

BRB No. 08-0664 BLA

L.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRANHAM & BAKER UNDERGROUND	)	
CORPORATION	)	
	)	DATE ISSUED: 07/31/2009
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Remand of Director's Motion for Reconsideration of Janice K. Bullard, Administrative Law Judge, Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order and the Decision on Remand of Director's Motion for Reconsideration (2004-BLA-05587) of Administrative Law Judge Janice K. Bullard denying benefits with respect to a claim filed on April 16, 2002, 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). Director's Exhibit 2. This is the second time that this case has been before the Board. The administrative law judge initially issued a Decision and Order on February 8, 2006, in which she found that claimant established at least twenty-one years of coal mine employment and that he was

totally disabled pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 2006 Decision and Order at 18. Accordingly, the administrative law judge denied benefits.

Claimant filed an appeal with the Board on February 15, 2006. The Director, Office of Workers' Compensation Programs (the Director), then filed a Motion for Reconsideration with the administrative law judge on March 13, 2006. The administrative law judge determined that she lacked jurisdiction to consider the Director's motion because claimant had begun the appeals process. The administrative law judge also found that the motion was untimely, as the Director filed it more than ten days after the entry of the Decision and Order. Based upon these determinations, the administrative law judge dismissed the Director's Motion for Reconsideration and his subsequent Second Motion for Reconsideration, filed on April 17, 2006. The Director filed an appeal with the Board, which was consolidated with claimant's appeal for decision purposes only. The Board remanded the case to the administrative law judge with instructions to consider the Director's outstanding motions for reconsideration, as they were timely filed. [*L.B.*] v. *Branham & Baker Underground Corp.*, BRB Nos. 06-0420 BLA and 06-0606 BLA-A, slip op. at 3 (May 25, 2007)(unpub.).

On remand, the administrative law judge considered the Director's initial Motion for Reconsideration and again found that claimant failed to establish the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), or that his total pulmonary disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). 2008 Decision on Remand at 12. Accordingly, the administrative law judge denied benefits.<sup>1</sup>

On appeal, claimant argues that the administrative law judge failed to adequately consider whether claimant established the existence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Employer responds urging affirmance of the administrative law judge's denial of benefits.<sup>2</sup> Although the Director has declined to file a brief in this appeal, in the brief in support of his Motion for Reconsideration of the administrative law judge's 2006 Decision and Order, the Director argued unequivocally that a proper

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<sup>1</sup> Claimant died on January 18, 2008, while this claim was before the administrative law judge on remand from the Board.

<sup>2</sup> We affirm the administrative law judge's findings that claimant established twenty-one years of coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), as they are not challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 2006 Decision and Order at 13, 18.

application of the law to the facts of this case would mandate an award of benefits. The Director analyzed the administrative law judge's decision in light of the revised definition of legal pneumoconiosis set forth at 20 C.F.R. §718.201(a)(2), recognizing that pneumoconiosis can cause significant obstructive disease:

*Legal Pneumoconiosis.* "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.202(a)(2).

The Director explained that this regulation had been revised because "[a]fter two hearings, two comment periods, painstaking review of the submitted comments, and consultation with the National Institute for Occupational Safety and Health (NIOSH), the Department [of Labor] concluded the relevant scientific data showed that coal mine dust exposure can cause significant chronic obstructive pulmonary disease, including emphysema, and can do so even absent complicated pneumoconiosis." Director's Motion for Reconsideration at 7, *citing* 65 Fed. Reg. 79,938-43 (Dec. 20, 2000). The Director observed that even though the revised regulation is consistent with prior caselaw, *e.g.*, *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989), it was necessary to state plainly that coal mine employment can cause significant obstructive pulmonary disease, in order to avoid unjust, inconsistent results in Black Lung litigation. Through the revised regulations and comments to the regulations, the Department of Labor (DOL) clarified the existing law, thereby enabling administrative law judges, the Board and the courts to properly evaluate those medical opinions in Black Lung cases which categorically reject coal mine employment as a possible cause of chronic obstructive pulmonary disease (COPD) or emphysema. The Director asserted that *Freeman United Coal Mining v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), holding that the administrative law judge properly rejected a medical opinion that coal dust exposure does not cause significant obstructive lung disease, is a good example of a court's appropriate reliance on the revised regulation and the comments to the regulations to hold that the doctor's opinion is inconsistent with the prevailing view of the medical community, as well as the medical literature, now codified in the regulations. *Summers*, 272 F.3d at 484 n.7, 22 BLR at 2-281 n.7, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000); *see* Director's Motion for Reconsideration at 7.

With this background, the Director analyzed the administrative law judge's consideration of the medical opinion evidence and concluded that it was error for the administrative law judge to credit the opinions of Drs. Broudy and Dahhan that claimant's obstructive pulmonary impairment was due to smoking, because their opinions

were not well-reasoned and were inconsistent with the Act and regulations. The Director also concluded that the administrative law judge erred in failing to credit Dr. Baker's opinion that claimant suffers from legal pneumoconiosis which, in addition to smoking, is a substantially contributing cause of his totally disabling COPD. The Director argued that Dr. Baker's opinion is entitled to controlling weight because of a combination of factors: his impressive credentials; the clarity, reasoning and documentation of his opinion; its consistency with medical science and the Act; and its corroboration by the opinions of Drs. Forehand and King.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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 the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *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*).

The primary issue raised by claimant on appeal is whether the administrative law judge erred in finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and therefore failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. 718.204(c). The administrative law judge's determinations were based upon her consideration of the medical evidence of record, including the opinions of Drs. Baker, Forehand, King, Broudy, and Dahhan.

Dr. Baker examined claimant on June 17, 2002, at the request of the DOL and diagnosed pneumoconiosis due to coal dust exposure, COPD with moderate obstructive defect, and bronchitis. Director's Exhibit 9. Dr. Baker identified coal dust exposure and cigarette smoking as the causes of the diagnosed conditions and noted that claimant's pulmonary function study showed a moderate defect with decreased FEV1. *Id.*

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<sup>3</sup> 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*).

Subsequently, on November 6, 2002, Dr. Baker completed a questionnaire submitted to him by the claims examiner, in which the doctor indicated that claimant had both clinical and legal pneumoconiosis. Director's Exhibit 30.

In a report dated May 1, 2005, Dr. Baker reiterated that claimant suffered from pneumoconiosis and COPD with moderate obstructive defect and mild bronchitis due to the combined effects of smoking and coal dust exposure. Claimant's Exhibit 6. Although Dr. Baker acknowledged that smoking is the most common cause of obstructive airways disease, he contested Dr. Broudy's opinion that claimant's pulmonary impairment was entirely due to smoking. *Id.* Dr. Baker stated that "approximately 25 to 35% [of claimant's symptoms] may be due to coal dust exposure." *Id.* Dr. Baker concluded that claimant had "a class 3 impairment with the FEV1 between 40 and 59% of predicted. This is a 25 to 50% impairment of the whole person." *Id.* Dr. Baker further stated that while the majority of claimant's symptoms were due to cigarette smoking, his condition was significantly related to, and substantially aggravated by, dust exposure during his coal mine employment. Claimant's Exhibit 6. Because both coal dust exposure and smoking are known causes of obstructive airway disease, and claimant had exposure to both, Dr. Baker opined that it would be difficult to "clearly rule out coal dust exposure [as a cause of claimant's condition] as there is no way to partition the effects of coal dust exposure or cigarette smoking." *Id.*

In addition to Dr. Baker's opinion, claimant offered the opinions of Drs. Forehand and King. Dr. Forehand examined claimant on March 11, 2005, diagnosed coal workers' pneumoconiosis, "cigarette smokers['] lung disease," and a totally disabling pulmonary impairment. Claimant's Exhibit 3. In a letter dated April 12, 2005, Dr. Forehand indicated that claimant "was found to have complex lung disease that has led to a totally and permanently disabling respiratory impairment, which arose from a combination of occupational exposure to coal mine dust and smoking cigarettes." *Id.* Dr. Forehand identified the "key factors" supporting his diagnosis as "a history of working in underground coal mining for 21 years[,] including 12 years as a driller, a job with higher than expected association with coal workers' pneumoconiosis . . . and a history of smoking cigarettes for 47 years." *Id.*

Dr. King, one of claimant's treating physicians, diagnosed severe COPD, in the form of emphysema, and coal workers' pneumoconiosis, based on x-rays, pulmonary function and arterial blood gas studies, and claimant's symptom of shortness of breath. Claimant's Exhibit 1. Dr. King checked a box on a questionnaire, dated March 30, 2005, indicating that claimant had clinical pneumoconiosis and further indicated that claimant had severe COPD, emphysema, coal workers' pneumoconiosis, and shortness of breath, all of which were caused by coal dust exposure and smoking. *Id.*

Employer proffered the medical opinions of Drs. Broudy and Dahhan. Dr. Broudy examined claimant on October 15, 2003, and diagnosed severe chronic obstructive airways disease due to cigarette smoking based, in part, on an x-ray showing emphysema and his conclusion that there was no evidence of coal workers' pneumoconiosis.<sup>4</sup> Employer's Exhibits 1, 2. Dr. Broudy testified at his deposition that he was able, as a pulmonary physician, "to distinguish between pulmonary impairment caused by smoking and that caused by the inhalation of dust and/or coal workers' pneumoconiosis." Employer's Exhibit 2 at 9. Dr. Broudy further stated the bases for his opinion that claimant's severe obstructive airways disease was caused solely by cigarette smoking:

[O]btaining the history of heavy smoking for many years, he has the typical impairment due to cigarette smoking, that is, irreversible airways obstruction, there's no other apparent cause of the impairment, the chest x-ray showed no evidence of pneumoconiosis and in fact showed hyperexpansion, suggesting emphysema and hyperinflated lungs, which is typical of findings in smoking. If pneumoconiosis had caused impairment of this severity, one would certainly expect to see some radiographic changes suggesting pneumoconiosis, and this is not the case in this instance.

*Id.* at 10.

Dr. Dahhan examined claimant on June 28, 2003, and concluded that there was no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure. Employer's Exhibit 4. Dr. Dahhan further indicated that claimant had a severe obstructive abnormality due solely to cigarette smoking. *Id.* At his deposition, Dr. Dahhan stated the reasons for his exclusion of coal dust exposure as a cause of claimant's disabling obstructive impairment: a disabling airway obstruction "is not usually seen secondary to inhalation of coal dust, *per se*, without smoking, according to the medical literature[;]" the claimant demonstrates "significant response to bronchodilator therapy in the laboratory indicating his impairment is flexible . . . not fixed, . . . [as when the] airway obstruction [is] secondary to inhalation of coal dust . . . [; and] he has no evidence of complicated coal worker[s'] pneumoconiosis that may cause secondary obstructive abnormality." *Id.* at 9-10.

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<sup>4</sup> The administrative law judge's 2006 Decision and Order at 14 and her 2008 Decision on Remand at 9, contain the same typographical error, stating that Dr. Broudy's report is dated October 13, 2005. The correct date is October 15, 2003. *See* Employer's Exhibit 1.

The administrative law judge's findings regarding the medical opinion evidence are set forth both in her 2006 Decision and Order and in her 2008 Decision on Remand. The administrative law judge initially declined to accord "great weight" to Dr. Baker's opinion because she found it was not well-documented. 2006 Decision and Order at 14. In her 2008 Decision on Remand, the administrative law judge accorded reduced weight to Dr. Baker's diagnosis of legal pneumoconiosis. 2008 Decision on Remand at 11. The administrative law judge found that Dr. Baker's opinion, that claimant's COPD was due to coal dust exposure, was conclusory and provided an inadequate explanation for his diagnosis of legal pneumoconiosis. The administrative law judge proffered several criticisms of Dr. Baker's opinions:

[Dr. Baker] acknowledged that [c]laimant's smoking history was the primary cause of [c]laimant's symptoms, but nevertheless rejected the opinion of pulmonary expert Dr. Broudy that [c]laimant's pulmonary disability was due to smoking induced emphysema. Claimant's physical examinations by Drs. Broudy, Forehand and Dahhan produced findings consistent with smoking induced emphysema. Dr. Baker did not address the impact of reversibility upon bronchodilators upon his opinion. Dr. Baker's opinion regarding the contribution of legal pneumoconiosis to [c]laimant's disability is also speculative and not reliable. The doctor stated that approximately 25% to 35% of [c]laimant's symptoms may be due to coal dust exposure, but also opined that he could not separate the causes of [c]laimant's disabling COPD. I find these opinions are inconsistent, and undermine the overall reliability of Dr. Baker's opinion.

2008 Decision on Remand at 11-12.

Regarding Dr. Forehand's opinion, the administrative law judge initially found that his diagnosis of clinical pneumoconiosis was well-reasoned and well-documented and entitled to weight because it was based upon his positive x-ray reading and claimant's coal mine employment history. 2006 Decision and Order at 14. However, the administrative law judge discredited Dr. Forehand's determination that claimant had a totally disabling pulmonary impairment caused by smoking and coal dust exposure because the doctor failed to reconcile claimant's partially reversible obstructive impairment with "the permanent nature of pneumoconiosis." *Id.* at 18. The administrative law judge reiterated these findings in her 2008 Decision on Remand. *See* 2008 Decision on Remand at 12.

With respect to Dr. King's opinion, the administrative law judge initially declined to give it controlling weight based upon his status as claimant's treating physician, because "other record evidence contradicts the opinion." 2006 Decision and Order at 14. The administrative law judge further found that Dr. King's opinion attributing claimant's

pulmonary impairment to coal dust exposure was conclusory and was not well-reasoned. *Id.* at 18. The administrative law judge reiterated these findings in her 2008 Decision on Remand and stated that Dr. King “provided no rationale” for his conclusion that claimant’s impairment was attributable to both smoking and coal dust exposure. 2008 Decision on Remand at 12.

The administrative law judge initially concluded that Dr. Broudy’s opinion, excluding coal mine employment as a cause of claimant’s impairment, was entitled to some weight because he is a pulmonary specialist and because his opinion is well-documented. 2006 Decision and Order at 14-15. In her 2008 Decision on Remand, the administrative law judge rejected the Director’s contentions that Dr. Broudy’s opinion is contrary to the Act and inconsistent with the regulations. 2008 Decision on Remand at 5-6. Her view of Dr. Broudy’s opinion was unchanged. *Id.* at 6.

Similarly, the administrative law judge initially found that Dr. Dahhan’s opinion was entitled to weight because it was supported by the evidence of record. 2006 Decision and Order at 15. In her 2008 Decision on Remand, the administrative law judge accorded substantial weight to Dr. Dahhan’s opinion, based on its reasoning and documentation. 2008 Decision on Remand at 9. Again, the administrative law judge rejected the Director’s contention that the reasons which the doctor offered for excluding coal mine employment as a cause of claimant’s impairment were contrary to the Act and inconsistent with the regulations. *Id.* at 7-9.

Based upon these findings, the administrative law judge determined, in her 2008 Decision on Remand, that claimant failed to prove that he had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because the “physician opinion evidence is inconclusive and fails to support a finding of the presence of pneumoconiosis.” 2008 Decision on Remand at 12; *see also* 2006 Decision and Order at 15.

On appeal, claimant contends that the administrative law judge failed to consider the evidence properly in light of the revised definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), and therefore erred in finding claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and entitlement of benefits. Claimant asks the Board to reverse the administrative law judge’s decision denying benefits. Claimant’s Brief at 13. Claimant raises numerous allegations of error in the administrative law judge’s consideration of the medical opinion evidence, in arguments which are intertwined with those of the Director in his Motion for Reconsideration.

Upon consideration of claimant’s arguments on appeal, and the arguments raised by the Director in his Motion for Reconsideration, we reverse the administrative law judge’s findings at 20 C.F.R. §§718.202(a)(4), 718.204(c). While the Sixth Circuit has



held that the reviewing authority is required to defer to the administrative law judge's credibility determinations, claimant argues correctly that the reasons provided by the administrative law judge in the present case for discrediting the opinions of Drs. Baker and Forehand are not valid. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).

As the Director argued, and we agree, the administrative law judge's reasons for discrediting Dr. Baker's opinion are not supported by substantial evidence. *See* Director's Motion for Reconsideration at 11-13. First, the administrative law judge incorrectly determined that Dr. Baker's opinion is conclusory and rests exclusively on claimant's history of coal mine employment. Dr. Baker relied on an examination, claimant's symptoms, objective tests, and smoking history, in addition to claimant's employment history, in reaching his opinion. Dr. Baker also recognized that both smoking and coal mine employment are known causes of chronic obstructive airways disease and that these exposures impact the lung similarly, which is consistent with the consensus relied upon by DOL in promulgating the amended definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a). 65 Fed. Reg. 79,943 (Jan. 19, 2001). In his May 2005 report, Dr. Baker referenced the NIOSH studies explaining that "the effect of one-half to one year of coal dust exposure on the FEV1 is equal to about one pack year of cigarette smoking." Claimant's Exhibit 6. Dr. Baker stated that because of the known impact of both coal mine employment and smoking on lung impairment, and because underground coal mine employment has a greater impact, he considered claimant's sixty-pack year smoking history and his twenty-two year coal mine employment history as combined causes of claimant's impairment, resulting in an attribution of 25 to 35 percent to coal mine employment. *See Id.*

We also agree with the Director that the administrative law judge erred in rejecting Dr. Baker's opinions on the contribution of pneumoconiosis to his disability as speculative and unreliable. The doctor cited well-respected authority for his opinion. In fact, DOL relied upon similar NIOSH findings in developing the amended definition of legal pneumoconiosis. *See* 65 Fed. Reg. 79,943 (Jan. 19, 2001). Dr. Baker also clearly explained his analysis of the data which supports his conclusion. *See* Claimant's Exhibit 6.

In addition, we agree with the Director that the administrative law judge incorrectly found that Dr. Baker's opinion was inconsistent because he both attributed 25 to 35 percent of claimant's impairment to coal dust exposure, and stated that he could not distinguish between the effects of smoking and the effects of coal dust exposure. 2008 Decision on Remand at 12; Director's Motion for Reconsideration at 12. Scientific evidence supports the doctor's statement that he cannot distinguish between the effects of

smoking and the effects of coal dust exposure because they impact the lungs similarly. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000). That is not inconsistent with his opinion on the degree to which claimant's impairment is attributable to coal dust exposure. That analysis is derived from NIOSH studies. Furthermore, the Sixth Circuit has held that opinions virtually identical to the one proffered by Dr. Baker in this case, attributing the pulmonary disability to both smoking and coal dust exposure, are sufficient to establish causation. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Additionally, as the Director contends, courts have recognized that a judge may credit a physician as to total disability causation when the physician is unable to determine with precision what percentage of the miner's impairment was due to coal mine dust exposure and what was due to cigarette smoking. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *see also Summers*, 272 F.3d at 484, 22 BLR at 2-281; *see generally Youghioghney & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 510 U.S. 1040 (1994).

Further, claimant correctly argues that the administrative law judge's decision to give less weight to Dr. Baker's diagnosis of legal pneumoconiosis, because he rejected Dr. Broudy's opinion that smoking was the sole cause of claimant's emphysema, is not supported by substantial evidence. *See* 2008 Decision on Remand at 12; Claimant's Exhibit 6. The record reflects that Dr. Baker criticized Dr. Broudy's opinion for "totally discount[ing] any contribution from coal dust exposure that the patient had [from] a significant history of 22 years in the underground mines." Claimant's Exhibit 6 at 3. Dr. Baker explained that medical science recognizes that both smoking and coal mine employment are known to cause obstructive airways disease, and there is no medical basis to exclude one as opposed to the other. *Id.* This is consistent with the position expressed in the comments to the amended definition of legal pneumoconiosis in which DOL recognized that "emphysema can be aggravated by coal dust exposure." 65 Fed. Reg. 79,943 (Jan. 19, 2001), *citing Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 124, 7 BLR 2-72, 2-81 (4th Cir. 1984).

Claimant's allegation that the administrative law judge incorrectly discredited Dr. Baker's opinion because he did not address the diagnoses of smoking induced emphysema made by Drs. Forehand, Broudy, and Dahhan also has merit. *See* 2008 Decision on Remand at 12. The administrative law judge appears to have overlooked the fact that Dr. Forehand attributed claimant's impairment to both smoking and coal mine employment. *See* Claimant's Exhibit 3. In addition, the administrative law judge failed to consider properly the Director's contentions that the opinions of Drs. Broudy and Dahhan were based upon premises that are inconsistent with the Act and the amended regulations.

We agree with the Director that Dr. Broudy provided three invalid reasons for attributing claimant's emphysema exclusively to smoking.<sup>5</sup> First, he asserted that there is "no other apparent cause of the [irreversible airways obstructive] impairment . . . ." Employer's Exhibit 2 at 10. The Director explained that the statement reveals a belief contrary to 20 C.F.R. §718.201(a)(2), that obstructive lung disease is never related to coal mine work. Director's Motion for Reconsideration at 10. The Director reasonably concludes that the "doctor's opinion on this point, if not directly hostile to the regulation, is at a minimum lacking in persuasive force." *Id.* at 9. Attempting to disparage the Director's argument, the administrative law judge states it was made "without reference to the record . . . ." 2008 Decision on Remand at 5. The attempt is unsuccessful because the administrative law judge overlooked page five of the Director's Motion, identifying pages nine and ten of Dr. Broudy's deposition (Employer's Exhibit 2) as the basis for all three of the Director's arguments.

The second and third reasons for Dr. Broudy's diagnosis of smoking related emphysema rest on the x-ray evidence. He opined that the chest x-ray showed emphysema and not pneumoconiosis. Employer's Exhibit 2 at 10. Again, as the Director contends, the doctor failed to recognize that pneumoconiosis can cause emphysema. 20 C.F.R. §718.201(a)(2); Director's Motion for Reconsideration at 9. Third, the doctor stated: "[i]f pneumoconiosis had caused impairment of this severity, one would certainly expect to see some radiographic changes suggesting pneumoconiosis, and this is not the case in this instance." Employer's Exhibit 2 at 10. Again, the Director points out the error in crediting the doctor's opinion: "it is inconsistent with Section [413(b)] of the Act, 30 U.S.C. 923(b), which specifically provides that no claim may be denied solely upon the results of an x-ray analysis." Director's Motion for Reconsideration at 9. The administrative law judge refused to address the Director's specific arguments, but attempted to deflect them with the assurance that "[i]t is clear that my analysis of Dr. Broudy's opinion on this issue, and more significantly, my final determination in this claim, did not rest solely upon x-ray analysis." 2008 Decision on Remand at 6. That assurance is unpersuasive, however, in light of Dr. Broudy's stated reasons for his opinion which are inconsistent with the Act and regulations.

The administrative law judge also erred in criticizing Dr. Baker's opinion as inconsistent with the findings of Dr. Dahhan, because she failed to address honestly the Director's criticisms of Dr. Dahhan's opinion. The Director pointed out that since claimant is a smoker, it was irrational for the doctor to exclude coal mine employment as a cause of claimant's disabling impairment for the reason that it "is not usually seen secondary to inhalation of coal dust, *per se*, without smoking . . . ." Employer's Exhibit 4

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<sup>5</sup> We shall discuss later a fourth reason Dr. Broudy offered to justify excluding coal dust exposure as a cause of claimant's impairment, its irreversibility.

at 9. The administrative law judge dismissed the Director's objection, stating that she "did not place any particular significance upon this observation by Dr. Dahhan." 2008 Decision on Remand at 7. Instead, the administrative law judge stated that she had relied on the doctor's discussion of claimant's responsiveness to bronchodilator treatment to prove that his impairment is unrelated to coal dust exposure. *Id.* The administrative law judge also noted the Director's assertion that not all doctors had agreed with Dr. Dahhan's finding of reversibility. *Id.* To that she responded, "that contention is erroneous," yet in the sentence immediately following, she said that Dr. Forehand had found reversibility but Dr. Broudy had not, thereby belying her assertion that the Director's contention was erroneous. *Id.*

The administrative law judge acknowledged the Director's argument that Dr. Dahhan's reasoning was flawed because claimant's impairment was not completely reversible, in fact, it was still disabling after bronchodilator therapy. 2008 Decision on Remand at 7. The administrative law judge stated that the implication of the Director's argument is that the fixed component of claimant's impairment is pneumoconiosis, but that contention is based on "conjecture and inferences outside the medical literature." *Id.* Again, the administrative law judge refused to grapple honestly with the Director's argument which was based on logical analysis, not conjecture.

The Director provided a second argument to support his contention that Dr. Dahhan's finding of reversibility was not a sound basis to exclude coal dust exposure as a cause of claimant's impairment. The Director cited The Merck Manual, routinely cited by the Sixth Circuit, which describes COPD as reversible. Director's Motion for Reconsideration at 10. Since the revised regulations recognize that COPD can be legal pneumoconiosis, 20 C.F.R. §718.201(a)(2), the reversibility of COPD is not a valid basis to exclude coal dust exposure as a cause. Again, the administrative law judge refused to address the logic of the Director's argument. She said that she accepted Dr. Dahhan's opinion as a pulmonary expert and that it would be inappropriate for her to "analyze medical information outside the scope of the medical evidence of record." 2008 Decision on Remand at 7-8. The administrative law judge could not address the logic of the Director's argument because if she did so, she would have to acknowledge that by pointing to the reversibility of claimant's COPD as showing that it was not caused by coal dust exposure, the doctor was denying that COPD can be caused by coal dust exposure, an opinion which is flatly contrary to the revised regulations. The inescapable conclusion from this argument is that it was error for the administrative law judge to credit Dr. Dahhan's opinion excluding coal dust exposure as a cause of claimant's COPD based on the reversibility of claimant's impairment. The conclusion must also be that it was error for the administrative law judge to discredit the opinions of both Drs. Baker and Forehand for failing to discuss the reversibility of the impairment.

It is particularly puzzling that the lynchpin of the administrative law judge's decision is Dr. Dahhan's testimony that the reversibility of claimant's obstructive impairment proves that it is unrelated to coal dust exposure in coal mine employment. That is the principal reason that the administrative law judge accorded Dr. Dahhan's opinion substantial weight. 2008 Decision on Remand at 9. The failure of Drs. Baker and Forehand to discuss this reversibility is the principal reason the administrative law judge provided for according their opinions diminished weight. *Id.* Yet, the administrative law judge did not acknowledge the glaring inconsistency at the heart of her decision: she credited the opinions of both Drs. Dahhan and Broudy that claimant's disabling obstructive impairment was unrelated to coal mine employment, when Dr. Dahhan stated that his opinion was based on the reversibility of claimant's impairment, Employer's Exhibit 4 at 10, and Dr. Broudy stated that his opinion was based on the irreversibility of claimant's impairment ("he has the typical impairment due to cigarette smoking, that is irreversible airways obstruction . . . ."), Employer's Exhibit 2 at 10.<sup>6</sup> The administrative law judge did not attempt to reconcile the fundamental difference in the opinions of the two pulmonary experts she credited, nor did she acknowledge that the irreversibility of claimant's impairment was the first reason which Dr. Broudy provided for his opinion excluding coal mine employment as a cause of claimant's impairment. It was incumbent upon the administrative law judge to address the contradiction at the heart of these opinions before determining to credit them both. Moreover, it was irrational for the administrative law judge to discredit the opinions of Drs. Baker and Forehand for failing to discuss the reversibility of claimant's impairment when the experts she credited reached opposite conclusions on the significance of reversibility. Because there is a basic contradiction at the core of the administrative law judge's decision, it is irrational.

The administrative law judge concluded her discussion of the Director's objections to Dr. Dahhan's opinion by referring to his statement that he attributed claimant's disabling impairment exclusively to smoking because claimant "has no evidence of complicated coal worker[s'] pneumoconiosis that may cause secondary obstructive abnormality." Employer's Exhibit 4 at 10. The administrative law judge insisted that the doctor did not mean what he said, *i.e.*, that he could not diagnose coal dust exposure as a cause of claimant's disabling obstructive impairment unless x-ray evidence showed complicated pneumoconiosis. Despite the doctor's plain statement, the administrative law judge concluded that he had appropriately considered the evidence of record to exclude pneumoconiosis as a factor in claimant's pulmonary condition. 2008 Decision on Remand at 8. Again, the administrative law judge arrived at her conclusion by putting on blinders to the truth of the Director's argument.

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<sup>6</sup> Dr. Broudy specifically noted in his October 15, 2003 report that the "[s]pirometry shows severe obstruction with no responsiveness to bronchodilation." Employer's Exhibit 1 at 2.

Based on our review of the administrative law judge's determinations concerning the medical opinion evidence, we agree with the Director that Dr. Baker's opinion is entitled to controlling weight because it is well-reasoned and documented, consistent with the Act and regulations, and supported by the opinions of Drs. Forehand and King. Director's Motion for Reconsideration at 11. Furthermore, as the Director demonstrated, the contrary opinions of Drs. Broudy and Dahhan are not credible because they are premised on views inconsistent with the Act and the regulations.

Because the administrative law judge's findings regarding Drs. Baker, Forehand, Broudy, and Dahhan are not rational, supported by substantial evidence, or in accordance with law, we reverse her findings with respect to these opinions and her findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Further, based on our reversal of the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c), we reverse the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order and the Decision on Remand of Director's Motion for Reconsideration, both denying benefits, are reversed, and this case is remanded to the district director for reinstatement of the award of benefits in the miner's claim.<sup>7</sup>

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL  
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' holdings reversing the administrative law judge's Decision and Order and the Decision on Remand of Director's Motion for Reconsideration, both denying benefits. I would affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), as I find that it is rational and supported by substantial evidence. The United States Court of Appeals for the Sixth Circuit has held that the reviewing authority is required to defer to the administrative law judge's credibility determinations. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). In the present case, the administrative law judge rationally found that Dr. Baker's opinion was insufficient to establish the existence of legal pneumoconiosis because it was inconsistent and based upon generalities, rather than the circumstances of the present case. *See Stephens*, 298 F.3d at 522, 22 BLR at 2-513; 2008 Decision on Remand at 11-12.

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<sup>7</sup> In his proposed Decision and Order issued on September 25, 2003, the district director of the Office of Workers' Compensation Programs determined that claimant was entitled to benefits under the Act.

In addition, I would affirm the administrative law judge's discrediting of Dr. Forehand's diagnosis of legal pneumoconiosis because, unlike Dr. Dahhan, Dr. Forehand failed to explain how the results of claimant's pulmonary function study, showing a partially reversible obstructive ventilatory pattern, is consistent with the permanent nature of pneumoconiosis. *See Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Further, I find that when evaluating Dr. King's opinion, the administrative law judge properly considered whether his opinion was entitled to controlling weight based on his status as claimant's treating physician pursuant to 20 C.F.R. §718.104(d)(1)-(4). However, the administrative law judge rationally found that Dr. King's opinion was entitled to diminished weight because he provided no explanation of his determination that claimant's pulmonary impairment was caused by smoking and coal dust exposure. *See* 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); 2008 Decision on Remand at 12; 2006 Decision and Order at 14.

I would hold that remand of the case to the administrative law judge for consideration of Dr. Rogers's treatment records is not required. As an initial matter, I would affirm the administrative law judge's exclusion of the questionnaire completed by Dr. Rogers, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). I would further hold that the administrative law judge's omission of a finding with respect to Dr. Rogers's records is harmless, as the records do not contain any documentation for his diagnosis of clinical pneumoconiosis and Dr. Rogers did not link claimant's COPD or other respiratory problems to coal dust exposure, as is required under 20 C.F.R. §718.201(a)(2). 20 C.F.R. §718.104(d)(5); *see Williams*, 338 F.3d at 514, 22 BLR 2-647-49; *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because the administrative law judge provided valid reasons for determining that the medical opinion evidence failed to satisfy claimant's burden of proof to establish the existence of legal pneumoconiosis, I would affirm the administrative law judge's finding that claimant did not establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). I would decline to address, therefore, the allegations of error made by claimant, concerning the administrative law judge's weighing of the opinions of Drs. Dahhan and Broudy, or by employer concerning the deposition of Dr. Kraman, as error, if any, is harmless. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.



In light of the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a), an essential element of entitlement, I would also affirm the denial of benefits. Accordingly, I would affirm the administrative law judge's Decision and Order and the Decision on Remand of Director's Motion for Reconsideration, both denying benefits, in claimant's case.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge