BRB Nos. 13-0574 BLA
and 13-0589 BLA

LINDA FAYE STANLEY (On Behalf Of and Survivor of WILLIAM STANLEY)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 07/25/2014
ISLAND CREEK COAL COMPANY	)	
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits of Administrative Law Judge Alice M. Craft, rendered on a miner's subsequent claim filed on January 2, 2007 (2008-BLA- 05147) and a survivor's claim filed on March 23, 2009 (2010-BLA-05672),[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] In considering the miner's 2007 subsequent claim, the administrative law judge initially determined that claimant was not eligible for the presumption at amended Section 411(c)(4), because that miner worked fewer than fifteen years in coal mine employment.[3] In considering the miner's claim pursuant to the regulations at 20 C.F.R. Part 718,[4] the administrative law judge found that claimant

[1] The miner filed four previous claims, all of which were finally denied. Director's Exhibits 1-4. The miner's most recent prior claim, filed on July 6, 2002, was denied by the district director on November 13, 2003. Director's Exhibit 4. The district director determined that while the miner was totally disabled, the evidence was insufficient to establish the existence of pneumoconiosis. *Id*. The miner took no further action until filing his subsequent claim on January 2, 2007. Director's Exhibit 6. The district director awarded benefits and employer requested a hearing. In the interim, the miner died on February 9, 2009. Director's Exhibit 52. Claimant, the widow of the miner, filed a survivor's claim on March 23, 2009, which was consolidated with the miner's claim. Director's Exhibit 44. The district director awarded survivor's benefits on March 22, 2010. Directors' Exhibit 84. Employer requested a hearing, which was held on June 18, 2010. Director's Exhibits 96, 97. Thereafter, the administrative law judge issued her Decision and Order Awarding Benefits on September 9, 2013, which is the subject of this appeal.

[2] The administrative law judge issued her Decision and Order Awarding Benefits under the case number of the survivor's claim, 2010-BLA-0562, although she considered entitlement in both the miner's and the survivor's claims. Employer filed a notice of appeal with the Board listing both claim numbers. The Board has assigned employer's appeal of the award of benefits in the miner's claim, 2008-BLA-05147, the docket number, BRB No. 13-0574 BLA and employer's appeal of the award of benefits in the survivor's claim, 2010-BLA-0562, the docket number, BRB No. 13-0589 BLA. The Board consolidated the appeals for purposes of decision only.

[3] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[4] In order to establish entitlement to benefits under 20 C.F.R. Part 718 in the miner's claim, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he was totally disabled due

established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge also found that claimant established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[5] Accordingly, benefits were awarded on the miner's claim. With respect to the survivor's claim, the administrative law judge determined that claimant satisfied the requirements for automatic entitlement to benefits pursuant to amended Section 932(*l*).[6]

On appeal, employer asserts that the administrative law judge erred in crediting the opinions of Drs. Simpao and Houser that the miner had legal pneumoconiosis. Employer also asserts that the administrative law judge erred in his consideration of the pulmonary function study evidence pertaining to whether the miner was totally disabled, and erred in finding that the miner's disability was due to pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are supported by substantial evidence, rational, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Miner's Claim

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative

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to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[5] A finding that pneumoconiosis arose out of coal mine employment is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201.

[6] Amended Section 932(*l*) provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*), as implemented by 20 C.F.R. §718.305.

[7] The record reflects that claimant's coal mine employment was in Kentucky. Decision and Order at 4; Director's Exhibit 6. 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, 1-202 (1989) (en banc).

law judge finds that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The miner's last claim was denied because the miner did not establish the existence of pneumoconiosis. Decision and Order at 3; Director's Exhibit 4. Consequently, to obtain review of the merits of the miner's claim, claimant was required first to establish, based on the newly submitted evidence, this element of entitlement. 20 C.F.R. §725.309(d)(2), (3).

A. Legal Pneumoconiosis

The administrative law judge determined that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[8] The administrative law judge specifically credited the opinions of Drs. Simpao and Houser, that the miner suffered from chronic obstructive pulmonary disease (COPD) caused by coal dust exposure, over the contrary opinions of Drs. Selby and Repsher, that the miner did not have a coal dust-related lung disease. The administrative law judge explained:

> After weighing all of the medical opinions of record in the current claim, I am persuaded by Drs. Simpao's and Houser's opinions that coal dust contributed to the Miner's COPD, satisfying the definition of legal pneumoconiosis. I find their reasoning and explanation in support of their conclusions more consistent with the evidence available to them and the treatment records than was provided by Drs. Selby and Repsher. Drs. Simpao and Houser were in better accord with the evidence underlying their opinions, the overall weight of the medical evidence of record, and the premises underlying the regulations. Neither Dr. Selby nor Dr. Repsher adequately explained why coal dust exposure was not a factor in the Miner's obstructive disease. . . .

Decision and Order at 35.

[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment[,] ... includ[ing], but … not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.202(a)(2). Further, a disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.202(b).

Employer asserts that the administrative law judge erred by failing to "reconcile Dr. Simpao's opinion that [the miner's] heart disease was *well-managed* with the contrary evidence of record," such as the abnormal electrocardiogram (EKG) and treatment and hospitalization records for cardiac disease, thus undermining his opinion. Employer's Brief at 5-6 (emphasis added). Employer maintains that Dr. Simpao "had no knowledge of [the miner's] ongoing heart problems and cardiac disease" and that his diagnosis of legal pneumoconiosis is not credible. *Id*. at 6.

Contrary to employer's assertion, Dr. Simpao discussed the miner's cardiac condition and acknowledged that it contributed to the miner's pulmonary disease. *See* Director's Exhibit 16. Dr. Simpao specifically testified that the miner "definitely has a cardiac problem" and referred to the EKG showing "*first degree airway block* and some probably old mitral valve damage." Director's Exhibit 31 at 10 (emphasis added). The administrative law judge accurately described Dr. Simpao's opinion, noting that he diagnosed legal pneumoconiosis based on the results of the miner's "pulmonary function testing, respiratory symptoms, and physical findings" on examination. Decision and Order at 33. She also noted correctly that Dr. Simpao opined that the miner's coal dust exposure was a significant contributing factor in his respiratory condition,[9] while heart disease was a secondary cause. *Id*. at 20-21, 33; Director's Exhibits 16, 31, 72. Because the administrative law judge acted within her discretion, we affirm her determination that Dr. Simpao's opinion was reasoned and documented and sufficient to support a finding that the miner had legal pneumoconiosis.[10] *See Martin v. Ligon Preparation Co*., 400

[9] Dr. Simpao examined the miner on behalf of the Department of Labor on February 6, 2007. Director's Exhibits 16, 72. He took occupational, social, family and medical histories, conducted a physical examination, electrocardiogram, chest x-ray, arterial blood gas and pulmonary function testing, and noted that the miner worked for eleven years in coal mine employment and never smoked. *Id*. Dr. Simpao concluded that the pulmonary function study showed a moderate restrictive and a severe obstructive respiratory impairment. *Id*.

[10] Employer argues that Dr. Simpao's opinion is entitled to less weight because Dr. Simpao is a general practitioner, while Drs. Selby and Repsher are Board-certified in pulmonary disease. The administrative law judge acknowledged the qualifications of each doctor. However, contrary to employer's assertion, she was not required to resolve the conflict in the medical opinion evidence, based solely on her consideration of the qualifications of the physicians. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Rather, the administrative law judge acted within her discretion in finding Dr. Simpao's opinion to be credible in light of the rationale Dr. Simpao provided for his medical conclusions. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer also contends that the administrative law judge violated the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), by failing "to consider or discuss" how Dr. Houser's review of "non-record" evidence may have affected his opinion that the miner had legal pneumoconiosis.[11] Employer acknowledges that the administrative law judge, in her analysis of the issue of total disability, specifically discussed the fact that Dr. Houser reviewed a report from Dr. Castle, proffered as evidence by employer, which was deemed inadmissible, in view of the evidentiary limitations. However, employer contends that the administrative law judge erred by failing to further explain why Dr. Houser's opinion was credible as to the existence of legal pneumoconiosis, given his review of the same inadmissible evidence. Employer's arguments are without merit.

The Board has held that an administrative law judge should not automatically exclude a medical opinion where the physician has reviewed evidence that was not of record or was deemed inadmissible, without first ascertaining whether the opinion or portions of that opinion has been tainted by the review of the inadmissible evidence. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting). If the administrative law judge finds that the opinion is tainted, he or she is not required to exclude the report or testimony in its entirety. *Harris*, 23 BLR at 1-108. Rather, the administrative law judge may redact the objectionable content; ask the physician to submit a new report; or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *See Harris*, 23 BLR at 1-108; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (en banc).

In this case, the administrative law judge observed correctly that Dr. Houser diagnosed a totally disabling respiratory impairment, "based on [his] review of the treatment records, testing, and medical reports available in the current claim, plus Dr. Castle's opinion." Decision and Order at 37. The administrative law judge specifically found that Dr. Houser's review of Dr. Castle's report "[did] not undermine his opinion on disability, because he had access to all the recent test data, which was admissible." *Id*. In

[11] Dr. Houser reviewed the miner's medical records and medical opinions provided by employer and concluded that the miner had legal pneumoconiosis. He stated that the medical literature documents that coal dust is a risk factor similar to smoking for developing chronic obstructive pulmonary disease (COPD) in the form of emphysema and chronic bronchitis; obstructive airway disease is associated with increased cardiovascular morbidity and mortality; and COPD represents a systemic inflammatory response which can affect cardiovascular and other systems.

addressing Dr. Houser's opinion on the issue of legal pneumoconiosis, the administrative law judge permissibly credited Dr. Houser's explanation that the miner's respiratory condition was due to both smoking and coal dust exposure because she found that it was supported by the "overall weight of the evidence," and was also "consistent with the premises underlying the regulations." Decision and Order at 35; *see Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Based on the totality of her statements, we conclude that the administrative law judge satisfied her obligation under the APA and *Harris* to explain the weight accorded Dr. Houser's opinion. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc); *Harris*, 23 BLR at 1-108; *Dempsey*, 23 BLR at 1-66-67. Furthermore, employer has not explained in this appeal how Dr. Houser's diagnosis of legal pneumoconiosis was tainted by his review of Dr. Castle's excluded medical report. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984). We agree with the Director that "since Dr. Houser came to medical conclusions different tha[n] those of Dr. Castle – Dr. Houser found legal pneumoconiosis and Dr. Castle did not – it can hardly be said that Dr. Houser improperly 'relied' upon Dr. Castle's opinion." Director's Brief at 2. Thus, we affirm the administrative law judge's determination that Dr. Houser provided a reasoned and documented opinion that the miner had legal pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

For the all of the above-stated reasons, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, based on the opinions of Drs. Simpao and Houser at 20 C.F.R. §718.202(a)(4). We also affirm her determination that claimant demonstrated a change in an applicable condition of entitlement in the miner's claim under 20 C.F.R. §725.309. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

B. Total Disability

Employer challenges the administrative law judge's finding that claimant established total disability, asserting that she erred in weighing the pulmonary function study evidence. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge provided a chart listing the results of all of the pulmonary function studies of record, dating from July 1990 to September 2008. Decision and Order at 13-15. The administrative law judge observed that there was "a variance in the recorded height of the miner from 68 [inches] to 71 [inches]," and she relied on "the midpoint (69.5)" in determining whether the studies qualified for total disability under the regulations. *Id*. at 12. The administrative law judge noted that, despite her use of an *average* height, "the qualifying tests are qualifying to show disability whether considering the mid-point, or the heights listed by the persons who administered the testing, except for Dr. Selby's pre-bronchodilator test in 2007." *Id*. at 11-12. The administrative law judge stated that she considered the qualifying pre-bronchodilator value obtained by Dr. Selby on July 19,

2007 to be "a more reliable indicator of the miner's exertional ability than post-bronchodilator values" obtained during that test.[12] *Id*. at 37. The administrative law judge concluded that claimant established total disability by a preponderance of the qualifying pulmonary function study evidence submitted with the current subsequent claim and the most recent prior claim.[13] *Id*.

Employer argues that the administrative law judge's reliance on height measurements as far back as 1984-1990, "does not provide an accurate reflection of [the miner's] height" and skews the results. Employer's Brief at 12. Employer's argument is belied, however, by the fact that the administrative law judge found that all of the same tests were qualifying whether or not she used the miner's average height or the actual height recorded by the physician who administered the test. Employer also offers no support for its argument that the heights obtained in connection with prior claims are not reliable.

The Board has held that where there are substantial differences in the recorded heights among the pulmonary function studies of record, an administrative law judge must make a factual finding to determine a claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). It is within the administrative law judge's discretion to render factual determinations, *see Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), and we discern no abuse of discretion in the administrative law judge's decision to average all of the heights listed in the record to obtain an average height for the miner. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas*, 6 BLR at 1-223. Thus, we affirm the administrative law judge's use of an average height for the miner of 69.5 inches in evaluating whether the pulmonary function study evidence was qualifying for total disability under the regulations. As employer raises no other challenge with respect to the manner in which the administrative law judge weighed the pulmonary

[12] The administrative law judge's reliance on pre-bronchodilator results is consistent with the position of the Department of Labor that: "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980).

[13] The administrative law judge noted that "the pulmonary function testing from the fourth claim [which is the most recent prior claim] was qualifying and the District Director found the [m]iner disabled in that claim as well." Decision and Order at 37. Although there were also qualifying pulmonary function studies obtained with respect to the miner's first three claims, the administrative law judge considered the testing from those earlier claims to be "too remote in time to reflect the [m]iner's condition in later years." *Id*.

function study evidence, we affirm, as supported by substantial evidence, the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(i)(iv), employer contends that the administrative law judge erred in giving less weight to Dr. Selby's opinion, that the miner was not totally disabled, based on her finding that Dr. Selby's pulmonary function testing showed a *qualifying* pre-bronchodilator result. Based on our affirmance of the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), we reject employer's assertion of error. Furthermore, we affirm the administrative law judge's decision to give less weight to Dr. Selby's opinion, as she found that Dr. Selby "did not address the exertional requirements of the [m]iner's last job in the mines" in stating that the miner was not totally disabled. Decision and Order at 38; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). We therefore affirm the administrative law judge's finding that claimant established total disability, based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and based on her consideration of the record evidence, as a whole, under 20 C.F.R. §718.204(b)(2).

C. Disability Causation

The administrative law judge rejected the opinions of Drs. Selby and Repsher that the miner's respiratory disability was unrelated to coal dust exposure, because neither physician diagnosed legal pneumoconiosis, contrary to her finding that the existence of the disease was established. Decision and Order at 39. The administrative law judge credited, however, "the opinions of Drs. Simpao and Houser that coal dust exposure caused the [m]iner's pulmonary disability." *Id*. Because employer does not raise any specific error with regard to the administrative law judge's credibility findings as they pertain to the issue of disability causation, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. 20 C.F.R. §718.204(c). *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Consequently, we further affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because claimant filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, the administrative law judge determined that claimant is automatically entitled to benefits pursuant to Section 932(*l*). Decision and Order at 40. As employer raises no specific challenge to claimant's entitlement under Section 932(*l*), we affirm the administrative law judge's award of benefits in the survivor's claim. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on the miner's claim and her Decision and Order Awarding Benefits on the survivor's claim are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge