BRB No. 10-0460 BLA

BETTY JENT (on behalf of the Estate of ROY R. JENT) Claimant-Respondent v. CUMBERLAND RIVER COAL COMPANY and ARCH COAL, INCORPORATED, UNDERWRITERS SAFETY & CLAIMS Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/28/2011 DECISION and ORDER

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

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2004-BLA-6200) of Administrative Law Judge Alice M. Craft on a subsequent claim[1] filed on October 3, 2002, pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] In its prior Decision and Order, the Board affirmed the evidentiary rulings rendered by Administrative Law Judge Thomas F. Phalen, Jr., but vacated the award of benefits and remanded the case for consideration of the timeliness of the subsequent claim and for reconsideration of the relevant medical opinions pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv) and 718.204(c).[3] *Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA (July 31, 2007) (unpub.).

On remand, Judge Phalen denied employer's requests that it be permitted to redesignate certain medical evidence pursuant to 20 C.F.R. §725.414(a)(3). Due to Judge Phalen's subsequent unavailability, the case was assigned to Judge Craft (the administrative law judge) for decision. The administrative law judge initially determined that the subsequent claim was timely filed under 20 C.F.R. §725.308 and indicated that she agreed with Judge Phalen's evidentiary rulings on remand. With respect to the merits of entitlement, the administrative law judge found that the evidence was sufficient to

[1] Roy R. Jent, the miner, filed his first claim on March 31, 1993, which was finally denied on October 7, 1996, because the miner did not establish that he was totally disabled. Director's Exhibit 1. The miner filed his second claim on February 16, 2001, but subsequently requested withdrawal of the claim. Director's Exhibit 2. On November 29, 2001, the district director granted the miner's request. *Id*. The miner filed a subsequent claim on October 3, 2002. Director's Exhibit 4. Following the miner's death on May 5, 2006, claimant, the miner's widow, filed a survivor's claim on October 19, 2006, which was denied on the ground that claimant failed to establish that the miner's death was due to pneumoconiosis. The Board affirmed the denial of survivor's benefits. *B.J.* [*Jent*] *v. Cumberland River Coal Co.*, BRB Nos. 08-0853 BLA and 08-0853 BLA-A (Sept. 29, 2009) (unpub.). The survivor's claim was not consolidated with the miner's subsequent claim, which was still pending before the Office of Administrative Law Judges.

[2] The recent amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 and pending on or after March 23, 2010, do not apply in this case, as the miner's subsequent claim was filed prior to January 1, 2005.

[3] The Board summarily denied employer's Motion for Reconsideration. *Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA (Dec. 17, 2007) (unpub. Order).

establish the existence of legal pneumoconiosis, total disability and total disability due to legal pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that it was entitled to redesignate its affirmative case medical reports or, in the alternative, that Dr. Jarboe's report dated May 25, 2001 was admissible without any separate designation. Employer further contends that the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(i), (iv), and 718.204(c). Claimant responds and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds and urges the Board to reject employer's arguments regarding the redesignation of its affirmative medical reports on remand. Employer filed briefs in reply to the response briefs of claimant and the Director, reiterating its prior contentions.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. The Exclusion of Dr. Jarboe's May 25, 2001 Medical Report

In the Evidence Summary Form that employer initially submitted to Judge Phalen, employer designated as affirmative evidence Dr. Jarboe's report dated July 14, 2003, which was based on his examination of the miner, and Dr. Jarboe's November 8, 2005 report, which was based on his review of additional medical evidence. Employer's Exhibit 4. In the initial Decision and Order in this case, Judge Phalen noted that employer did not designate the transcript of Dr. Jarboe's August 28, 2003 deposition, to which his report dated May 25, 2001 was attached, as evidence. Judge Phalen stated:

> Since [e]mployer summarized and relied on this testimony in its post-hearing brief, and since [it] is admissible within the limitations of [20 C.F.R.] §725.414, I would typically consider this evidence in the

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner's subsequent claim was timely filed under 20 C.F.R. §725.308. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 2010 Decision and Order at 5.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

> adjudication of this claim. In this case, however, Dr. Jarboe's deposition is a review of both his 2003 medical report and a previous report submitted on May 25, 2001, which is not included as part of the admissible record, and even if included, its consideration would exceed the limitations of [20 C.F.R.] §725.414. Furthermore, I note that Dr. Jarboe's deposition conclusions are inexorably entwined with the two reports. As a result, I am not able to determine which of his conclusions are based solely on the 2003 report. Therefore, I will not consider Dr. Jarboe's 2003 deposition in the instant adjudication.

June 16, 2006 Decision and Order at 5 n. 6. Judge Phalen also declined to address a majority of Dr. Jarboe's November 8, 2005 report, as the physician did not adequately identify whether he based his conclusions on his July 14, 2003 report or the inadmissible 2001 report. *Id*. at 13 n. 20.

In its prior appeal, employer maintained that Dr. Jarboe's August 28, 2003 deposition and November 8, 2005 report were not separate reports that it was required to designate under 20 C.F.R. §725.414(a)(3)(i), as they were based on the doctor's May 25, 2001 and July 14, 2003 reports. The Board rejected employer's argument, holding that because employer expressly designated Dr. Jarboe's July 14, 2003 and November 8, 2005 reports as its affirmative case medical reports, Judge Phalen acted within his discretion in relying upon this designation to exclude Dr. Jarboe's May 25, 2001 report pursuant to Section 725.414(a)(3)(i). *Jent*, slip op. at 5. The Board also affirmed Judge Phalen's exclusion of Dr. Jarboe's 2003 deposition and a majority of Dr. Jarboe's November 8, 2005 report. *Id*. at 5-6.

On remand, employer twice submitted motions to amend its Evidence Summary Form. Employer indicated that it wished to designate Dr. Jarboe's May 25, 2001 report and the transcript of his August 28, 2003 deposition as one affirmative medical report, stating:

> Dr. Jarboe testified at his deposition regarding his 6/30/03 exam findings primarily. He also referenced his 5/25/01 exam findings. The 5/25/01 exam is an attachment to the depo[sition]. It is also Dir[ector's] Ex[hibit] 2. The depo[sition] is allowed under 20 C.F.R. §§725.457, 725.458. The 5/25/01 exam counts as one exam under 20 C.F.R. §725.414(a)(3)(i).

February 4, 2008 Evidence Summary Form at 6. Employer also identified Dr. Jarboe's reports dated July 14, 2003 and November 8, 2005, with an addendum to the latter dated November 10, 2005, as affirmative case medical reports. *Id*. at 7. Judge Phalen denied employer's motions, finding that employer waived its opportunity to show good cause for exceeding the evidentiary limitations by failing to raise the issue at the hearing. May 27,

2008 Order at 1. Judge Phalen further determined that allowing employer to "amend its Evidence Summary Form to include all three reports by Dr. Jarboe would not only be in violation of the evidence limitations contained in [20 C.F.R. §]725.414(a)(3), but would also undermine the Board's decision affirming the exclusion of Dr. Jarboe's third report." *Id*.

In the Decision and Order that is the subject of the present appeal, the administrative law judge stated, "I agree with Judge Phalen's determinations regarding Dr. Jarboe's evidence as affirmed by the Board. Thus, I too exclude Dr. Jarboe's 2001 report and 2003 deposition testimony and find that redaction of the admissible content from his 2005 report[s], for the most part, is not possible." 2010 Decision and Order at 8. Accordingly, the administrative law judge considered Dr. Jarboe's reports dated July 14, 2003 and November 8, 2005, and the November 10, 2005 addendum. *Id*.

Employer alleges that the denial of its request to redesignate its affirmative case medical reports constitutes error, particularly Judge Phalen's determination that the Board's Decision and Order precluded him from granting employer's request. Employer also contends that Dr. Jarboe's 2001 report is admissible under 20 C.F.R. §725.456(a) because it was attached to the transcript of his 2003 deposition, which was exchanged with the parties and made part of the record at Director's Exhibit 19. Employer further argues that the 2001 report does not constitute excess evidence, as the 2003 and 2005 medical reports should be treated as a single report for the purposes of the evidentiary limitations. Lastly, employer asserts that the exclusion of Dr. Jarboe's 2001 report violates both Section 413(b) of the Act, 30 U.S.C. §923(b), which provides that all relevant evidence should be considered, and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it deprives employer of a full and fair hearing.

In response to employer's allegations of error, claimant states that the Board addressed and properly rejected these assertions in its prior Decision and Order. The Director has also responded and urges the Board to hold that employer's contentions are without merit.

The Board reviews an administrative law judge's procedural and evidentiary rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*). Upon review of the evidentiary determinations in this case and the parties' arguments on appeal, we affirm the denial of employer's requests to redesignate its affirmative case medical reports and the exclusion of Dr. Jarboe's 2001 report.

Judge Phalen acted within his discretion in finding that admitting the evidence identified by employer on its revised Evidence Summary Form would violate the

evidentiary limitations.[6] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Pursuant to 20 C.F.R. §725.414(a)(3)(i), employer is "entitled to obtain and submit, in support of its affirmative case . . . no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i). Judge Phalen rationally determined that Dr. Jarboe's reports dated May 25, 2001, July 14, 2003, and November 8, 2005 (including the November 10, 2005 addendum), constituted three affirmative case medical reports for the purposes of the evidentiary limitations.[7] *Dempsey*, 23 BLR at 1-55; *Clark*, 12 BLR at 1-153. Judge Phalen's finding is supported by substantial evidence, as the 2001 and 2003 medical reports were based upon separate examinations of the miner, while the 2005 submissions were based upon Dr. Jarboe's review of additional medical evidence, including Dr. Baker's deposition.

Accordingly, Judge Phalen acted within his discretion in relying upon employer's initial designation of its affirmative case medical reports and excluding Dr. Jarboe's 2001 medical report from consideration. *Dempsey*, 23 BLR at 1-55; *Clark*, 12 BLR at 1-153. We also hold that the administrative law judge rationally decided to address only Dr.

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[6] Contrary to employer's contention, Judge Phalen did not indicate that the Board's decision precluded him from granting employer's request to redesignate its evidence on remand.

[7] Employer also suggests that, in this case, the Board should follow its holding in claimant's survivor's claim that Administrative Law Judge Janice K. Bullard acted within her discretion in treating Dr. Jarboe's reports dated July 14, 2003 and November 8, 2005, and the transcript of his August 28, 2003 deposition as one medical report under 20 C.F.R. §725.414(a)(3)(i). Employer's Brief in Support of Petition for Review at 21, *citing Jent*, BRB Nos. 08-0853 BLA and 08-0853 BLA-A, slip op. at 5. Employer does not mention that Judge Bullard admitted Dr. Jarboe's 2003 deposition for the limited purpose of rehabilitating his opinion in light of the criticisms made by Dr. Baker in his deposition. *Jent*, BRB Nos. 08-0853 BLA and 08-0853 BLA-A, slip op. at 5. In addition, on its revised Evidence Summary Form in this case, employer explicitly designated Dr. Jarboe's May 25, 2001 report and his 2003 deposition as one affirmative case medical report, but designated Dr. Jarboe's reports dated July 14, 2003 and November 8, 2005, with an addendum, as its second and third affirmative case medical reports. February 4, 2008 Evidence Summary Form at 6-7. Furthermore, because the resolution of evidentiary issues is committed to an individual administrative law judge's discretion, the Board's affirmance of an action taken by a different administrative law judge in a different case does not preclude the Board from affirming, as within her discretion, the administrative law judge's evidentiary rulings in this case. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

Jarboe's report dated July 14, 2003 and a portion of the report dated November 8, 2005 (including the addendum), based upon the Board's affirmance of Judge Phalen's evidentiary rulings with respect to this evidence. *Jent*, slip op. at 5-6; 2010 Decision and Order at 8.

In addition, we reject employer's contention that it was not required to designate Dr. Jarboe's 2001 report as, pursuant to 20 C.F.R. §725.456(a), it was made part of the evidentiary record when it was attached to the transcript of Dr. Jarboe's August 28, 2003 deposition, which was marked as Director's Exhibit 19 and admitted with the rest of the Director's Exhibits at the hearing. The terms of 20 C.F.R. §725.456(b) provide that "[a]ll documents transmitted to the Office of Administrative Law Judges *under* [*20 C.F.R. §*]*725.421* shall be placed into evidence by the administrative law judge, subject to objection by any party." 20 C.F.R. §725.456(b) (emphasis added). Under 20 C.F.R. §725.421(b)(4):

> In any case referred to the Office of Administrative Law Judges . . . the district director shall transmit to that office the following documents, which shall be placed in the record at the hearing subject to the objection of any party . . . All medical evidence submitted to the district director under this part by the claimant and the potentially liable operator designated as the responsible operator in the proposed decision and order issued pursuant to [20 C.F.R. §]725.418, or the fund, as appropriate, *subject to the limitations of* [*20 C.F.R. §*]*725.414 of this part . . . .*"

20 C.F.R. §725.421(b)(4) (emphasis added). Contrary to employer's argument, therefore, the admission of evidence submitted before the district director, and transmitted by him or her to the Office of Administrative Law Judges, is ultimately controlled by the extent to which the evidence complies with the evidentiary limitations.[8]

Finally, we find no merit in employer's contention that the APA and 30 U.S.C. §923(b) of the Act require the admission of Dr. Jarboe's 2001 report, as it is relevant evidence. The Board has held that 20 C.F.R. §725.414 is not in conflict with the

[8] Employer cites the Board's unpublished decision in *Hamilton v. Blackfield Coal Co.*, BRB No. 09-0545 BLA (Apr. 28, 2010) (unpub.), in support of its argument. In *Hamilton*, the Board affirmed the administrative law judge's consideration of an autopsy report submitted by claimant on remand, holding that it was properly transmitted to the Office of Administrative Law Judges under 20 C.F.R. §725.421(b) and was properly admitted into the record under 20 C.F.R. §725.456(a). The Board's reasoning in *Hamilton* does not apply in the present case as, in contrast to Dr. Jarboe's 2001 report, the autopsy report did not exceed the evidentiary limitations because the parties had not previously submitted any autopsy evidence.

requirement, at 30 U.S.C. §923(b), that all relevant evidence be considered, as other language in 30 U.S.C. §923(b) incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a). *Dempsey*, 23 BLR at 1-59. Additionally, the Board held that 20 C.F.R. §725.414 does not conflict with the APA, because its specifically empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy," 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *Id*. We affirm, therefore, Judge Phalen's evidentiary rulings and the administrative law judge's reliance upon them.

II. The Merits of Entitlement

A. The Existence of Legal Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[9] The administrative law judge considered the reports of Drs. Baker, Jarboe and Alam. Dr. Baker examined the miner on November 16, 2002 and diagnosed coal workers' pneumoconiosis related to coal dust exposure, based on a positive x-ray reading and the miner's coal mine employment history. Director's Exhibit 15. Dr. Baker also diagnosed chronic bronchitis, hypoxemia, and a moderate restrictive defect, all of which he related to smoking and coal dust exposure. *Id*. Dr. Baker was deposed on September 22, 2005 and reiterated his diagnoses. Claimant's Exhibit 1 at 3-5. In addition, Dr. Baker indicated that he disagreed with Dr. Jarboe's determination that the miner's lung disease was entirely attributable to smoking. *Id*. at 7.

Dr. Jarboe examined the miner on June 30, 2003 and submitted a report dated July 14, 2003. Director's Exhibit 16. Dr. Jarboe diagnosed probable chronic bronchitis likely caused by smoking. *Id*. Dr. Jarboe also determined that the miner suffered from mild restrictive lung disease, but there was insufficient medical evidence to make a diagnosis of coal workers' pneumoconiosis. *Id*. Dr. Alam, the miner's treating physician, submitted a report dated October 5, 2005, in which he diagnosed a totally disabling respiratory impairment caused by smoking and coal dust exposure. Claimant's Exhibit 3.

In reports dated November 8 and 10, 2005, Dr. Jarboe reviewed Dr. Baker's deposition, Dr. Alexander's positive interpretation of an x-ray obtained on November 16, 2002, Dr. Alam's treatment records and October 5, 2005 report. Employer's Exhibit 2.

[9] Under 20 C.F.R. §718.201, "legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201.

Dr. Jarboe identified several flaws in Dr. Baker's opinion and challenged Dr. Baker's assertion that he consistently attributes any lung disease to smoking. *Id*.

The administrative law judge gave Dr. Baker's opinion "probative weight" on the issue of the existence of legal pneumoconiosis because it was reasoned, documented and consistent with the premises underlying the regulations. *Id*. at 15. The administrative law judge concluded that Dr. Jarboe's opinion was entitled to "less weight," because Dr. Jarboe "failed to sufficiently explain why [twenty] years of coal dust exposure was not a factor in the [m]iner's lung disease, he relied on erroneous pulmonary function study (PFS) results, he did not address the irreversible portion of the impairment, and his opinion was inconsistent with the premises underlying the regulations." *Id*. at 15-16. The administrative law judge accorded little weight to Dr. Alam's opinion, as he did not adequately explain his diagnosis of legal pneumoconiosis and did not base his conclusion on an accurate smoking history. 2010 Decision and Order at 14. Based upon his weighing of the relevant medical opinions, the administrative law judge concluded that Dr. Baker's opinion was sufficient to establish the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in crediting Dr. Baker's opinion without identifying the analysis and the objective data that made his opinion well-reasoned and well-documented. Employer maintains that Dr. Baker's opinion was not credible on the issue of legal pneumoconiosis, as he relied upon an assumption that the miner's impairment was caused, in part, by coal dust exposure and "did not articulate the basis" for his finding that the miner had legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 26. Employer further contends that the administrative law judge "has offered no valid basis for discrediting Dr. Jarboe's medical opinion." *Id*. at 29. Employer also alleges that the administrative law judge did not properly resolve the conflict in the evidence regarding the miner's height and the PFS results obtained by Drs. Baker and Jarboe.

Employer's contentions are without merit. Employer's argument that Dr. Baker's opinion is neither reasoned nor documented goes to the authority of the administrative law judge to render credibility determinations. Pursuant to the Sixth Circuit's holding in *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002), the reviewing authority is required to defer to the administrative law judge's assessment of the credibility of a physician's opinion. *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002)(lacking the authority to make credibility determinations," the court defers to the administrative law judge's findings). In this case, the administrative law judge rationally found that Dr. Baker's opinion was well-documented and well-reasoned, as the doctor:

> [E]xplained that the [m]iner's moderate restrictive defect, chronic bronchitis, mild resting hypoxemia, physical examination, and coal dust exposure were consistent with legal pneumoconiosis – even in the absence of a diagnosis of clinical pneumoconiosis based on x-ray. Dr. Baker further explained that cigarette smoking, obesity, and heart disease probably all had an impact on the [m]iner's pulmonary condition and that it is difficult to separate the causes of a pulmonary impairment. However, he testified that the [m]iner's heart disease and obesity were not severe enough to cause this degree of restriction, opining that the "predominant cause" was the [m]iner's coal dust exposure.

2010 Decision and Order at 15, *quoting* Claimant's Exhibit 1 at 14; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); 65 Fed. Reg. 79,940 (Dec. 20, 2000).

Regarding Dr. Baker's reliance upon an incorrect height to assess the values produced on the PFS that he obtained on November 16, 2002, the administrative law judge indicated correctly that, whether the height of sixty-nine inches recorded by Dr. Baker is used or the height of seventy-one inches found by Judge Phalen is used, Dr. Baker's PFS produced qualifying results, which documented his diagnosis of a restrictive impairment.[10] 2010 Decision and Order at 15, *citing Jent*, slip op. at 10 n.8. Because the administrative law judge's crediting of Dr. Baker's diagnosis of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) was within her discretion as fact-finder, it is affirmed. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002).

The administrative law judge also rationally found that Dr. Jarboe's opinion, that the miner's respiratory impairment is not related to coal dust exposure, "lacked credibility." 2010 Decision and Order at 16; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. As the administrative law judge noted, Dr. Jarboe indicated that the miner was 68.9 inches tall, while a preponderance of the evidence supported a height of seventy-one inches. 2010 Decision and Order at 15. Based upon his measurement of 68.9 inches, Dr. Jarboe determined that the post-bronchodilator results of the PFS that he obtained on June 30, 2003, were nonqualifying. Director's Exhibit 16. The administrative law judge found that these results were

[10] The administrative law judge explained, "[w]hile qualifying pulmonary function study results do not equate with a finding of legal pneumoconiosis, such results are an indicator of the presence of a chronic lung disease or impairment." 2010 Decision and Order at 16.

qualifying when the height of seventy-one inches was used.[11] 2010 Decision and Order at 15. The administrative law judge acted within her discretion in determining that Dr. Jarboe's erroneous conclusion regarding the post-bronchodilator PFS detracted from the credibility of his opinion that the degree of reversibility of the miner's impairment was inconsistent with an impairment related to coal dust inhalation. *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. The administrative law judge also rationally found that the probative value of Dr. Jarboe's opinion was diminished by his failure to "address the residual fully disabling impairment."[12] 2010 Decision and Order at 16; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483-84; *see also Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227 (4th Cir. 2004).

Finally, the administrative law judge reasonably exercised her discretion in determining that Dr. Jarboe did not sufficiently explain why the miner's twenty years of coal mine employment played no role in the development of his respiratory impairment and focused on the lack of clinical pneumoconiosis in ruling out the presence of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-308, 23 BLR

[11] Employer further asserts that the administrative law judge was bound by Judge Bullard's findings in the survivor's claim that the June 30, 2003 post-bronchodilator pulmonary function study (PFS) was nonqualifying and that the PFS evidence was insufficient to establish total disability. Employer's contention has no merit. Although the survivor's claim was filed after January 1, 2005, Judge Bullard issued her Decision and Order before March 23, 2010, the date that Congress enacted the amendments reinstating the rebuttable presumption of death due to pneumoconiosis in cases in which, *inter alia*, the miner had a totally disabling respiratory or pulmonary impairment. Therefore, Judge Bullard's findings as to whether the PFS evidence was sufficient to establish total disability were not necessary to the adjudication of the survivor's claim and had no preclusive effect in the miner's claim. *See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n*, 821 F.2d 328 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*).

[12] The administrative law judge noted the Board's prior holding that Judge Phalen substituted his opinion for that of a medical expert in finding that the miner had a non-reversible defect. 2010 Decision and Order at 16, *citing Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA, slip op. at 8 (July 31, 2007)(unpub.). The administrative law judge stated, "I am not questioning Dr. Jarboe's opinion regarding 'some element of reversibility'; however, I do find his opinion regarding legal pneumoconiosis less persuasive because he relied on erroneous conclusions regarding his pulmonary function study and because he did not address the residual fully disabling impairment." 2010 Decision and Order at 16, *quoting* Director's Exhibit 16.

2-261, 2-284-287 (6th Cir. 2005); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 16. As the administrative law judge noted, Dr. Jarboe partly based his opinion, attributing the miner's impairment solely to smoking, on his view that "[i]f the changes in [the miner's] residual volume had been caused by coal dust inhalation, it is my reasoned opinion there would have been some evidence of dust deposition on the CT scan of the chest which was completely negative for the presence of nodulation." Decision and Order at 16, *quoting* Director's Exhibit 16. Contrary to employer's contention, therefore, the administrative law judge rationally found that "[b]y these statements . . . Dr. Jarboe's opinion is based on the premise that because there is no clinical pneumoconiosis revealed by CT scan, the [m]iner's pulmonary impairment cannot have been caused by coal dust exposure." *See Martin*, 400 F.3d at 306-308, 23 BLR at 2-284-287; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 16. Accordingly, we affirm the administrative law judge's determination that Dr. Baker's opinion was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

B. Total Disability – The Medical Opinion Evidence

The administrative law judge considered the opinions of Drs. Alam, Baker and Jarboe pursuant to 20 C.F.R. §718.204(b)(2)(iv). Drs. Alam and Baker opined that the miner had a totally disabling respiratory impairment, while Dr. Jarboe opined that the miner was not totally disabled from a respiratory standpoint. Director's Exhibits 15, 16; Claimant's Exhibits 1, 3; Employer's Exhibit 2. The administrative law judge gave little weight to Dr. Alam's disability opinion because he relied upon PFSs that did not contain three tracings, as prescribed by 20 C.F.R. §718.103, and did not explain his finding of total disability in light of the nonqualifying PFS the miner performed on August 16, 2002. 2010 Decision and Order at 18. The administrative law judge similarly accorded little weight to Dr. Jarboe's opinion, citing the Board's affirmance of Judge Phalen's determination that Dr. Jarboe's opinion was not adequately reasoned, as he did not explain how the qualifying post-bronchodilator values on the PFS that he obtained on June 30, 2003 supported his conclusion that the miner was not totally disabled. 2010 Decision and Order at 18, *citing Jent*, slip op. at 10. The administrative law judge accorded "full probative weight" to Dr. Baker's opinion, finding that his diagnosis of a totally disabling impairment was "consistent with the evidence available to him, especially the qualifying [PFS]." 2010 Decision and Order at 18. The administrative law judge determined, therefore, that Dr. Baker's opinion was sufficient to establish total disability at 20 C.F.R. §718.202(b)(2)(iv) and that the evidence relevant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv), when considered as a whole, was sufficient to establish that the miner was totally disabled.

Employer argues that the administrative law judge erred in finding that Dr. Baker's diagnosis of a totally disabling impairment was adequately reasoned and documented. Employer maintains that Dr. Baker did not explain how the vital capacity and FEV1 values that he obtained supported his conclusion and did not address the exertional requirements of the miner's usual coal mine employment.

Employer's contentions are without merit. The administrative law judge's decision to credit Dr. Baker's opinion, that the miner had a totally disabling respiratory impairment, is rational and supported by substantial evidence. In Dr. Baker's report dated November 16, 2002, he indicated that the miner was a roof bolter and rock duster. Director's Exhibit 15. In the Employment History Form attached to Dr. Baker's report, the miner indicated that he last worked as a motor man underground.[13] Director's Exhibit 5. Dr. Baker obtained a qualifying PFS, which he characterized as revealing a moderate restrictive defect, and an arterial blood gas study, which he described as revealing mild resting arterial hypoxemia. *Id*. On the questionnaire attached to the Department of Labor's Form CM-988, Dr. Baker checked the "no" box in response to a query as to whether the miner had the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. *Id*. Dr. Baker identified the miner's vital capacity and FEV1, which were fifty-eight percent of the predicted normal values, as support for his determination that the miner was totally disabled. *Id*. At his deposition, Dr. Baker was asked whether the miner could "sustain his usual coal mine employment as he related [it] to you on a sustained basis." Claimant's Exhibit 1 at 9. Dr. Baker responded, "[o]n the basis of his breathing test, his bronchitis, his oxygen values, I don't think he can sustain an eight hour, ten hour, twelve hour day of labor in the coal mining industry." *Id*.

Based upon the content of Dr. Baker's report and his deposition testimony, the administrative law judge acted within her discretion in concluding that Dr. Baker provided a reasoned and documented diagnosis of a totally disabling respiratory impairment. *See Napier*, 301 F.3d at 713, 22 BLR at 2-552; *Cornett*, 227 F.3d 569, 578, 22 BLR at 2-124; *Cross Mountain Coal Inc. v. Ward*, 93 F.3d 211, 219, 20 BLR 2-360, 2-374 (6th Cir. 1996). Accordingly, we affirm the administrative law judge's findings that Dr. Baker's opinion was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv) and that the medical evidence, when considered as a whole, was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2).

[13] At the hearing before Judge Phalen, the miner testified that his job involved loading motors and supplies onto equipment, unloading the supplies at various locations in the mine, shoveling belts and performing a variety of additional tasks. Hearing Transcript at 11-14.

C. Total Disability Causation

The administrative law judge considered the opinions of Drs. Alam, Baker and Jarboe at 20 C.F.R. §718.204(c). The administrative law judge accorded little weight to Dr. Alam's opinion, that the miner's disabling impairment was due to coal dust exposure and smoking, as he relied upon an incorrect smoking history and did not consider whether the miner's obesity and heart disease were causal factors. 2010 Decision and Order at 20. With respect to Dr. Baker's opinion, that the miner was totally disabled due to an impairment caused by coal dust inhalation and smoking, the administrative law judge found that it was entitled to "probative weight." *Id*. The administrative law judge stated:

> Dr. Baker also considered the [m]iner's heart disease and obesity, noting that neither of these factors cause [sic] the degree of restriction that the [m]iner suffered. He acknowledged that it can be difficult to separate out the causes of a pulmonary impairment, but he opined that in this case the "predominant" cause was the [m]iner's coal dust exposure.

Id., *quoting* Claimant's Exhibit 1 at 14. The administrative law judge determined that Dr. Jarboe's opinion, that the miner's lung conditions were entirely attributable to smoking, was "less well reasoned than Dr. Baker's and entitled to less weight on the issue of the causation of the [m]iner's total disability." 2010 Decision and Order at 20. The administrative law judge concluded, therefore, that Dr. Baker's opinion was sufficient to establish total disability due to legal pneumoconiosis under 20 C.F.R. §718.204(c).

Employer contends that the administrative law judge did not properly weigh Dr. Jarboe's opinion.[14] Employer also argues that the administrative law judge erred in

[14] Once again, we reject employer's contention that Judge Bullard's crediting of Dr. Jarboe's opinion, that the miner did not have an impairment attributable to coal dust inhalation and that the miner's death was unrelated to a coal dust-induced impairment, is *res judicata* and precludes claimant from relitigating the issue of total disability causation in the miner's claim. *See* slip op. at 11 n.11.

determining that Dr. Baker's opinion was well-reasoned and well-documented regarding the cause of the miner's totally disabling impairment. Employer's allegations of error have no merit. The administrative law judge acted within her discretion in according less weight to Dr. Jarboe's opinion on the issue of disability causation because he determined, contrary to the administrative law judge's findings, that the miner did not have legal pneumoconiosis and was not suffering from a totally disabling respiratory or pulmonary impairment. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 816, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003). Finally, based upon the administrative law judge's permissible credibility determinations regarding Dr. Baker's diagnoses of legal pneumoconiosis and a totally disabling impairment at 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2)(iv), we affirm the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish total disability causation at 20 C.F.R. §718.204(c). *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge