BRB No. 06-0141 BLA

JOSEPH E. KOLICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GATEWAY COAL COMPANY	)	DATE ISSUED: 08/30/2006
	)	
and	)	
	)	
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits (04-BLA-5890) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed 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). Based on the date of filing, September 19,

2002, the administrative law judge adjudicated this claim pursuant to 20 C.F.R. Part 718, observing that, *inter alia*, the parties agreed that claimant established forty-one years of coal mine employment and that the evidence established the existence of a totally disabling pulmonary impairment. Decision and Order at 2; *see* Hearing Transcript at 18-19. On considering the evidence, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and that claimant was totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis and that it was totally disabling.[1] Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

Employer first contends that the administrative law judge erred in finding Dr. Goodman's opinion to be contrary to the Act because Dr. Goodman believed that coal dust exposure cannot cause an obstructive impairment and erred in finding it to be hostile to the Act because Dr. Goodman believed that a positive x-ray was required in order to make a diagnosis of pneumoconiosis. Employer contends that Dr. Goodman never said that coal dust exposure could not cause a chronic obstructive pulmonary disease, or that a positive x-ray was required to make a diagnosis of pneumoconiosis. Rather, employer contends that Dr. Goodman merely opined that, based on the timing of claimant's

[1] The administrative law judge found that the existence of clinical pneumoconiosis was not established by the x-ray evidence of record at 20 C.F.R. §718.202. Decision and Order at 12.

exposure to coal dust and cigarette smoking, and the symptoms and findings he observed in claimant, claimant's chronic obstructive pulmonary disease was due to cigarette smoking, not to coal mine employment. Likewise, employer contends that while Dr. Goodman stated that he could not diagnose the existence of clinical pneumoconiosis without an x-ray, he never said that the existence of legal pneumoconiosis could not be diagnosed without an x-ray. In fact, employer contends that Dr. Goodman admitted that coal dust exposure can cause centrolobular emphysema, but that he had not diagnosed the existence of legal pneumoconiosis because he did not believe such a finding was consistent with the timing of claimant's coal dust exposure and the timing and extent of claimant's smoking habit.[2]

In considering Dr. Goodman's medical report and subsequent deposition testimony, the administrative law judge offered three reasons for discounting the opinion of Dr. Goodman that claimant's obstructive impairment was due to cigarette smoking, and not to coal mine employment. First, the administrative law judge believed that Dr. Goodman was hostile to the Act as the doctor stated that he could not diagnose the existence of pneumoconiosis without a positive x-ray. There is abundant evidence in the record to support the administrative law judge's interpretation. On deposition, Dr. Goodman testified numerous times that a diagnosis of simple pneumoconiosis could not be made without a positive x-ray:

> Q. So in this particular case, you did not diagnose pneumoconiosis caused by exposure to coal dust because you didn't see his X-ray as being positive for the disease process[.]
>
> A. That is correct.

Dep. Tr. at 45.

> Q. Dr. Goodman, if you had read [claimant's] x-ray as positive for pneumoconiosis, would you have diagnosed the disease?
>
> A. If I had read his chest x-ray film as positive for pneumoconiosis, I believe I would be at that moment diagnosing the disease.

[2] The administrative law judge found that claimant was born on December 12, 1925 and was seventy-eight at the time of the hearing in December 2004. Claimant had a forty-one year history of coal mine employment, ending in 1988 and an approximately forty-two year smoking history, or one pack per day beginning when he was thirty and ending in 1997 when he was seventy-two. Decision and Order at 3.

> Q. Okay. So there's really nothing in his presentation that rules out the presence of pneumoconiosis, other than the fact that you did not read his x-ray as positive for the disease process; correct?
>
> A. That is correct. His chest x-ray film was, I felt, not consistent with pneumoconiosis.

Dep. at 55-56.

> A. I do not believe that this individual had pneumoconiosis to begin with, and I do not believe the decline in lung function can be attributed to pneumoconiosis, because he did not have it to begin with.
>
> Q. Okay. That's because you didn't read his x-ray as positive for pneumoconiosis.
>
> A. That is correct.

Dep. at 57.

> Q. Dr. Goodman, would I be correct in stating that you believe that for pneumoconiosis to cause a disabling pulmonary impairment in a coal miner, you have to have the following evidence: You have to have positive x-ray evidence, or autopsy or biopsy evidence, and if you have positive x-ray evidence, it must show the effects -- it must show progressive massive fibrosis? Would I be correct in stating that?
>
> A. I believe that's true.

Dep. at 64.

Dr. Goodman's opinion is like the opinion of the doctor in *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989). In that case, the Third Circuit held that a doctor who could not attribute the miner's disabling pulmonary disease to pneumoconiosis without x-ray evidence of progressive massive fibrosis was hostile to the Act. Thus, we conclude, in keeping with the Third Circuit's holding in *Mercatell*, that the administrative law judge properly rejected Dr. Goodman's opinion because he stated that he could not attribute claimant's chronic obstructive pulmonary disease to coal mine employment without positive x-ray evidence of pneumoconiosis. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004)(while a doctor's testimony is susceptible to more than one interpretation, the administrative law judge inference that a doctor who found that legal pneumoconiosis

could not be diagnosed without x-ray was hostile is supported by substantial evidence and therefore permissible). *Stephens v. Bethlehem Mines Corp.*, 8 BLR 1-350 (1985); *Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985).

Second, the administrative law judge discounted Dr. Goodman's opinion that coal dust exposure did not contribute to claimant's disabling, obstructive impairment. The administrative law judge found the opinion to be contrary to the Act because the doctor stated that he would not have expected pneumoconiosis to cause the pattern of obstructive impairment exhibited on claimant's pulmonary function studies. On deposition, Dr. Goodman discussed his position regarding the effects of coal dust exposure:

> Q. You do not agree with the literature that indicates that they [smoking and coal dust exposure] act similarly on one's airways; true?
>
> A. That's correct, I do not.

Dep. at 49. The opposite view was taken by the Department of Labor in comments to the revised regulation. The Department credited a study showing that smoking and coal dust exposure are similar in causing both chronic bronchitis and emphysema. 65 Fed. Reg. at 79939 (Dec. 20, 2000). The Department observed that:

> coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.

65 Fed. Reg. at 79940 (Dec. 20, 2000).

The administrative law judge concluded that Dr. Goodman's opinion was contrary to the Act which recognizes that pneumoconiosis encompasses "obstructive" impairments which arise out of coal mine employment. Pneumoconiosis is defined in the implementing regulations as:

> [A] chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal" pneumoconiosis.

20 C.F.R. §718.201(a). Legal pneumoconiosis is further defined as including:

> Any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any

> chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

> "[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 to coal mine employment.

20 C.F.R. §718.201(b). Further,

> [f]or purposes of this definition, 'pneumoconiosis' is recognized as the latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. §718.202(c). Additionally, the comments to the revised regulation provide further support:

> [t]he Department's proposed revision to the definition of pneumoconiosis is also supported by the growing evidence of the adverse effects of coal mine dust exposure at the cellular level leading to obstructive lung disease.

65 Fed. Register 79920, 79942 (Dec. 20, 2000). Likewise, the Department's position is consistent with the growing body of case law recognizing that obstructive lung diseases can arise from coal mine dust exposure. 65 Fed. Register 79920, 79943 (Dec. 20, 2000), citing case law from numerous circuits. Thus, the doctor's expectation that pneumoconiosis would not cause an obstructive impairment is contrary to the Act as implemented by the regulations and the administrative law judge acted properly in discounting, as contrary to the Act, Dr. Goodman's opinion that coal dust exposure did not contribute to claimant's disabling obstructive impairment. *See Shores*, 358 F.3d 486, 495, 23 BLR 2-18, 2-35; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 2001); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25 (4th Cir. 1993); *Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532 (11th Cir. 1985).

Third, the administrative law judge discounted Dr. Goodman's opinion because the doctor stated that another factor he considered in finding that claimant's obstructive impairment was due to smoking, not coal mine employment, was that claimant's cough and sputum production were consistent with smoking and inconsistent with pneumoconiosis, even though the doctor later acknowledged that pneumoconiosis can

cause cough and sputum production. Accordingly, the administrative law judge found that Dr. Goodman's opinion regarding claimant's cough and sputum was not a valid basis for finding that claimant did not have pneumoconiosis. *See White v. Director, OWCP*, 6 BLR 1-368 (1983).

In addition, the administrative law judge's finding that Dr. Goodman undermined his own opinion is supported by the record as the doctor admitted that claimant's worsening pulmonary function, as exhibited on his pulmonary function studies, was not inconsistent with pneumoconiosis, Dep. Tr. at 56-57. The doctor further testified that although he could not diagnose industrial bronchitis in light of claimant's lengthy smoking history, he could not rule it out with complete confidence. Dep. Tr. at 60. Dr. Goodman also admitted that he was not familiar with medical literature that found that coal dust and smoking similarly affected ventilatory function, causing a shift of the FEV_1 distribution to lower values. Dep. Tr. at 60. For these reasons, therefore, we also conclude that the administrative law judge properly rejected Dr. Goodman's opinion. *See Shores*, 358 F.3d 486, 23 BLR 2-18.

Employer next contends that the administrative law judge's opinion is internally inconsistent and irrational since he found, on the one hand, Dr. Goodman's opinion to be undermined because the doctor acknowledged that coal dust exposure "could" have caused claimant's symptoms, while the administrative law judge did not discredit the opinions of Drs. Cohen, Garson and Jaworski, who testified that claimant's symptoms "could" be caused by cigarette smoking.[3] Indeed, employer contends: if any opinion in the record is at odds with the amended regulations, it is the opinion of Dr. Cohen which employer characterizes as holding that any obstructive impairment must be deemed to be due to coal mine employment based on medical literature which establishes that coal dust exposure can cause an obstructive impairment. These contentions are without merit. First, the administrative law judge's Decision and Order was not inconsistent or irrational: the administrative law judge did not find the opinions of Drs. Cohen, Garson, and Jaworski undermined by their statements that cigarette smoking "could" cause claimant's symptoms, since these doctors, unlike Dr. Goodman, opined that claimant's chronic obstructive pulmonary disease was due to both smoking and coal mine dust exposure. Likewise, employer does not cite to any evidence to support his contention that Dr. Cohen believes that all obstructive impairment is due to coal mine employment; rather, Dr. Cohen, like the regulations, recognizes that coal mine employment can be a cause of chronic obstructive pulmonary disease.

[3] Drs. Cohen, Garson, and Jaworski found that claimant's chronic obstructive pulmonary disease was due to both coal mine employment and smoking, while Drs. Renn and Goodman found that claimant's chronic obstructive pulmonary disease was due solely to smoking.

Additionally, employer contends that after the administrative law judge recognized that all of the doctors were well-qualified, he erred in ignoring the opinion of Dr. Renn, which the administrative law judge found to have a "broader base of data" than the other opinions. Decision and Order at 13. Likewise, employer contends that the administrative law judge cannot find the opinions of Drs. Cohen, Garson, and Jaworski to outweigh the opinions of Drs. Renn and Goodman, after he found the opinion of Dr. Jaworski to be "troublesome" because of Dr. Jaworski's findings on x-ray and because Dr. Jaworski impermissibly presumed that any miner with more than ten years of coal mine employment who had a respiratory impairment also had pneumoconiosis.

In holding the existence of legal pneumoconiosis established, the administrative law judge found that the opinions of Drs. Cohen and Garson, as supported by the opinion of Dr. Jaworski, outweighed the opinions of Drs. Renn and Goodman. As discussed above, the administrative law judge permissibly discounted the opinion of Dr. Goodman as contrary to the Act. The administrative law judge stated that he placed some weight on Dr. Renn's opinion as it was well-documented and reasoned and because Dr. Renn had reviewed all of the other medical evidence, thus providing him with a broader base of data on which to rely. The administrative law judge accorded some weight to the opinion of Dr. Garson, finding it well-reasoned and documented, because Dr. Garson had accurate accounts of claimant's smoking and coal mine employment histories and the doctor had clearly stated that claimant's symptoms and his findings on examination of claimant led to his determination that claimant's chronic obstructive pulmonary disease was due to coal mine employment. Likewise, the administrative law judge accorded some weight to the opinion of Dr. Jaworski, diagnosing an obstructive airway disease due, in significant part, to coal dust exposure, despite the fact the opinion was "troublesome." Decision and Order at 12. The administrative law judge observed that in considering Dr. Jaworski's opinion, in its totality, he concluded that it supported a finding of legal pneumoconiosis as it was well-documented and adequately reasoned and Dr. Jaworski maintained excellent credentials in the area of pulmonary medicine.

The administrative law judge accorded great weight to the opinion of Dr. Cohen, however, as he found it well-documented and reasoned and based on a thorough examination of claimant. The administrative law judge observed that Dr. Cohen explained how claimant's symptoms were consistent with pneumoconiosis and why claimant's x-rays, even if found to be negative, would not preclude a diagnosis of legal pneumoconiosis. Further, the administrative law judge observed that Dr. Cohen was Board-certified in internal medicine, pulmonary disease, and critical care medicine.

On reviewing the medical opinion evidence as well as the administrative law judge's Decision and Order, we conclude that the administrative law judge properly accorded greater weight to the opinions of Drs. Cohen and Garson, as supported by the opinion of Dr. Jaworski, for the reasons given. *See* 20 C.F.R. §718.201; *Eastover Mining*

Co. v. Williams, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Dillon v. Peabody Coal Co., OWCP*, 11 BLR 1-113 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Employer's arguments are no more than a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

With respect to Dr Renn's finding that claimant had emphysema and chronic bronchitis due to smoking, employer contends that the administrative law judge erred in finding, on the one hand, that Dr. Renn's opinion was based on a broader base of data than the other reports of record, but then failing to accord Dr. Renn's opinion determinative weight. This argument is rejected as the administrative law judge is not required to credit any particular medical opinion, but may credit the medical opinion evidence he finds most persuasive, even if that physician has not reviewed all of the record evidence. Employer's Exhibit 1; Employer's Exhibit 5; Decision and Order at 6-7, 12-13; *Williams*, 338 F.3d 501, 22 BLR 2-623 (administrative law judge credits doctor's opinion based on its power to persuade); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Likewise, contrary to employer's argument, the administrative law judge did not err in crediting the opinion of Dr. Jaworski even though he found it troublesome. The administrative law judge acknowledged that while Dr. Jaworski found that the pattern of opacities seen on claimant's x-ray was inconsistent with pneumoconiosis, the totality of Dr. Jaworski's opinion, that claimant had obstructive airway disease due, in significant part, to coal dust exposure, was well-documented and adequately reasoned and Dr. Jaworski had excellent credentials in the area of pulmonary medicine. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Dillon*, 12 BLR 1-113.[4] We also find no merit in employer's contention that the decision fails to adequately indicate the administrative law judge's findings of fact and conclusions of law, and therefore, violates the provisions of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 21 BLR 2-83 (3d Cir. 1997); *Schaaf v. Matthews*, 574 F.2d 157 (3d Cir. 1978); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, we affirm the administrative law judge's finding that the existence of legal pneumoconiosis was established based on the opinions of Drs. Cohen, Garson, and Jaworski.

[4] Dr. Jaworski stated that the pattern of unilateral opacities seen on claimant's x-ray was inconsistent with pneumoconiosis absent asymmetrical emphysema or air trapping, but stated that if claimant has asymmetrical emphysema or air trapping, the x-ray would be consistent with pneumoconiosis. Claimant's Exhibit 5.

Finally, employer contends that the administrative law judge erred in crediting the disability causation opinions of Drs. Cohen and Jaworski simply because they recognized the possibility that claimant's disability was due to pneumoconiosis; while discrediting the opinions of Drs. Goodman and Renn because they did not completely rule out the possibility that claimant's disability was due to pneumoconiosis. Employer contends that claimant has not carried his burden of establishing disability causation as Drs. Cohen and Jaworski, did not definitively link claimant's total disability to his coal dust exposure.

We find no merit to employer's contentions. In finding that disability causation was established, the administrative law judge placed greater weight on the opinion of Dr. Jaworski attributing claimant's disability to both smoking and coal dust exposure. The administrative law judge found Dr. Jaworski's reasoning that while smoking alone could cause claimant's disability, claimant's significant coal dust exposure could not be ignored and that both conditions affected claimant similarly. Likewise the administrative law judge placed great weight on the opinion of Dr. Cohen, attributing claimant's disability to both coal dust exposure and smoking, based, in part, on claimant's severe gas exchange abnormality, severe diffusion impairment, severe obstructive lung disease and the extent and duration of claimant's coal dust exposure. The administrative law judge accorded less weight to Dr. Renn's opinion, attributing none of claimant's disability to coal mine employment, because Dr. Renn's opinion conflicted directly with the better reasoned opinions of Drs. Jaworski and Cohen, explaining how claimant's pulmonary function studies and diffusion capacity studies supported a finding that claimant's coal mine employment was a significant cause of his disability. The administrative law judge also accorded less weight to Dr. Renn's opinion because of the doctor's failure to find, contrary to the administrative law judge's finding, the existence of legal pneumoconiosis. Regarding Dr. Goodman's opinion, the administrative law judge properly discounted it for several reasons: the doctor testified that he could not completely rule out coal mine employment as a cause of claimant's disability and that had he diagnosed pneumoconiosis he might have attributed some of the impairment to that disease. Thus the doctor's failure to find legal pneumoconiosis weakened the credibility of his opinion; the doctor testified that in order for pneumoconiosis to be totally disabling it must be complicated pneumoconiosis, *see Thorn v. Itmann Coal Co.*, 3 F.3d 713 (4th Cir. 1995) (such an opinion is hostile to the Act); the doctor's failure to find legal pneumoconiosis weakened the credibility of his opinion; and the doctor stated he did not expect an obstructive impairment to be caused in part by coal dust exposure.

Based on our review of the doctors' opinions and the administrative law judge's decision, we conclude that the administrative law judge's weighing of the medical opinion evidence and his finding that disability causation was established was proper. 20 C.F.R. §718.204(c); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Thorn*, 3 F.3d 713, 18 BLR 2-16; *Gross*, 23 BLR 1-8; *Clark v. Karst-Robbins Coal Co.*,

12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues. I agree with employer that the administrative law judge erred in finding Dr. Goodman's opinion to be hostile and contrary to the Act. Although Dr. Goodman stated that the pattern of obstructive impairment shown on claimant's pulmonary function study would not be "expected" to be seen as a result of pneumoconiosis, the doctor did not state that such a pattern could "never" be the result of pneumoconiosis. *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Further, while Dr. Goodman indicated that the absence of positive x-ray evidence played a part in his finding, that claimant's obstructive impairment did not arise out of coal mine employment, the doctor did not expressly state that he could only diagnose the existence of pneumoconiosis with a positive x-ray. In fact, Dr. Goodman acknowledged in his opinion that pneumoconiosis could cause claimant's symptoms. Employer's Exhibit 2. As employer contends, therefore, the administrative law judge erred in finding Dr. Goodman's opinion to be hostile and contrary to the Act for the reasons given. *See Shores*, 358 F.3d 486, 23 BLR 2-18; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *see also* 65 Fed. Reg. 79,920, 79, 938; *National Mining Assoc., et. al. v. Department of Labor, et. al.*, 292 F.3d 849, 863, 23 BLR 2-124, 2-162 (D.C. Ct. 2002)(while obstructive lung disease may be caused by mining exposure, there is no presumption that all or even

most obstructive disease is caused by exposure to coal dust; rather, each miner must demonstrate that his obstructive lung disease did, in fact, arise out of his coal mine employment).

Thus, as Dr. Goodman provided in detail a number of reasons in support of his conclusion that claimant did not have pneumoconiosis and that his obstructive impairment was due solely to cigarette smoking, the administrative law judge has incorrectly dismissed, out of hand, Dr. Goodman's opinion as hostile to the Act without consideration of his entire evaluation of claimant. Goodman Deposition at 30-66. Because the administrative law judge erred in rejecting Dr. Goodman's opinion, I would vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to reconsider Dr. Goodman's opinion along with the other medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c).

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ROY P. SMITH
Administrative Appeals Judge