of evidence of significant fibrosis. Addressing essentially the same opinion from Dr. Fino which had been entered in the Rulemaking Record,⁴ the Department of Labor declared: "The available pathologic evidence is to the contrary. The severity of the emphysema was related to the amount of dust in the lungs." 65 Fed. Reg. 79, 994. Accordingly, the administrative law judge acted well within his discretion in discrediting Dr. Fino's opinion because, as the administrative law judge explained, it is based on his belief that coal dust [alone] cannot cause or aggravate COPD, a view which is contrary to majority medical opinion [evidence] (*see* 65 Fed. Reg. 79,923 (Dec. 20, 2000)). Decision and Order at 8. The administrative law judge's rationale for discrediting Dr. Fino's opinion is the same as that of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281, (7th Cir. 2001). The administrative law judge in *Summers* had discounted an opinion by Dr. Fino, because it was not supported by adequate data or sound analysis. The Seventh Circuit held that this determination was rational. The court's words in *Summers* are equally applicable to the instant case:

During a rulemaking proceeding, the Department of Labor considered a similar

⁴ The comments to the regulations summarize the opinion at issue as follows: "Dr. Fino and Bahl find no scientific support that clinically significant emphysema exists in coal miners without progressive massive fibrosis. Rulemaking Record, Exhibit 89-37, Appendix C at 31." 65 Fed. Reg. 79, 941.

presentation by Dr. Fino and concluded that his opinions are not in accord with the prevailing view of the medical community or the substantial weight of the medical scientific literature. 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

Id. at 483 n.7, 22 BLR at 2-281 n.7.⁵ Thus, the only relevant authority confirms the reasonableness of the administrative law judge's treatment of Dr. Fino's opinion.⁶

⁵ Other statements in Dr. Fino's opinion in the case at bar also echo his statements in the Rulemaking Record, *e.g.*, Dr. Fino asserted that claimant's disabling COPD was unrelated to his coal mine employment, explaining, "Although a statistical drop in the FEV1 was noted in working miners, that drop was not clinically significant. This man would be as disabled had he never stepped foot in the mines." Director's Exhibit 36 at 8. However, the comments to the regulations point out how this reasoning is fundamentally flawed:

As the majority of miners may have small or perhaps in some cases, no decline in pulmonary function, the average decline of the population studied can appear to be relatively small. Despite this, the individual miners affected can have quite severe disease, and statistical averaging hides this effect. The amended definition clarifies that these miners have a right to prove their case with evidence of a disabling obstructive lung disease that arose out of coal mine employment.

65 Fed.Reg. at 79,941.

⁶ We note our dissenting colleague's implicit criticism of our reliance on *Summers*, a decision by the United States Court of Appeals for the Seventh Circuit, when the instant case arises within the jurisdiction of the United States Courts of Appeals for the Fourth Circuit. However, the dissent cites no contrary authority from the Fourth Circuit, in fact, the dissent cites no contrary authority from any circuit; and in arguing that the issue is a finding of hostility, the dissent relies upon decisions from the Seventh Circuit. Furthermore, we are mindful that when the Board was presented with another case arising in the Fourth Circuit, and the Board rejected application of *Lukosevicz v. Director, OWCP*, 888 F.2d 1001 13 BLR 2-100 (3d Cir. 1989), observing only that the instant case arose in the Fourth, not the Third Circuit, the Fourth Circuit court castigated the Board. The court admonished:

We do not consider this a legally persuasive ground for distinction. Likewise, the BRB gave no explanation for its rejection of the Director's interpretation of the regulations. We are mystified as to how the BRB could have reached its decision in the face of such obviously relevant authority, and we are left with

Our dissenting colleague tries to evade the force of the court=s decision in *Summers*, stating I am not privy to Dr. Fino=s opinion in *Summers*, I am not able to compare it with his opinion in the instant case.@ Decision and Order at 12. That is puzzling because the Seventh Circuit quoted the relevant portion of Dr. Fino=s report and then observed that he had made a similar statement during the rulemaking proceeding, and the Department of Labor had concluded that his opinions which are set forth in the rulemaking proceedings do not reflect current medical or scientific knowledge. The court explained:

Dr. Fino stated in his written report of August 30, 1998 that there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.@ (Br. Supp. Pet. Modif=n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions Aare not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

We follow the example of the Seventh Circuit in *Summers* when we point out that the essential part of the rationale of Dr. Fino=s opinion on causation in the instant case, which the administrative law judge cited, is similar to his statement in the rulemaking proceeding. We continue to follow the court=s example when we observe that the Department of Labor specifically stated that current medical science reveals that Dr. Fino=s opinion is wrong: the severity of a coal miner=s obstructive lung disease relates to the amount of dust in the lungs, not to fibrosis as Dr. Fino opined. We do not suggest, as our dissenting colleague fears, that all opinions offered by Dr. Fino are *per se* invalid. However, when the administrative law judge identifies the basis of Dr. Fino=s opinion in a claim, which is essentially the same as a statement he made in the rulemaking

the distinct impression that the BRB did not, in this case, carry out its statutorily imposed responsibilities in good faith. We trust that, in the future, the BRB will attempt to support its decisions with at least a semblance of legal reasoning.

Shuff v. Cedar Coal Company, 967 F.2d 977, 980, 16 BLR 2-90,2-93 (4th Cir. 1992).

proceeding and the Department has found that statement to be against the prevailing view of the medical community or scientific literature, the administrative law judge is reasonable in discrediting that opinion.

When our dissenting colleague asserts that the administrative law judge erred in finding Dr. Fino=s opinion hostile to the Act, he is building a straw man in order to knock it down. The administrative law judge never said that he found Dr. Fino=s opinion hostile to the Act; he discredited Dr. Fino=s opinion because it was Acontrary to majority medical opinion [evidence],@ citing the comments to the regulations.⁷ As we demonstrated above, this rationale was upheld by the Seventh Circuit in *Summers*. That court has also cited the comments to the Federal Register when affirming an administrative law judge's determination to credit a doctor. *See Stein* 294 F.3d at 895, 22 BLR at 2-418 (7th Cir. 2002) A([T]here is overwhelming scientific and medical evidence supporting Dr. Cohen=s opinion that exposure to coal dust can cause, aggravate, or contribute to obstructive lung disease@. 65 Fed.Reg. at 79, 944 (citations omitted). *See also Villian*, 312 F.3d at 335, BLR at (Court held that administrative law judge properly credited claimant=s treating physician over employer=s expert where there was a medical basis for the physicians opinion: A[A]s the Secretary observed when promulgating ' 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000)@(emphasis in original). The cases reflect that a determination of whether a medical opinion is supported by accepted scientific evidence is a valid criterion in deciding whether to credit the opinion. This is very different from finding an opinion hostile to the Act. We note that in arguing that the issue is whether the opinion is hostile, our dissenting colleague relies upon decisions of the Seventh Circuit, the same court which upheld the discrediting of Dr. Fino=s opinion because Ahis opinions are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).@ *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. The obvious conclusion to be drawn from the Seventh Circuit=s decision in *Summers* is that it did not apply its caselaw on hostility because it is irrelevant when an administrative law judge rejects a medical opinion which is contrary to the prevailing view of the medical community or the weight of medical and scientific knowledge, as revealed in the comments to the regulations.

Following the teaching of the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998),

⁷ Since the administrative law judge properly discredited Dr. Fino=s opinion on another ground we need not determine whether it could also be discredited as hostile to the Act.

the administrative law judge evaluated the evidence upon which Dr. Fino=s conclusions were based, and reasonably determined his supporting evidence was contrary to the prevailing view in medicine. For that reason he properly discredited Dr. Fino=s opinion. *See Summers*, 272 F.3d at 483, 22 BLR at 2-281. The law of the Fourth Circuit is clear:

[T]he findings of an ALJ Amay not be disregarded on the basis that other inferences might have been more reasonable. Deference must be given the fact-finder=s inferences and credibility assessments, and we have emphasized the scope of review of ALJ findings is limited.@

Newport News Shipbuilding and Dry Dock Co. v. Ward, 326 F.3d 434 (4th Cir., Apr. 14, 2003), quoting *Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

In sum, the administrative law judge properly found that claimant has satisfied his burden of establishing that pneumoconiosis is a contributing cause of his total disability in this Fourth Circuit case. *See* 20 C.F.R. ' 718.204(c); *Hobbs v. Clinchfield Coal Co.*, 45 F. 3d 819, 19 BLR 2-86 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Robinson v. Pickands Mather & Co.*, 914 F. 2d 35, 14 BLR 2-68 (1990). We affirm, therefore, the administrative law judge=s finding that the newly submitted evidence establishes that claimant=s total disability is due to pneumoconiosis pursuant to Section 718.204(c).

Inasmuch as we have rejected each of carrier=s specific contentions on appeal, we further affirm the award of benefits.

Accordingly, the administrative law judge=s Decision and Order awarding benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the award of benefits. Instead, I would remand this case for reconsideration of the evidence at 20 C.F.R. ' 718.202(a)(4) and 718.204(c). Central to the administrative law judge's conclusion under each of these regulations is his rejection of Dr. Fino's opinion. The administrative law judge rejected Dr. Fino's opinion because he found that the doctor took exception to ADepartment of Labor policy@ and because he found that the doctor's beliefs were Acontrary to a substantively binding regulation.@ Decision and Order at 8. Thus, the administrative law judge implicitly found that Dr. Fino's opinion was hostile to the Act. While carrier does not raise directly the issue of hostility, it argues in this appeal that the administrative law judge erred in not crediting Dr. Fino's report. Carrier, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), specifically argues, *inter alia*, that the administrative law judge should have considered Dr. Fino's superior credentials in weighing the conflicting medical reports. The majority rejects this argument, concluding that *Hicks* and *Akers* have no application in this case, as Dr. Fino's opinion was discredited outright and therefore was never weighed against the conflicting medical opinions. To arrive at this conclusion, the majority ignores the fact that the administrative law judge erred in his consideration of Dr. Fino's opinion. Inasmuch as carrier has raised the issues of the existence of pneumoconiosis and disability causation at Sections 718.202(a)(4) and 718.204(c), and has taken issue with the administrative law judge's treatment of Dr. Fino's opinion, I do not believe that the administrative law judge's erroneous consideration of Dr. Fino's opinion can be ignored.

The majority contends that the administrative law judge provided a proper basis for discrediting Dr. Fino's opinion. In his consideration of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge stated that:

I credit the opinions of Drs. Sherman and Rasmussen over that of Dr. Fino because Dr. Fino takes strong exception to Department of Labor policy and regulations concerning the role of coal dust in causing and aggravating COPD. (DX 36). As he bases his opinion concerning the cause of Claimant's obstructive pulmonary disease on his belief that coal dust cannot cause or aggravate COPD, contrary to a substantively binding regulation and majority medical opinion (see 20 C.F.R. 718.201; 65 FR 79923 (Dec. 20, 2000)), I cannot credit his opinion that COPD was not aggravated by coal dust.

Decision and Order at 8 (footnote omitted).

The administrative law judge further noted that:

Dr. Fino argues that [c]laimant=s differential reduction in airways flow argues against coal dust being a factor in [c]laimant=s COPD. I do not credit this argument, because, unlike other statements in his lengthy discourse, Dr. Fino cites no medical literature or other authority for this proposition. (DX 36 at 5).

Decision and Order at 8 n.2.

Although the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the majority relies upon a Seventh Circuit decision, *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), to hold that the administrative law judge provided a proper basis for discrediting Dr. Fino=s opinion. In *Summers*, the Seventh Circuit held that it was Arational to discount Dr. Fino=s opinions, based on a finding that they were not supported by adequate data or sound analysis.@ 272 F.3d at 483, 22 BLR at 2-281. The Seventh Circuit further noted that:

Dr. Fino stated in his written report of August 30, 1998 that Athere is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.@ (Br. Supp. Pet. Modif=n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions Aare not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

Summers, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

The majority=s interpretation of *Summers* would effectively require an administrative law judge to hold that any opinion offered by Dr. Fino is *per se* invalid. I disagree. Because I am not privy to Dr. Fino=s opinion in *Summers*, I am not able to compare it with his opinion in the instant case. Moreover, it is the role of the administrative law judge to evaluate each medical opinion in the context of the unique factual circumstances of each case. It is not the role of the Board to speculate as to whether Dr. Fino=s opinion is similar to an earlier opinion rejected by another administrative law judge in a separate case.⁸

⁸In an unpublished case arising in the Fourth Circuit, a claimant argued that the administrative law judge should have discredited an opinion provided by Dr. Fino because the Fourth Circuit had found that Dr. Fino rendered an opinion hostile to the Act in another, unpublished case nearly two years earlier. The Fourth Circuit held that, contrary to the claimant=s assertion, Dr. Fino=s opinions in another case did not bear on the adequacy of his

Even if Dr. Fino expressed beliefs hostile to the Act, Seventh Circuit case precedent would not dictate the automatic rejection of his opinion. In addressing the hostility-to-the-Act rule, the Seventh Circuit has held that the rule allows an administrative law judge to disregard medical testimony *when a physician's testimony is affected by his subjective personal opinions* about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions.⁹

⁹ *Pancake v. Amax Coal Co.*, 858 F.2d 1250, 1256 (7th Cir. 1988) (emphasis added); *see also Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). In the instant case, the administrative law judge did not specifically identify which aspects of Dr. Fino's opinion were hostile to the Act. Moreover, even if the administrative law judge properly found that Dr. Fino expressed an opinion that is hostile to the Act, the Seventh Circuit has held that a physician's expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration. Rather, the administrative law judge must determine whether, and to what extent, the hostile opinion affected the physician's medical diagnoses. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Inasmuch as the administrative law judge did not undertake such an analysis in the instant case, he erred in his consideration of Dr. Fino's opinion.

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testing, reasoning, and conclusions in the claimant's case. *Terry v. Bethenergy Mines, Inc.*, 151 F.3d 1030 (table), 1998 WL 372612 (4th Cir. 1998) (unpublished).

⁹The Fourth Circuit has similarly recognized that a physician's opinion may be discredited when the physician *Abases his conclusion* on a premise fundamentally at odds with the statutory and regulatory scheme.⁹ *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993) (emphasis added) (quoting *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 109-110 (3d Cir. 1989)); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

¹⁰In his August 25, 2000 report, Dr. Fino acknowledged that there was no doubt that some miners do have clinically significant obstruction as a result of coal mine dust inhalation.¹⁰ Director's Exhibit 36. Dr. Fino, however, also noted that there is no evidence that there is a clinically significant reduction in the FEV1 as a result of chronic obstructive lung disease due to coal mine dust inhalation.¹⁰ *Id.*

In the instant case, Dr. Fino noted that claimant had three risk factors for his pulmonary disability: (1) coal mine dust exposure; (2) smoking; and (3) asthma. Director's Exhibit 36. Dr. Fino explained that the clinical information was consistent with a smoking related disability and an asthma related disability. *Id.* Dr. Fino noted that on a proportional basis, claimant's small airway flow was more reduced than the large airway flow. *Id.* Dr. Fino explained that this type of finding was consistent with conditions such as cigarette

smoking, pulmonary emphysema, non-occupational chronic bronchitis and asthma, but not with a coal dust related condition. *Id.*

Consequently, I would remand this case for reconsideration of the evidence at Sections 718.202(a)(4) and 718.204(c).

ROY P. SMITH
Administrative Appeals Judge