BRB Nos. 13-0502 BLA
and 13-0503 BLA

STARLET TACKETT (o/b/o and as Widow of RONNIE TACKETT) Claimant-Respondent v. H.J. MINING COMPANY, INCORPORATED and BITUMINOUS CASUALTY CORPORATION OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/10/2014 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Before: HALL Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits on Remand (04-BLA-5248 and 08-BLA-5324) of Administrative Law Judge Theresa C. Timlin rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] This case involves a miner's subsequent claim[2] filed on April 25, 2002, and a survivor's claim filed on August 3, 2006. The miner's subsequent claim is before the Board for the fourth time, and the survivor's claim is before the Board for the third time.[3]

When this case was most recently before the Board, the Board vacated the awards of benefits in both the miner's and the survivor's claims, and remanded the claims for reassignment to a new administrative law judge to consider the issues of legal pneumoconiosis, disability causation and death causation pursuant to 20 C.F.R. §§718.202(a), 718.204(c), 718.205(c). Specifically, the Board held that Administrative Law Judge Janice K. Bullard failed to sufficiently analyze the evidence when she found the existence of clinical pneumoconiosis established.[4] Additionally, the Board held that

[1] Employer and the Director, Office of Workers' Compensation Programs, correctly represented that the recent amendments to the Act, reviving, in pertinent part, the Section 411(c)(4) rebuttable presumption of totally disabling pneumoconiosis, 30 U.S.C. §921(c)(4), which became effective on March 23, 2010, and which applies to claims filed on or after January 1, 2005, did not apply to the miner's claim because it was filed before January 1, 2005. Further, the Director correctly noted that only if an award in the miner's claim became final would claimant be derivatively entitled to survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). *See Tackett v. H.J. Mining Co.*, BRB No. 09-0601 BLA, slip op. at 2 n.1 (June 3, 2010)(unpub.)(2010 Board Decision and Order).

[2] The miner's previous claims, filed on March 9, 1992 and June 25, 2000, were denied on August 18, 1992 and October 16, 2000, respectively, for failure to establish any element of entitlement. DXLM-1. The miner died on July 20, 2005, while his subsequent claim was pending, and claimant, the miner's surviving spouse, has pursued the miner's claim.

[3] In the 2009 Decision and Order issued by Administrative Law Judge Janice K. Bullard, the survivor's claim was consolidated with the miner's subsequent claim. The lengthy procedural history of both claims is set forth by reference in the Board's most recent Decision and Order. *Tackett v. H.J. Mining Co.*, BRB Nos. 11-0303 BLA and 11-0428 BLA, slip op. at 2 n.3 (Jan. 30, 2012)(unpub.)(2012 Board Decision and Order).

[4] The Board affirmed Judge Bullard's findings: the miner had 4.3 years of coal mine employment; a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309; clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2), (4); the clinical pneumoconiosis arose out of coal mine

Judge Bullard failed to provide sufficient support for her determination that the miner's disability and death were due to clinical pneumoconiosis. The Board instructed that, should the administrative law judge find that the miner's disability and/or death were not due to clinical pneumoconiosis, she must consider whether the evidence establishes the existence of legal pneumoconiosis, namely whether the miner's chronic obstructive pulmonary disease (COPD) was due, in part, to coal mine employment, and whether the miner's disability and/or death were due to legal pneumoconiosis. *Tackett v. H.J. Mining Co.*, BRB Nos. 11-0303 BLA and 11-0428 (Jan. 30, 2012)(unpub.).

On remand, the administrative law judge found that the evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a), and that the miner's disability and death were due to legal pneumoconiosis pursuant to Sections 718.204(c) and 718.205(c). Hence, she awarded benefits in both the miner's and the survivor's claims.

On appeal, employer contends that the law of the case doctrine bars consideration of the issue of legal pneumoconiosis in these claims. Further, employer contends that the administrative law judge did not properly consider the evidence relevant to the issues of legal pneumoconiosis, disability causation and death causation. Employer also contends that the administrative law judge's evaluation of the evidence fails to meet the requirements of the Administrative Procedure Act (APA).[5] In response, claimant contends that the administrative law judge's decision awarding benefits in both the miner's and the survivor's claims should be affirmed. Employer reiterates its arguments in a reply brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30

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employment pursuant to 20 C.F.R. §718.203(c); and that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b). *Tackett v. H.J. Mining Co.*, BRB No. 06-0873 BLA (July 31, 2007)(unpub.)(2007 Board Decision and Order).

[5] The Administrative Procedure Act requires that an administrative law judge independently evaluate the evidence and provide an explanation for any findings of fact and conclusions of law. 5 U.S.C §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[6] The record reflects that the miner's most recent coal mine employment was in Kentucky. Director's Exhibits 7, 9, 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Legal Pneumoconiosis

At the outset, we reject employer's assertion that the law of the case doctrine bars consideration of the issue of legal pneumoconiosis in these claims. Employer's assertion that "the question of legal pneumoconiosis was litigated, [and] a decision was entered," is belied by the Board's two most recent decisions in this matter referencing "evidence of record supportive of a finding of legal pneumoconiosis, namely COPD due in part to coal mine employment," and directing the administrative law judge to consider whether the miner's disability and death were due to legal pneumoconiosis. Employer's Brief at 23-24; *see Tackett v. H.J. Mining Co.*, BRB Nos. 11-0303 BLA and 11-0428 BLA, slip op. at 2 n.6, 5 (Jan. 30, 2012)(unpub.)(2012 Board Decision and Order);[7] *Tackett v. H.J. Mining Co.*, BRB No. 09-0601 BLA, slip op. at 6, 8 (June 3, 2010)(unpub.)(2010 Board Decision and Order). Hence, the issue of legal pneumoconiosis was unresolved when the Board last remanded this case for assignment to a new administrative law judge for a "fresh look" at both claims. Employer's contention that consideration of the issue of legal pneumoconiosis "exceeded the Board's order on remand" is, therefore, meritless. Employer's Brief at 23.

In finding that the evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge credited the opinions of Drs. Mettu, Younes, Ammisetty and Forehand,[8] which she found to be reasoned. The administrative

[7] Although Judge Bullard stated that the miner did not have legal pneumoconiosis, the Board noted that because there was evidence in the record that could establish the existence of legal pneumoconiosis, namely a chronic obstructive pulmonary disease (COPD) due in part to coal mine employment, the case must be remanded for the administrative law judge to consider whether legal pneumoconiosis was established.

[8] Dr. Mettu, based on an evaluation conducted on April 21, 1992, which included examination findings, symptoms, work and medical histories, an x-ray and objective test results, diagnosed the miner with chronic bronchitis due to both smoking and coal dust exposure. LM-DX 1.

Dr. Younes saw the miner on July 19, 2000. He diagnosed COPD and chronic bronchitis, due to the miner's occupational dust exposure and smoking. Dr. Younes's opinion was based on physical examination findings, work and medical histories, symptoms, an x-ray, and objective tests results. LM-DX 16.

Dr. Ammisetty, based on an evaluation conducted on July 16, 2002, diagnosed COPD (in the form of emphysema) and chronic bronchitis due to the combination of coal

law judge discounted the contrary opinions of Drs. Repsher, Rosenberg and Oesterling[9] as unreasoned.

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dust exposure and smoking. LM-DX 15. Dr. Ammisetty's evaluation included examination findings, symptoms, work and medical histories, an x-ray and objective test results.

Dr. Forehand performed a pulmonary evaluation of the miner on May 27, 2004. The evaluation included an examination, symptoms, work and medical histories, an x-ray, objective tests and a biopsy. Dr. Forehand opined:

> Twenty-five years of smoking cigarettes alone would not impair [the miner's] lungs to the degree I measured on May 27, 2004 (FEV_1=0.56 liters (17% of predicted). Cigarette smoking is the leading cause of obstructive lung disease but affects only 15% of smokers. Occupational exposure is the second leading cause of obstructive lung disease. Moreover legal coal workers' pneumoconiosis and cigarette smoker's lung disease both cause the type of emphysema that effects (sic) [his] lungs. Therefore I believe I have clear cut reasons to conclude that [his] totally and permanently disabling respiratory impairment was not due solely to the effects of cigarette smoking but to the combined effects of cigarette smoking and inhaling coal mine dust. That [he] inhaled toxic coal mine dust further aggravated his obstructive lung disease caused in part by smoking cigarettes and materially worsened his complaints of shortness of breath on exertion.

LM-EX 7.

[9] In an April 21, 2005 letter, Dr. Repsher, based on a review of the miner's medical records, opined that there was no evidence of coal workers' pneumoconiosis. Instead, Dr. Repsher found that the miner had lobular and bullous emphysema. Dr. Repsher noted that the miner's lobular and bullous emphysema were unrelated to coal dust exposure, which caused only focal emphysema. Dr. Repsher further opined that COPD from coal is, on average, associated with a very minimal impairment. LM-EX 5.

In an April 27, 2005 report, Dr. Rosenberg reviewed the miner's medical records, including the results of his own 2003 examination of the miner, and opined that the miner "did not have legal pneumoconiosis," and that the pathology evidence showed panlobular emphysema not related to coal mine dust exposure. He further stated that the miner's COPD was due to his long history of smoking and was not related to coal mine employment. LM-EX 1, 3.

Employer first contends that the administrative law judge erred in crediting Dr. Forehand's opinion because he relied on an inaccurate length of coal mine employment history in finding legal pneumoconiosis established. The administrative law judge found, however, that even though Dr. Forehand stated that the miner reported twelve years of coal mine employment, Dr. Forehand opined "that as little as five years of exposure to silica-containing hard rock coal dust could lead to coal workers' pneumoconiosis and the degree of lung damage experienced by the miner." Decision and Order at 14. The administrative law judge further noted, "Dr. Forehand is the only doctor who commented regarding the impact that a lesser amount of coal mine employment would have on his opinion." *Id*. at 14 n.5. Thus, since Dr. Forehand opined that far fewer years of coal mine employment, than claimant reported, could show that the miner's COPD was due to coal mine employment, we conclude that the administrative law judge, within her purview as fact-finder, permissibly found that Dr. Forehand's opinion, that the miner's COPD was caused, in part, by his coal mine employment, was reasoned. *See* 20 C.F.R. §718.201; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). Employer also contends that the administrative law judge should not have credited the opinions of Drs. Mettu and Younes because they relied on an overstated coal mine employment history of ten and twelve years, respectively. However, since the administrative law judge accepted Dr. Forehand's opinion regarding the impact that only five years of coal mine employment would have on COPD, we reject employer's contention that the administrative law judge should not have credited the opinions of Drs. Mettu and Younes. *See* 20 C.F.R. §718.201; *Gross*, 23 BLR at 1-18-19.

Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Forehand over the opinions of Drs. Repsher, Rosenberg and Oesterling because Dr. Forehand is less qualified.[10] To the extent that employer contends that the administrative law judge is required to credit its medical experts based on their superior

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Dr. Oesterling, based on his review of the miner's slides from his July 9, 2004 left pneumonectomy, opined that the miner had clinical pneumoconiosis and severe panlobular and centrilobular emphysema unrelated to coal mine employment. He further found that the miner had mild micronodular coal workers' pneumoconiosis with little evidence of macular change, which was insufficient to alter pulmonary function and would produce no impairment or disability. LM-EX 6.

[10] Dr. Forehand is Board-certified in Pediatrics, as well as Allergy and Immunology. LM-CX 7. Dr. Repsher is Board-certified in Internal Medicine and the Subspecialty of Pulmonary Disease. LM-EX 4. Dr. Rosenberg is Board-certified in Internal Medicine and the Subspecialty of Pulmonary Disease and Occupational Medicine. LM-EX 1. Dr. Oesterling is Board-certified in Nuclear Medicine and Clinical and Anatomic Pathology. LM-EX 6.

qualifications, that argument is rejected. An administrative law judge may accord greater weight to a physician's opinion based on his or her expertise, but is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting); *Bateman v. E. Assoc. Coal Corp.*, 22 BLR 1-255, 1-261 (2003). Hence, as the administrative law judge noted the respective professional credentials of the physicians of record, and discussed her reasons for crediting and discrediting their opinions, we reject employer's contention that Dr. Forehand's opinion should have been discounted. *See* Decision and Order at 9, 12 n.3, 13, 14.

Further, employer contends that the administrative law judge erred in crediting Dr. Forehand's opinion, which was buttressed by the opinions of Drs. Mettu, Younes and Ammisetty. Employer contends that the administrative law judge erred in crediting Dr. Forehand's opinion, attributing the miner's respiratory impairment to coal mine employment and smoking when the miner had other health conditions, namely diabetes, high cholesterol and hypertension.[11] Employer does not, however, contend that the miner's respiratory impairment was caused by these other health conditions. Moreover, the presence of these other health conditions does not undermine Dr. Forehand's opinion that the miner's respiratory impairment was caused by coal dust exposure and smoking. *See* 20 C.F.R. §718.201; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). In fact, in this case, the administrative law judge recognized that the miner had a "severe lung disease of mixed causes," including coal dust exposure and smoking. Thus, contrary to employer's contention, the administrative law judge permissibly credited the opinion of Dr. Forehand, attributing the miner's respiratory impairment, in part, to coal mine employment.[12] *See Gross*, 23 BLR at 1-18-19;

[11] A pre-existing disability will not defeat entitlement if total disability due to pneumoconiosis is established. *See e.g., Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 20 BLR 2-362 (6th Cir. 1996). Moreover, in claims filed after January 19, 2001, such as this one, a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a); *see Ward*, 93 F.3d at 217, 20 BLR at 2-371.

[12] We also reject employer's contentions regarding the opinions of Drs. Younes and Ammisetty, which buttress Dr. Forehand's opinion regarding the cause of the miner's respiratory impairment and total disability. We reject employer's assertion that Dr. Younes's medical opinion was deficient because he opined that "smoking primarily caused [the miner's COPD] and chronic bronchitis, and that coal dust secondarily contributed." Employer's Brief at 29-30. Dr. Younes "opined that that COPD and chronic bronchitis was [sic] due to the combination of smoking and exposure to coal dust, and that his total disability was due to the combination of pneumoconiosis, COPD and chronic bronchitis." LM-DX 16. The administrative law judge rationally found that Dr.

Southard v. Director, OWCP, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); Decision and Order at 17.

Finally, employer asserts that the administrative law judge did not address the criticisms of Dr. Forehand's opinion by Drs. Repsher and Rosenberg. Contrary to employer's contention, however, the administrative law judge noted these criticisms, but nevertheless found Dr. Forehand's opinion reasoned. Decision and Order at 8-11. The administrative law judge was not obligated to accept any particular medical opinion, explanation or theory. Rather, as the fact-finder, it was within her purview to assess the persuasiveness and validity of the conflicting medical opinion evidence. *Id*. at 8-9, 11; Employer's Brief at 28; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

Younes's opinion indicated that the miner's coal-related pulmonary conditions contributed to the miner's disability. Decision and Order at 12-13. Hence, the administrative law judge found that Dr. Younes need not "explain the extent to which any of the three diagnoses contributed to [the miner's] disability," in order to render a reasoned opinion respecting disability causation. Decision and Order at 12; *see* Employer's Brief at 29; *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. 1998).

Additionally, we reject employer's assertion that Dr. Ammisetty's opinion "was insufficient to establish disability causation because it did not assess the extent to which smoking and coal dust exposure affected the miner's disability." *See* Employer's Brief at 30, referencing 2012 Board Decision and Order at 2 n.5. The issue under consideration at that point in the Board's review was whether Dr. Ammisetty's opinion could establish total disability due to *clinical pneumoconiosis*. In its 2012 decision, the Board noted that there was evidence of record that was supportive of a finding of legal pneumoconiosis and that indicated that the miner's disability was due to legal pneumoconiosis. Thus, the administrative law judge rationally determined that Dr. Ammisetty "found legal pneumoconiosis and found that the miner's coal dust exposure was a contributor to his disability." *See* Decision and Order at 13, 17. Nor was Dr. Ammisetty's diagnosis of legal pneumoconiosis deficient owing to his inability to "differentiate" the respective contributions of COPD/emphysema and chronic bronchitis to the miner's overall impairment, as a physician need not specifically apportion the extent to which various causal factors contribute to a respiratory or pulmonary impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483. Thus, the administrative law judge rationally accepted Dr. Ammisetty's attribution of both conditions "to the combination of coal dust exposure and smoking." *See* Decision and Order at 17.

In light of the foregoing, we conclude that the administrative law judge properly found that the opinions of Drs. Mettu, Younes, Ammisetty and Forehand established the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); *Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Gross*, 23 BLR at 1-18-19; Decision and Order at 11-17.

The administrative law judge discounted the contrary opinions of Drs. Repsher, Rosenberg and Oesterling because the doctors' views conflicted with the premises of the regulations and the preamble. Initially, employer asserts that, because the preamble was not subject to notice and rulemaking, the administrative law judge's references to the preamble are improper. Employer's Brief at 35-36. However, the preamble does not constitute evidence outside the record requiring notice and an opportunity to respond, but comprises an authoritative statement of medical principles accepted by the Department of Labor (DOL). *See A&E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Thus, the administrative law judge properly referenced the preamble in assessing the credibility of the medical experts' opinions in this case. *Id*.

Employer also contends that the administrative law judge "relie[d] on concepts that are not in the preamble," and mischaracterized the opinions of Drs. Repsher, Rosenberg and Oesterling. Employer's Brief at 31, 35. Specifically, employer contends that Dr. Repsher's description of a "statistically significant presence of COPD, but not a clinically significant presence of COPD," indicates that his statement that, "on the average, the amount of airways obstruction is so small that it cannot be measured in an individual," is consistent with the preamble. *Id*. at 31-32. The DOL, in promulgating the revised definition of pneumoconiosis at 20 C.F.R. §718.201(a), found that there was a consensus among medical experts that coal dust-induced chronic obstructive pulmonary disease can be clinically significant. *See* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-292 n.7 (7th Cir. 2001); Employer's LM Exhibits 4 at 7; 5 at 15-16; 29; 31-32; 36. Thus, the administrative law judge rationally found that Dr. Repsher's view, that COPD from coal dust exposure is associated with very minimal loss of lung function, conflicts with the DOL's position that coal dust exposure can cause a clinically significant obstructive impairment. Decision and Order at 15, 23; *see* 65 Fed. Reg. 79,942 (Dec. 20, 2000); *also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Obush*, 650 F.3d at 257, 24 BLR at 2-383.

Next, employer asserts that, because Dr. Repsher did not dispute the fact that coal dust exposure can cause emphysema in some cases, his view that the miner's bullous

emphysema was unrelated to coal dust exposure is not contrary to the preamble. Employer's Brief at 32, 34. In light of Dr. Repsher's statement that neither centrilobular nor bullous emphysema is related to coal mine dust inhalation, however, the administrative law judge properly found that his view "runs counter" to the definition of legal pneumoconiosis, which provides that emphysema can be causally related to coal dust exposure.[13] Decision and Order at 15; Employer's LM Exhibit 5 at 30. As the scientific premises underlying the regulations, as set forth in the preamble, establish that exposures to coal dust and smoking cause similar types of emphysema, the administrative law judge acted properly in discounting Dr. Repsher's opinion. *See* 65 Fed. Reg. 79,939 (Dec. 20, 2000); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7. Thus, we affirm the administrative law judge's conclusion that Dr. Repsher's medical opinion is "flawed by [the foregoing] underlying assumptions, and her consequent assignment of "no weight" to the opinion for these reasons. Decision and Order at 15-16; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Obush*, 650 F.3d at 257, 24 BLR at 2-383.

Further, employer asserts that the administrative law judge erred in rejecting Dr. Rosenberg's opinion because the doctor discounted the impact of the miner's coal dust exposure on his COPD, as Dr. Rosenberg noted that the miner "developed progressive obstructive lung disease many years removed from his coal mine employment."[14] Decision and Order at 16. The administrative law judge considered Dr. Rosenberg's lengthy discussion disputing the scientific studies accepted by the DOL. The DOL accepted studies stating that pneumoconiosis, which can be latent and progressive, "may lie dormant and progress, even after the cessation of exposure" and that, consequently, "a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period of time." 65 Fed. Reg. at 79,971; 20 C.F.R. §718.201(c); Decision and Order at 16, 24; *see* Employer's LM Exhibits 1 at 11-16, 3 at 15; *see* 20 C.F.R. §718.201(c); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(en banc); *Workman v. E. Assoc. Coal Corp*., 23 BLR 1-22 (2004)(en banc); *see also Mullins Coal Co. of Va. V. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987). Considering Dr. Rosenberg's opinion, the administrative law judge noted: the doctor's specific disagreement with the studies associating coal dust exposure with centrilobular and panlobular emphysema; his view that coal dust related bullous

[13] A medical opinion excluding coal dust exposure as a contributing factor in a miner's respiratory impairment based, in part, on a diagnosis of emphysema, may be discounted as contrary to the preamble. *See* 65 Fed. Reg. 79,939 (Dec. 20, 2000); *Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

[14] Dr. Rosenberg added that the miner's pattern of obstructive lung disease "does not occur in relationship to coal dust exposure." *See* Employer's LM Exhibit 3 at 12-13, 15.

emphysema occurs only with complicated pneumoconiosis; and his opinion that panlobular emphysema is due to smoking, and not coal dust exposure.[15] Hence, the administrative law judge rationally found that Dr. Rosenberg's opinion was "wholly based" on premises that are inconsistent with the regulations, and merited "no weight." Decision and Order at 16; 17; 20-21; 22-23; *see* Employer's LM Exhibit 1 at 11-16 and 3 at 13-16; Employer's Exhibits 4 at 8-11; 5 at 13-15, 17, 18-19. Thus, we reject employer's argument, and we affirm the administrative law judge's weighing of Dr. Rosenberg's opinion.

Similarly, employer argues that, because Dr. Oesterling diagnosed panlobular emphysema, not centrilobular emphysema, the administrative law judge's determination that Dr. Oesterling's views are inconsistent with the regulations "ignores" his opinion. Employer's Brief at 34-35. Dr. Oesterling stated that the "emphysema that's seen in coal miners is [centrilobular]," but that this miner "had progressed very well beyond [centrilobular] and had very severe panlobular with bullous emphysema." Dr. Oesterling opined that the miner's panlobular emphysema was unrelated to his coal mine dust exposure, and, finally, that coal dust-related panlobular emphysema only occurs with progressive massive fibrosis.[16] Employer's Exhibits 6 at 5 and 7 at 19-22. Hence, contrary to employer's assertion, the administrative law judge rationally found that Dr. Oesterling's opinion conflicts with the preamble's view that emphysema can be related to coal dust exposure. Decision and Order at 7; 16-17; 20; 22.

In sum, in evaluating the opinions of Drs. Repsher, Rosenberg and Oesterling, the administrative law judge properly assessed the significance of their erroneous views upon their overall medical diagnoses, *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009), and identified their differences with the DOL's determination regarding the connection between coal dust exposure and emphysema. The administrative law judge, therefore, properly assigned their opinions "no weight."

[15] Employer relies on Dr. Rosenberg's opinion that "the studies cited in the preamble" were "hampered by selection bias, inadequate controls and poor study design," and his conclusion that "there is no scientific foundation to conclude with a reasonable degree of medical certainty, [that centrilobular emphysema] and panlobular emphysema as would be seen with cigarette smoke develops in association with coal dust exposure." Employer's Brief at 34; *see* Employer's LM Exhibit 3 at 9-16; Employer's Exhibit 4 at 10.

[16] A medical opinion that a miner's emphysema is not due to coal dust exposure, based in part on the absence of progressive fibrosis, is inconsistent with the science credited in the preamble, because the Department of Labor has recognized that coal dust exposure alone can lead to disabling emphysema and does not require a showing of either simple or complicated pneumoconiosis. 65 Fed. Reg. 79,941 (Dec. 20, 2000).

Decision and Order at 16; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7. Hence, employer's contention that, "overall" the views of Drs. Repsher, Rosenberg and Oesterling "do not conflict with the preamble," is unfounded. *See* Employer's Brief at 26; 28; 32; 33; 35; *Obush*, 24 BLR at 125-26. Further, the administrative law judge adequately discussed her evaluation of the evidence in compliance with the APA. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, reject employer's argument that the administrative law judge erred in failing to consider the explanations for their opinions provided by Drs. Repsher, Rosenberg and Oesterling, as the administrative law judge provided valid reasons for discrediting each physician's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378 (1983). Thus, we affirm the administrative law judge's finding that the credible medical opinion evidence establishes that the miner suffered from legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4).

Disability Causation

Employer contends that the administrative law judge imposed an improper disability causation standard, and erred in relying on the opinions of Drs. Ammisetty, Younes, Mettu and Forehand, over those of Drs. Respher, Rosenberg and Oesterling at Section 718.204(c). Employer reiterates the arguments it raised on the issue of the existence of legal pneumoconiosis at Section 718.202(a)(4), and asserts that the administrative law judge provided no valid reasons for her credibility determinations concerning disability causation. Employer's Brief at 25-30. Additionally, employer argues that the opinions of Drs. Ammisetty, Younes, Mettu and Forehand fail to affirmatively prove that legal pneumoconiosis was a substantially contributing cause of disability, or that legal pneumoconiosis was more than a *de minimus* or infinitesimal factor in claimant's total disability and are, therefore, insufficient to establish disability causation at Section 718.204(c).

Employer's arguments lack merit. The administrative law judge correctly stated that a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.[17] 20 C.F.R. §718.204(c); *see* Decision and Order at 11. Thus, the Board held that, because Dr. Forehand concluded that "both inhaling coal mine dust and

[17] Pneumoconiosis is a "substantially contributing cause" of a miner's disability if it has a "material adverse effect" on the miner's respiratory or pulmonary condition or "[m]aterially worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1).

smoking were significant factors contributing to [the miner's] end stage lung disease and death," the administrative law judge reasonably credited Dr. Forehand's opinion as supportive of a finding that legal pneumoconiosis constituted more than a *de minimus* contribution to claimant's disability. *See* Decision and Order at 11-12, 14, 17, 22; Claimant's LM Exhibits 2 at 3-4, 4,7, Director's Exhibit 19; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Moreover, since Drs. Ammisetty, Younes and Mettu each attributed the miner's disabling respiratory conditions to both coal dust exposure and smoking, employer's argument that their opinions are diminished because they do not distinguish between the relative contributions of the two causes is rejected.[18] *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Gross*, 23 BLR at 1-18-19 (a medical opinion that pneumoconiosis "was one of two causes" of total disability meets the "substantially contributing cause" standard at 20 C.F.R. §718.204(c)). Additionally, the administrative law judge permissibly found that the opinions of Drs. Repsher, Oesterling and Rosenberg were not entitled to any weight because they did not diagnose the existence of legal pneumoconiosis, in direct contradiction to her finding. Decision and Order at 14; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002)(en banc); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 269-70, 22 BLR 2-372, 2-382-84 (4th Cir. 2002). The administrative law judge's explanation and rationale for her findings accords with the APA, and the evidence of record supports her determination that legal pneumoconiosis was a substantially contributing cause of the miner's disabling lung impairment. 20 C.F.R. §718.204(c); *see Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal Inc. v. Ward*, 83 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Wojtowicz*, 12 BLR at 1-165. We, therefore, affirm the administrative law judge's finding that disability causation was established at Section 718.204(c).[19] *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483, 23 BLR 2-44, 70 (6th Cir. 2003); *Peabody Coal Co. v. Smith*, 127 F.3d at 507, 21 BLR at 2-185-86.

[18] Further, because each of these medical opinions established that the miner suffered from legal pneumoconiosis, and connected the miner's disability to legal pneumoconiosis, we are unpersuaded by employer's assertion that the administrative law judge insufficiently distinguished between disability due to clinical versus legal pneumoconiosis. *See* 20 C.F.R. §718.201.

[19] Because we affirm the administrative law judge's finding that the miner was disabled due to legal pneumoconiosis, we need not consider her finding that the miner was disabled due to clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As the administrative law judge properly found the existence of legal pneumoconiosis and disability causation established at Sections 718.202(a) and 718.204(c), we affirm the award of benefits in the miner's claim.

Death Causation

Addressing the issue of whether the miner's death was due to pneumoconiosis, the administrative law judge considered the death certificate,[20] the autopsy report, and the opinions of Drs. Forehand,[21] Oesterling[22] and Rosenberg.[23] The administrative law judge found that the evidence established that the miner died of complications arising from his lung transplant surgery. Decision and Order at 22. She further found that the miner's death was hastened by his pneumoconiosis, based on the opinion of Dr. Forehand who stated that:

> [the miner] was left with so little respiratory reserve, he did not have the capacity to fight infection or to respond adequately to treatment. Both coal dust and smoking were significant factors contributing to [his] end stage disease and death. This evidence is sufficient to allow a reasonable person to conclude that pneumoconiosis hastened the [m]iner's death.

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[20] Dr. Camp authored the miner's death certificate and autopsy report. The death certificate listed pulmonary embolism, left lung transplant and COPD as causes of death, and noted a "history of coal miner's dust exposure'" under "other significant conditions contributed to death…." The autopsy report's final diagnoses included anthracosis of the hilar lymph nodes, multiple anthracotic macules and nodules consistent with simple coal workers' pneumoconiosis in the right (native) lung and cardiomegaly with left ventricular hypertrophy, and "severe emphysematous changes." Dr. Camp opined that the tobacco use and a history of coal exposure were contributing causes of the miner's COPD. Director's Exhibits 14, 16; Decision and Order at 17-18.

[21] Dr. Forehand stated that the miner's death was due to complications of a lung transplant to treat COPD stemming from a combination of coal mine dust inhalation and smoking. Decision and Order at 18, 22.

[22] Dr. Oesterling found that the cause of death was panlobular emphysema and overwhelming pneumonia. *Id*. at 16, 22.

[23] Dr. Rosenberg found that the miner's emphysema and COPD necessitated a lung transplant which produced complications and infection from rejection of the transplant, and that his death was not hastened or accelerated by his minimal clinical coal workers' pneumoconiosis. *Id*. at 20-22; *see* Employer's SC Exhibit 5 at 8, 15-18.

Id. at 22. The administrative law judge found Dr. Forehand's opinion regarding "the role of … pneumoconiosis in the [m]iner's death to be well-reasoned and supported by the record of his evaluation [as] [h]is opinion adequately explain[ed] the process through which the [m]iner's pneumoconiosis hastened his death." *Id*. The administrative law judge accorded less weight to the opinions of Drs. Oesterling and Rosenberg because they were based on the doctors' findings that the miner's emphysema did not arise out of coal mine employment, contrary to the preamble and the regulations. Consequently, the administrative law judge properly credited the better reasoned opinion of Dr. Forehand, which established that the miner's legal pneumoconiosis hastened his death.

Employer, however, challenges the administrative law judge's finding that the miner's death was hastened by legal pneumoconiosis.[24] Specifically, employer contends that Dr. Forehand's opinion is insufficient to demonstrate that the miner's legal pneumoconiosis hastened his death because it did not address the issue with sufficient specificity, citing *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303, 24 BLR 2-257, 2-266 (6th Cir. 2010); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625, 2-655 (6th Cir. 2003). Employer further contends that, because Dr. Forehand found that the miner's lung disease was "multi-factoral," and was only "due in part to … coal mine employment," it was not supportive of a finding that the miner's legal pneumoconiosis hastened his death. Employer's Brief at 39. Employer additionally renews its objection to the administrative law judge's reliance on the preamble to discredit the opinions of Drs. Oesterling and Rosenberg, who found that the miner's emphysema was not due to coal mine employment. Specifically, employer contends that the administrative law judge improperly discounted the opinions of Drs. Oesterling[25] and Rosenberg, that

[24] Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205(b); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(5); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

[25] Dr. Oesterling described the miner's lung transplant procedures, and explained that his panlobular emphysema "had necessitated all of his surgical procedures and, indeed, did play a major role in his demise because this is a very destructive disease process." He explained that rejection of the lung transplant led to the development of a "culminating hemorrhagic organizing pneumonia in both the transplant lung and what was left of his native lung. This was the final cause of his death." His explanation continued:

"smoking, and not coal dust exposure, caused the panlobular emphysema that led to [the miner's] lung transplant, and, ultimately, his death." *Id*. at 41.

Initially, we conclude that the administrative law judge properly discounted the opinions of Drs. Oesterling and Rosenberg, regarding the cause of the miner's death, because they were based on findings that emphysema is not caused by coal mine employment. *See* 65 Fed. Reg. 79,939, 79,941-44 (Dec. 20, 2000); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7.

Further, contrary to employer's argument, the administrative law judge noted that Dr. Forehand adequately explained how the miner's coal mine related COPD adversely affected the miner's ability to fight the infection caused as a result of his lung transplant or adequately respond to the treatments for that infection. Contrary to employer's contention, Dr. Forehand's opinion is not too generalized to support a finding that the miner's legal pneumoconiosis hastened his death. The administrative law judge noted that the medical opinion evidence was in agreement that the miner's death was due to respiratory deterioration stemming from the rejection of the miner's lung transplant, which was necessitated by the miner's severe emphysema. The administrative law judge found that the credible medical opinion evidence established that the miner's severe emphysema was caused, in part, by his coal mine employment. We are, therefore, unpersuaded by employer's argument that Dr. Forehand's opinion falls short of describing the process by which the miner's death was hastened by pneumoconiosis, as required by *Conley*. *See* Employer's Brief at 37-38; *Conley*, 595 F.3d at 303, 24 BLR at 2-266. Consequently, we affirm the administrative law judge's determination that Dr. Forehand provided a well-reasoned and probative opinion that "adequately explains the process through which the miner's pneumoconiosis hastened his death." Decision and

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> Q. What was the cause of [the miner's] death, or were you able to determine that?
>
> A. His lungs were totally destroyed. Between the panlobular emphysema and this overwhelming rejection and infection in his transplanted lung, he literally had no lung function left. …
>
> His primary cause of death was a respiratory death due to the panlobular emphysema and due to the overwhelming pneumonia.

See Employer's Exhibit 7 at 12, 16-17.

Order at 22. Thus, we reject employer's assignments of error on the issue of death causation, and we affirm the award of survivor's benefits.[26]

Accordingly, the administrative law judge's Decision and Order Granting Benefits on Remand in both the miner's and the survivor's claims is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

[26] Because we affirm the administrative law judge's finding that legal pneumoconiosis hastened the miner's death, we need not address the administrative law judge's finding that clinical pneumoconiosis hastened his death. *See Larioni*, 6 BLR at 1-1278.