U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 20-0377 BLA
and 20-0379 BLA

PEGGY CLEMONS (o/b/o and Widow of JAMES CLEMONS) Claimant-Respondent v. HUSCOAL, INCORPORATED and SECURITY INSURANCE OF HARTFORD Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/16/2021 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Jason A. Golden, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.[1]

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[1] Claimant is the widow of the Miner, who died on June 14, 2015. Director's Exhibit 48 at 1. In addition to her survivor's claim, she is pursuing the Miner's claim on his behalf.

James M. Poerio (Poerio & Walter, Inc.) Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jason A. Golden's Decision and Order Awarding Benefits (2015-BLA-05579; 2018-BLA-05728) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim[2] filed on March 14, 2014, and a survivor's claim filed on October 24, 2016. Director's Exhibits 3 at 1; 40 at 1.

The ALJ credited the Miner with ten years of coal mine employment, pursuant to the parties' stipulation, and thus found he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 4; Hearing Transcript at 5; Claimant's Closing Brief at 12. Considering entitlement under 20 C.F.R. Part 718, the ALJ found the new evidence established the Miner had legal pneumoconiosis[4] and therefore demonstrated a change in an applicable condition of entitlement.[5] Decision and Order at

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[2] On December 20, 2010, the district director denied the Miner's initial claim because he did not establish that he had pneumoconiosis. Director's Exhibit 1 at 4.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[5] If a miner files a claim for benefits more than one year after the final denial of a previous claim, the ALJ must also deny the subsequent claim unless he 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(c); *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(c)(3). Because the Miner failed to establish the existence of pneumoconiosis in his prior claim, he had to

18; 20 C.F.R. §§718.202(a)(4), 725.309(c). The ALJ accepted Employer's concession that the Miner was totally disabled by a respiratory or pulmonary impairment and further found the total disability was due to legal pneumoconiosis. 20 C.F.R. §718.204(b)(2), (c); Decision and Order at 21. Consequently, the ALJ awarded benefits in the Miner's claim. Decision and Order at 22. Based on the award of benefits in the Miner's claim, the ALJ found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act.[6] Decision and Order at 22; 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding that the Miner had legal pneumoconiosis.[7] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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).

Miner's Claim

To be entitled to benefits under the Act, a claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist a claimant in

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submit new evidence establishing this element to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1 at 4.

[6] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of the miner's death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[7] We affirm, as unchallenged, the ALJ's findings that the Miner had ten years of coal mine employment and was totally disabled. *See* 20 C.F.R. §718.204(b)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] We will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 30; Director's Exhibits 3 at 2; 46 at 1.

establishing these elements of entitlement if certain conditions are met, but failure to establish any of them precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Legal Pneumoconiosis

To establish legal pneumoconiosis, Claimant must prove the Miner had a "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. §718.201(a)(2), (b). The United States Court of Appeals for the Sixth Circuit has held that a miner can satisfy this burden by showing that the disease was caused "in part" by coal dust exposure. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 598-99, 600 (6th Cir. 2014); *see also Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020) ("[I]n [*Groves*] we defined 'in part' to mean 'more than a de minimis contribution' and instead 'a contributing cause of some discernible consequence.'").

The ALJ considered the new medical opinions of Drs. Sikder, Habre, and Broudy. 20 C.F.R. §718.202(a)(4). Dr. Sikder diagnosed the Miner with legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure and cigarette smoking. Director's Exhibits 17 at 28; 63 at 4. In contrast, Drs. Habre and Broudy opined that the Miner suffered from COPD due to smoking.[9] Director's Exhibits 17A at 5; 18 at 4.

Before weighing the medical opinions, the ALJ addressed the Miner's smoking and coal mine employment histories. Based on the smoking histories the doctors recorded,[10] he found the Miner smoked two packs of cigarettes per day for thirty years for a sixty pack-year history. Decision and Order at 11. The ALJ indicated that because all the physicians considered a smoking history similar to his finding, he did not discount any physician's

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[9] Although Dr. Habre opined that the Miner's COPD "ha[d] a dual etiology" of smoking and coal dust, he concluded the Miner did not have clinical or legal pneumoconiosis because "coal mine dust did not play a substantial role [and] the main etiology of [the Miner's] respiratory disability remains the smoking habits, which cause severe COPD." Director's Exhibit 18 at 4.

[10] As the ALJ summarized, Dr. Sikder reported the Miner smoked two packs per day from 1978 to February 2009. Decision and Order at 11; Director's Exhibit 17 at 26. Dr. Habre reported the Miner smoked two packs per day from 1978 to 2007, and Dr. Broudy reported the Miner smoked two packs per day from age 28 to 56. Decision and Order at 11; Director's Exhibits 18 at 23; 17A at 2.

opinion on that basis. *Id.* Next, noting that the Miner had ten years of coal mine employment, the ALJ found that Dr. Habre considered a similar coal mine employment history of 10.54 years, while Drs. Sikder and Broudy considered longer histories of fourteen to fifteen years and seventeen years, respectively. *Id.* at 14. The ALJ found the discrepancy large enough to "lessen the weight" of Drs. Sikder's and Broudy's opinions, but not enough to deprive their opinions of all probative value. *Id.* The ALJ indicated he would factor in the amount of coal mine employment each doctor considered in determining the weight of his or her opinion. *Id.* at 15.

The ALJ found Dr. Sikder's opinion attributing the Miner's COPD to both smoking and coal mine dust exposure to be well-documented and reasoned and supported by the record. *Id.* at 15. Considering the DOL's recognition in the preamble to the 2001 revised regulations (the preamble) that the effects of smoking and coal mine dust exposure are additive, the ALJ was "persuaded that Dr. Sikder adequately linked the Miner's COPD to his coal mine employment, irrespective of the length of coal mine employment she considered." Decision and Order at 18. He therefore accorded her opinion "probative weight." *Id.*

Conversely, the ALJ found the opinions of Drs. Habre and Broudy neither well-documented nor well-reasoned because neither physician adequately explained why coal mine dust exposure did not contribute "in part," along with cigarette smoking, to the Miner's disabling COPD. *Id.* at 16, 17, 18. The ALJ found that Dr. Habre "seem[ed] to" exclude legal pneumoconiosis because the Miner's x-ray was negative for clinical pneumoconiosis.[11] *Id.* at 16. He further found Drs. Habre's and Broudy's reliance on the partial reversibility of the Miner's obstructive impairment an unpersuasive reason for concluding that coal mine dust exposure did not contribute to the Miner's COPD. *Id.* at 16, 17. The ALJ additionally indicated he was not persuaded by Dr. Broudy's reasoning that the Miner's impairment was obstructive in nature, whereas "[t]he impairment due to coal dust exposure is usually a restrictive type of impairment." *Id.* at 17; Director's Exhibit 17A at 5. The ALJ concluded that the preponderance of the new medical evidence established the Miner had legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); Decision and Order at 15, 18.

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[11] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer asserts the ALJ erred in relying on Dr. Sikder's opinion because it was based on an "overstated employment history" and a "grossly understated smoking history." Employer's Brief at 10-11. Employer argues the ALJ failed to "actually factor[] in the amount of coal mine employment" Dr. Sikder relied on. *Id.* at 12. We disagree.

Contrary to Employer's assertion, as summarized above, the ALJ addressed Dr. Sikder's reliance on a fourteen to fifteen year coal mine employment history. He explained that in light of the additive nature of coal mine dust exposure and smoking discussed in the preamble, he was persuaded that "[Dr. Sikder] adequately linked the Miner's COPD to his coal mine employment irrespective of the length of coal mine employment she considered." Decision and Order at 18; *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); 65 Fed. Reg. 79,940, 79,941, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 674 (4th Cir. 2017) (an ALJ may rely on the principle from the preamble that the effects of smoking and coal dust exposure are "additive"). Moreover, Employer does not challenge the ALJ's reliance on the principle discussed in the preamble when he considered Dr. Sikder's opinion. In sum, the ALJ took the coal mine employment discrepancy into account when he weighed Dr. Sikder's opinion, and acted within his discretion in explaining that the discrepancy was not so great as to detract from her opinion's probative value. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Sellards v. Director, OWCP*, 17 BLR, 1-80-81 (1993).

We further reject Employer's argument that the ALJ erred in crediting Dr. Sikder's opinion because it is based on an inaccurate smoking history. Employer's Brief at 10, 12. While Employer focuses on a handwritten notation on her report which reads "2 ppd- 21 years," she specifically identified that the Miner smoked two packs of cigarettes per day from 1978 to February 2009, which is consistent with the ALJ's finding of a sixty pack-year smoking history.[12] Viewing Dr. Sikder's report in context,[13] substantial evidence supports the ALJ's finding that Dr. Sikder relied on an accurate smoking history.[14] *See*

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[12] Given that the notation does not follow from the smoking history Dr. Sikder recorded on the report just above it, which is consistent with the history found by the ALJ and recorded by the other physicians, Employer has not explained why the notation should not be considered a clerical error.

[13] The ALJ detailed the smoking histories recorded by Drs. Sikder, Habre, and Broudy and determined all physicians similarly relied on a two pack per day smoking history spanning about thirty years. Decision and Order at 11; Director's Exhibits 17 at 26; 17A at 2; 18 at 23.

[14] Moreover, even assuming Dr. Sikder relied on a forty-two pack-year history rather than the approximately sixty year history she recorded, Employer does not explain why a

Sellards, 17 BLR at 1-80-81; *Maypray v. Island Creek Coal Co*., 7 BLR 1-683 (1985) (the ALJ is responsible for making a factual determination as to the length and extent of a miner's smoking history and the effect of an inaccurate smoking history on the credibility of a medical opinion). We therefore reject Employer's argument that the ALJ erred in finding Dr. Sikder's opinion reasoned and documented.[15] *See Rowe*, 710 F.2d at 255.

Employer further contends the ALJ "misconstrued and mischaracterized" the reports of Drs. Habre and Broudy. Employer's Brief at 8. We disagree. Contrary to Employer's contention, the ALJ permissibly found Drs. Habre and Broudy did not

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remand would be required when it has not challenged the ALJ's basis for crediting the physician's opinion: that she credibly explained her conclusion that coal mine dust contributed along with smoking to the Miner's impairment, consistent with the principle that the effects of smoking and coal mine dust exposure are additive. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which he points could have made any difference").

[15] Our dissenting colleague asserts that a "large body of precedent" supports requiring the ALJ to re-determine whether Dr. Sikder's opinion is undermined by a reliance on inaccurate smoking and coal mine employment histories. The critical factor missing from the dissent's analysis, however, is that such credibility decisions, at their core, are within the purview of the fact-finder. The ALJ did not ignore that Dr. Sikder relied on fourteen to fifteen years of coal mine employment instead of ten; rather, he specifically found this fact did not undermine Dr. Sikder's attribution of Claimant's impairment, in part, to coal mine dust exposure. Decision and Order at 18. Moreover, setting aside that the ALJ found Dr. Sikder relied on an *accurate* sixty-year smoking history, *id*., at 11, neither the dissent nor Employer explains why her alleged reliance on a lesser smoking history undermines her diagnosis of a coal dust- and smoking-related impairment, given the alleged length of the discrepancy and the ALJ's discretion. *See Consolidation Coal Co. v. Williams,* 453 F.3d 609, 622 (4th Cir. 2006); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77 (6th Cir. 2000). These facts are markedly different than those cited in the dissent. *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628 (6th Cir. 2009) involved a finding that the miner had a 260 percent greater smoking history than that relied upon by the discredited doctor (45 years compared to 12.5 years) who also equivocated on the possible contribution of coal dust exposure to the miner's impairment. 575 F.3d at 635-36. Meanwhile, *Director, OWCP v. Rowe*, 710 F.2d 251 (6th Cir. 1983) involved a doctor who *completely ignored* the miner's smoking history. Even then, the court stated that the question of whether such an opinion is "sufficiently documented and reasoned is essentially a credibility matter . . . for the factfinder to decide." 710 F.2d at 255.

persuasively explain why the Miner's partial bronchodilator response on pulmonary function testing means that coal mine dust exposure did not contribute to his disabling COPD. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); Director's Exhibit 17A at 5; 18 at 2. Additionally, the ALJ permissibly found unpersuasive Dr. Broudy's reasoning that the Miner had an obstructive impairment, whereas "[t]he impairment due to coal dust exposure is usually a restrictive type of impairment." Director's Exhibit 17A at 5; *see Banks*, 690 F.3d at 477-88; 20 C.F.R. §718.201(a)(2) (legal pneumoconiosis includes "any chronic restrictive *or obstructive* pulmonary disease arising out of coal mine employment") (emphasis added). Moreover, Employer has not challenged that credibility determination. We therefore reject Employer's argument that the ALJ erred in discrediting the opinions of Drs. Habre and Broudy.

We also reject Employer's argument the ALJ shifted the burden of proof to Employer to establish that coal mine dust played no part in the Miner's impairment. Employer's Brief at 9. The ALJ did not shift the burden of proof, but instead acted within his discretion in weighing each doctor's opinion to determine its credibility. *See Rowe*, 710 F.2d at 254-55.

Therefore, we affirm the ALJ's finding that the new medical opinion evidence established legal pneumoconiosis and a change in an applicable condition of entitlement. *See* 20 C.F.R. §§718.202(a)(4), 725.309(c). We also affirm, as unchallenged, the ALJ's finding on the merits that the old and new evidence established the Miner had legal pneumoconiosis. Decision and Order at 18; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Disability Causation

The ALJ found Dr. Sikder's reasoned opinion that the Miner's disabling COPD was legal pneumoconiosis also established that pneumoconiosis was a substantially contributing cause of the Miner's total disability. Decision and Order at 20; 20 C.F.R. §718.204(c)(1). He discounted the opinions of Drs. Habre and Broudy that the Miner's totally disabling respiratory impairment was not caused by pneumoconiosis because they did not diagnose legal pneumoconiosis, contrary to the ALJ's finding. Decision and Order at 21. As Employer raises no specific allegations of error regarding disability causation, other than to assert the Miner did not have legal pneumoconiosis, we affirm the ALJ's finding that the Miner's total respiratory disability was due to legal pneumoconiosis. 20 C.F.R. §718.204(c); Decision and Order at 21. We therefore affirm the award of benefits in the Miner's claim.

Survivor's Claim

Because we have affirmed the award of benefits in the Miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. § 932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in the Miner's and Survivor's claims.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

Although I concur with my colleagues in all other respects, I respectfully dissent from the majority's decision as to the ALJ's crediting of Dr. Sikder's medical opinion on legal pneumoconiosis and disability causation.

Dr. Sikder considered a more lengthy coal mine dust exposure history (fifteen years) than that found by the ALJ (ten years), and her report contained a handwritten annotation of fewer pack-years of smoking history (two times twenty-one pack-years) than found by the ALJ (sixty pack-years).[16] Director's Exhibit 17 at 26; Decision and Order at 4, 11, 14. The ALJ found "Dr. Sikder adequately linked the Miner's COPD to his coal mine employment, irrespective of the length of coal mine employment she considered."

[16] The record reflects that Employer raised both of these discrepancies before the ALJ. Employer's Post-Hearing Brief at 7-8.

Decision and Order at 18. The ALJ then cited the Department's positions that coal mine dust exposure is associated with clinically significant airways obstruction and that the injurious effects of coal mine dust exposure may be[17] latent and progressive. However, the ALJ ignores that length of exposure to coal mine dust or tobacco smoke is relevant to disease development.

A physician's assessment of disease and disease causation is affected by the length of coal mine dust and smoking exposure assumed, *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993), and the Departmental positions cited by the ALJ also are not unrelated to cumulative dust exposure and length of coal mine dust exposure. *See* 65 Fed. Reg. 79,920, 79,939-42 (Dec. 20, 2000). This is the reason for the large body of precedent recognizing that medical opinions may be discredited when they rest on a length of exposure to coal mine dust or a smoking history that diverges from the exposure credited by the trier of fact. *See, e.g.*, *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 635-36 (6th Cir. 2009); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6 (6th Cir. 1983); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 796 (7th Cir. 2013); *Risher v. Director, OWCP*, 940 F.2d 327, 330-31 (8th Cir. 1991); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-89 (1993); *Sellards*, 17 BLR at 1-80-81; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). While these are credibility matters reserved for the ALJ, the ALJ must address all the relevant evidence and adequately explain the basis for his credibility determinations. *See Rowe*, 710 F.2d at 255; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Consequently, in accordance with the dictates of the Administrative Procedure Act,[18] I would remand this case for the ALJ to provide an adequate explanation as to why Dr. Sikder's opinion is reliable when it is based on a length of coal mine dust exposure half again as long as that found by the ALJ. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165. Further, because Dr. Sikder's report contains handwritten notations as to pack-years of smoking that differ from those found by the ALJ, I would require the ALJ to address these notations and explain his

[17] The ALJ erroneously states the Department's position as the effects "are" latent and progressive. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863, 869 (D.C. Cir. 2002) (recognizing the Department's position that pneumoconiosis may be latent and progressive).

[18] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

finding that all physicians, including Dr. Sikder, considered a smoking history similar to his finding of sixty pack-years. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, I concur in part and dissent in part from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge