BRB No. 99-0189 BLA

LEONARD M. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton and Hayes), Bluefield, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-0128) of Administrative Law Judge Samuel J. Smith awarding benefits on a duplicate 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).[1] This case is before the

[1]Claimant filed his first application for benefits on December 19, 1983 which the district director denied on the grounds that claimant had failed to

Board for a second time. In the initial Decision and Order, the administrative law judge credited claimant with twenty-two years of coal mine employment based on the parties' stipulation. As this case was filed after March 31, 1980, the administrative law judge adjudicated this claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption at 20 C.F.R. §718.203(b). At 20 C.F.R. §718.204(c) and (b), the administrative law judge found the medical evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were awarded. In a supplemental Decision and Order, the administrative law judge awarded attorney fees to claimant's counsel.

On appeal, the Board vacated the award of benefits and remanded the case for the administrative law judge to make a material change in conditions finding at 20 C.F.R. §725.309 in light of the decision in which the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, set forth its standard for assessing whether a claimant demonstrated a material change in conditions. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). On the merits, the Board also vacated the findings of the administrative law judge and remanded the case for further consideration. The Board directed the administrative law judge to consider all the medical evidence of record when determining whether claimant had established the existence of pneumoconiosis at Section 718.202(a)(4) and to make separate findings of fact and law at Sections 718.203(b), 718.204(c)

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establish the existence of pneumoconiosis arising out coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 31. Claimant took no further action until he filed the present claim on January 28, 1993. Director's Exhibit 1.

and 718.204(b).[2] *Lusk v. Consolidation Coal Co.*, BRB No. 96-0792 BLA (Feb. 19, 1997)(unpub.).

[2]The Board affirmed the finding of the administrative law judge with regard to the length of coal mine employment as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On remand, the administrative law judge again noted that the parties stipulated to twenty-two years of coal mine employment, and found that claimant had a smoking history of one pack of cigarettes a day for ten years ending in the 1960s. The administrative law judge found that claimant's prior claim had been finally denied on October 3, 1984 because claimant had failed to establish the existence of pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment due to pneumoconiosis. Applying the standard enunciated in *Rutter*, the administrative law judge found, at Section 725.309, that claimant had established a material change in conditions since the denial of his prior claim as claimant now has a totally disabling respiratory impairment, an element of entitlement not previously established. On the merits, the administrative law judge found the medical opinion evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge also found the evidence of record sufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, benefits were awarded payable from January 1, 1993. In the instant appeal, employer challenges the findings of the administrative law judge on the existence of pneumoconiosis at Section 718.202(a)(4) and on the cause of claimant's totally disabling respiratory impairment at Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order on Remand 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 respond in this appeal.[3]

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).

[3]We affirm the findings of the administrative law judge on claimant's smoking history, and his findings at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), 718.204(c), 725.309, and on the date of onset as unchallenged on appeal. *Skrack*, *supra.*

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*).

Initially, employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) when he accepted, as inviolate, the concept that "pneumoconiosis is a progressive disease," and then proceeded to analyze the medical opinions based on his assumption. Employer contends that the legal precedent cited by the administrative law judge is medically inaccurate and medically ungrounded, and that this concept has been imposed by relatively recent legal decisions developed in the absence of a scientific record. Thus, employer asserts that the courts were wrong when they described pneumoconiosis as a progressive disease. Employer urges the Board to find that questions of science are beyond its appellate purview, a position articulated by the United States Court of Appeals for the Seventh Circuit in *Freeman United Mining Co. v. Hilliard*, 65 F.3d 667, 19 BLR 2-282 (7th Cir. 1995). Claimant responds asserting that this argument lacks merit as there is no foundation in the record, in science or in law for employer's position. Claimant further notes that the Act and regulations allow parties to file requests for modification and to file duplicate claims based on the concept that pneumoconiosis is a progressive disease.

As claimant correctly states, the Act, which incorporates the modification provisions set out in Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated by 30 U.S.C. §932(a), and the regulations permit the filing of subsequent claims based on a change in conditions.[4] *See* 20 C.F.R. §§725.309, 725.310. Furthermore, the administrative law judge properly noted, in his Decision and Order on Remand, that the progressive nature of pneumoconiosis has been recognized by the courts and the Board. *See* Decision and Order on Remand at 14-15; *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn*

[4]Within one year of the denial of a previous claim, claimants can file a request for modification based on a change in conditions or a mistake in a determination of fact. *See* 20 C.F.R. §725.310. Beyond one year, claimants may file additional claims which will be denied on the basis of the prior denial unless claimant can establish a material change in conditions. *See* 20 C.F.R. §725.309.

Mining Co., 428 U.S. 1, 3 BLR 2-36 (1976); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990); *Belcher v. Beth-Elkorn Corp.*, 6 BLR 1-1180 (1984). Consequently, the administrative law judge did not make an erroneous assumption when he noted that pneumoconiosis is a progressive disease. Hence, employer's argument that the administrative law judge improperly discredited the medical opinion of Dr. Fino, who states that pneumoconiosis does not progress after a miner leaves the mines, as contrary to the fact that Congress, the courts and the Department of Labor (DOL) recognize that pneumoconiosis is a latent and progressive disease is rejected. *Id.* Likewise, employer's same contention regarding the opinion of Dr. Stewart, who stated that claimant's pulmonary impairment could not have been related to his coal dust exposure since claimant had no restriction two years prior to his retirement, is without merit. *Id.*

Employer next argues that the administrative law judge selectively analyzed the medical report of Dr. Zaldivar when he found Dr. Zaldivar's report inconsistent with Dr. Stewart's conclusion as to the cause of claimant's totally disabling respiratory impairment. Employer further asserts that the administrative law judge ignored the fact that Dr. Zaldivar found claimant's asthma and back pain as factors contributing to his totally disabling respiratory impairment, and that the administrative law judge mischaracterized the medical report of Dr. Zaldivar when he concluded that the physician applied a clinical, and not a legal, definition of pneumoconiosis.

Dr. Zaldivar reviewed claimant's medical records. Dr. Zaldivar noted significantly lower values in his 1993 pulmonary function study as compared to the pulmonary function study performed in 1985, and thus, opined that a significant deterioration in claimant's breathing capacity had occurred. *See* Employer's Exhibit 11. Based on the test results, Dr. Zaldivar diagnosed severe asthma; attributed claimant's atelectasis to his severe asthma, not his back pain; concluded that claimant's back injury was partly responsible for the low FVC values in claimant's pulmonary function studies, presumably from pain when taking a deep breath; and related claimant's breathing problem to severe asthma. *Id.* Dr. Zaldivar then stated that claimant does not have coal workers' pneumoconiosis by x-ray, and that his asthma was not caused by his coal mine employment as asthma is not related to coal mine employment and is a disease of the general public. *Id.*

The administrative law judge correctly found that in his medical report, Dr. Zaldivar discussed the basis for claimant's poor inspiration on pulmonary function testing, then opined that claimant's asthma, not his back pain, was the true reason for the atelectasis. Decision and Order on Remand at 16-17. Thus, the

administrative law judge properly decided that Dr. Zaldivar's medical opinion did not support Dr. Stewart's opinion that claimant's back injury was the cause of his breathing problems. *See* Employer's Exhibits 1, 11, 14. The administrative law judge permissibly accorded little probative value to Dr. Zaldivar's report after concluding that the physician applied a clinical, rather than a legal, definition of pneumoconiosis. In so doing, the administrative law judge noted that Dr. Zaldivar opined that claimant suffered from asthma, a condition which the physician described as a disease of the general population not at all related to pneumoconiosis, coal dust or mine work. The administrative law judge correctly recognized, however, that asthma can fall within the regulatory definition of pneumoconiosis at Section 718.201. Decision and Order on Remand at 15-16. Thus, the administrative law judge permissibly found Dr. Zaldivar's conclusion to be a general and unsupported statement. *See* 20 C.F.R. §718.201; *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1996).

Furthermore, the administrative law judge acted within his discretion when he accorded little probative value to this report because Dr. Zaldivar did not have a complete picture of claimant's health as he failed to examine claimant. Decision and Order on Remand at 24; *see Badger Coal Co. v. Director, OWCP*, 83 F.3d 414,, 20 BLR 2-265 (4th Cir. 1996); *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Likewise, the administrative law judge correctly stated that the issue was claimant's medical condition at the time of the hearing, not Dr. Zaldivar's focus on the lack of an impairment when claimant last worked in the coal mines. Decision and Order on Remand at 17; *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP,* 5 BLR 1-404 (1982); *see also Zettler v. Director, OWCP*, 886 F.2d 831 (7th Cir. 1989); *Freeman United Coal Co. v. Benefits Review Board*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990). Finally, after recognizing that the weight of the x-ray evidence was negative for pneumoconiosis, the administrative law judge permissibly noted that Dr. Zaldivar, who declined to diagnose coal workers' pneumoconiosis because highly qualified readers interpreted the x-rays as negative for pneumoconiosis, failed to address the fact that several similarly qualified readers interpreted the x-rays as positive for pneumoconiosis. Decision and Order on Remand at 17. Thus, contrary to employer's argument, the administrative law judge did not selectively analyze the medical opinion of Dr. Zaldivar nor did he mischaracterize this report, but rather he provided several rational reasons for according little probative weight to this report. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). We, therefore, affirm the administrative law judge's treatment of the medical opinion of Dr. Zaldivar.

Employer also contends that the administrative law judge erred in not crediting the report of Dr. Stewart because he found it inconsistent with the report of Dr. Zaldivar on the cause of claimant's totally disabling respiratory impairment. Employer asserts that Dr. Stewart did not diagnose an obstruction as he found his pulmonary function study invalid and that the administrative law judge substituted his opinion for that of Dr. Stewart when he stated that Dr. Stewart relied solely on a negative x-ray to find that claimant did not suffer from coal workers' pneumoconiosis as the physician relied on more than a negative x-ray.

In summarizing the report of Dr. Stewart, the administrative law judge noted his credentials and his finding of no pneumoconiosis by x-ray, CT scan or biopsy. The administrative law judge also outlined the factors Dr. Stewart considered when making a diagnosis of pneumoconiosis, including the physician's statement that in the absence of biopsy evidence of pneumoconiosis, he must rely on a positive x-ray to find pneumoconiosis, and would not rely on physical findings and laboratory tests only, even though claimant had sufficient exposure and a restrictive defect on pulmonary function testing, factors which he considers when diagnosing pneumoconiosis. *See* Decision and Order on Remand at 17-18; Employer's Exhibits 1, 14. The administrative law judge also noted that when asked in his deposition if he relied solely on the chest x-ray, Dr. Stewart testified that he relied on other factors such as a history of exposure, physical examination, pulmonary functions studies, blood gas studies, and any biopsy material, but then acknowledged that in this case, he relied heavily on the negative x-ray and CT scan evidence to exclude the presence of pneumoconiosis. *Id.*

The administrative law judge correctly noted that Section 718.202(a)(4) allows a physician to diagnose pneumoconiosis, notwithstanding a negative x-ray, based on objective medical evidence, a physical examination, and medical and work histories. Decision and Order on Remand at 18. The administrative law judge acted within his discretion when he rejected Dr. Stewart's medical opinion because the physician stated that he would not diagnose pneumoconiosis in the absence of a positive x-ray. *See* 20 C.F.R. §718.202(a)(4). In so doing, the administrative law judge properly recognized that the Section 718.202(a)(4)[5] does not provide that a miner is "presumed" not to have pneumoconiosis unless he presents biopsy evidence of the disease, as Dr. Stewart required. *See* 20 C.F.R. §718.202(a)(4); *Church v. Eastern*

[5]In his Decision and Order on Remand, the administrative law judge twice references 20 C.F.R. §718.202(a)(2) while discussing Dr. Stewart's report at 20 C.F.R. §718.202(a)(4). Since it appears that the reference to Section 718.202(a)(2) is a typographical error, we will consider it so.

Associated Coal Co., 20 BLR 1-8 (1996), *aff'd on recon*. 21 BLR 1-51 (1997). Hence, the administrative law judge did not err by substituting his opinion for that of Dr. Stewart when he concluded that in his report and testimony, Dr. Stewart did not provide grounds other than negative x-rays, CT scans and biopsies for his opinion that claimant did not have coal workers' pneumoconiosis. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987).

Furthermore, in assessing the probative value of Dr. Stewart's medical opinion, the administrative law judge properly determined that the physician based his conclusions on incomplete information because at the time of his physical examination, Dr. Stewart failed to evaluate claimant for physical manifestations compatible with his back injury, and was unable to say whether claimant's back injury was cervical or lumbar, although acknowledging that the latter would not affect claimant's breathing. Decision and Order on Remand at 19; *see* Employer's Exhibits 1, 14; *Trumbo, supra*; *Cosalter v. Mathies Coal Co.*, 6 BLR 1-82 (1984). Thus, the administrative law judge permissibly found this report not well-documented and not well-reasoned, and permissibly accorded little probative weight to Dr. Stewart's conclusion that claimant's severe restrictive pulmonary impairment was not caused in whole or in part by coal dust exposure, but by his back injury. Decision and Order on Remand at 20; *see Church, supra*; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, we note that the administrative law judge found Dr. Stewart's suggestions that congestive heart failure, possible venous problem in claimant's legs, possible pulmonary emboli or inflammatory lung disease may be the reason for claimant's pulmonary impairment speculative, incomplete, unsupported, and equivocal. Decision and Order on Remand at 19-20. As employer failed to challenge this additional ground provided by the administrative law judge for declining to accord determinative weight to the medical report of Dr. Stewart, the administrative law judge's finding in this regard is affirmed. *See Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's treatment of the medical opinion of Dr. Stewart.

Employer next argues that the administrative law judge did not explain why the reports of Drs. Rasmussen and Jabour are documented and reasoned. We find employer's argument without merit. The administrative law judge permissibly found the report of Dr. Rasmussen documented as he noted that the physician thoroughly examined claimant, and that his evaluation consisted of claimant's recitation of symptoms, his work, medical and smoking histories, a physical examination, a pulmonary function study including a diffusing capacity, a resting and exercise blood gas study, and an EKG. *Church, supra*; *Carson, supra*; *Fields, supra*. Contrary to

employer's assertion, after reviewing Dr. Rasmussen's discussion of his test results, the diagnosis indicated by these results, his knowledge of claimant's work and medical histories, and his explanation for his conclusions, the administrative law judge provided his rationale for finding the report of Dr. Rasmussen reasoned. *Id.*; *McGinnis, supra*. In particular, the administrative law judge discussed the fact that Dr. Rasmussen elaborated on his findings and diagnosis during the course of his deposition; that Dr. Rasmussen opined that claimant had essentially a classic manifestation of an interstitial lung disease such as coal workers' pneumoconiosis; that his report was based on a thorough examination of claimant including a review for heart disease, objective tests, work history, medical history, smoking history; and that the physician testified at length about the role of smoking and coal dust in claimant's respiratory insufficiency. Decision and Order on Remand at 22. We, therefore, affirm the administrative law judge's findings regarding the medical opinion of Dr. Rasmussen. *Id.*

Regarding the report of Dr. Jabour, employer incorrectly asserts that this report is not documented. The administrative law judge noted that Dr. Jabour thoroughly examined claimant, and based his report on symptoms, medical and work history, as well as test results, including a positive x-ray; thus, the administrative law judge properly concluded that this report was documented. *Church, supra*; *Carson, supra*; *Fields, supra*. Likewise, the administrative law judge acted within his discretion when he determined that the report of Dr. Jabour was reasoned after concluding that Dr. Jabour explained his diagnosis of restrictive lung disease, chronic obstructive pulmonary disease, pneumoconiosis, and severe pulmonary impairment due to pneumoconiosis in his supplemental report dated February 14, 1994. *See* Claimant's Exhibit 3; *Id.* Specifically, the administrative law judge reviewed the medical opinion of Dr. Jabour noting that the physician based his opinion on a thorough examination of claimant, his symptoms, an x-ray which showed pulmonary fibrosis, the presence of a restrictive lung disease as revealed by pulmonary function test results, past smoking history which he ruled out as a causative factor, coal mine employment history, and his determination that claimant exhibited all the classic symptoms of black lung. Decision and Order on Remand at 24; *Id*. Additionally, the administrative law judge did not err when he concluded that Dr. Jabour was claimant's treating physician, as he permissibly relied on claimant's hearing testimony that Dr. Jabour had treated him for the last two years and that he sees Dr. Jabour once a month for his breathing problems. *See* Hearing Transcript at 19-22. Therefore, we reject employer's argument that the administrative law judge mechanically credited Dr. Jabour's opinion based solely on his status as claimant's treating physician. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994).

Since employer has not challenged the administrative law judge's treatment of the reports of Drs. Vasudevan, Taylor, and Dahhan as well as his treatment of the CT scan and the related reports of Drs. Pathak, Wiot, and Wheeler, we affirm his findings regarding these reports. *Skrack, supra*. We, therefore, affirm the finding of the administrative law judge that the medical opinion evidence of record is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) as it is rational and supported by substantial evidence.[6]

At Section 718.204(b), employer initially argues that the administrative law judge did not do a separate analysis of causation, but rather referred back to his findings at Section 718.202(a)(4). After making findings favorable to claimant at Sections 718.202(a)(4), 718.203(b), and 718.204(c), the administrative law judge reviewed the medical opinions of Drs. Zaldivar, Stewart, Pathak, Wheeler, Fishman, Vasudevan, Taylor, Fino, Dahhan, Rasmussen, and Jabour on the issue of causation. The administrative law judge addressed the causation findings in each report and provided a separate analysis at Section 718.204(b). Decision and Order on Remand at 38-41; *McGinnis, supra*. We, therefore, reject employer's argument.

Employer contends that the administrative law judge improperly rejected Dr. Zaldivar's medical opinion that claimant's asthma is not pneumoconiosis, and that the administrative law judge mischaracterized the medical opinion of Dr. Dahhan when he stated that Dr. Dahhan did not consider the presence of legal pneumoconiosis as the physician actually based his conclusions on the cause of claimant's impairment on multiple factors. Specifically, employer argues that asthma is pneumoconiosis only if a reasoned medical opinion assesses it as a chronic dust disease of the lungs significantly related to or aggravated by coal dust exposure and that for the administrative law judge to assume that asthma is pneumoconiosis shifts the burden of proof from claimant.

[6]We decline to apply the decision in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) to this case which does not arise within the jurisdiction of the United States Court of Appeals for the Third Circuit.

The administrative law judge noted that Dr. Zaldivar linked claimant's respiratory impairment to asthma, which the physician stated is a disease of the general public and not related to coal workers' pneumoconiosis and/or coal mine work. In discounting the medical opinion of Dr. Zaldivar on the issue of causation, the administrative law judge permissibly found that the physician conclusively ruled out coal mine dust and/or pneumoconiosis as a contributory factor to claimant's asthma when he failed to consider asthma as regulatory pneumoconiosis.[7] Decision and Order on Remand at 39; *Barber, supra*; *see discussion, supra, at 5-6*. Likewise, the administrative law judge did not mischaracterize the medical opinion of Dr. Dahhan, who diagnosed chronic obstructive lung disease and a disabling respiratory impairment related to hyperactive airways disease with bronchial asthma, as the physician's report does not reflect the multiple factors he allegedly considered when rendering his opinion on the cause of claimant's respiratory impairment. Decision and Order on Remand at 40; *Hess, supra*. Moreover, the administrative law judge rationally discounted Dr. Dahhan's medical opinion because the physician mistakenly assumed that asthma could not be related to coal dust and/or pneumoconiosis, and because the physician focused on claimant's past health condition and not his current health condition. Decision and Order on Remand at 40; *Barber, supra*; *Cooley, supra*. We, therefore, affirm the administrative law judge treatment of the medical opinions of Drs. Zaldivar and Dahhan on the issue of causation.

Lastly, employer argues that the administrative law judge erred in finding the medical report of Dr. Fino inconsistent and insufficiently explained, asserting that the

[7]Employer raises no challenges to the administrative law judge's rejection of its argument that Dr. Zaldivar linked claimant's totally disabling respiratory impairment to claimant's back injury. The administrative law judge opined that employer's argument was simply not true because Dr. Zaldivar clearly stated in his report that Dr. Stewart's explanation about claimant's back injury as the cause of his respiratory impairment was incomplete. We, therefore, affirm the administrative law judge's treatment of this report as unchallenged on appeal. *Skrack, supra*.

administrative law judge again relied on his theory that pneumoconiosis is progressive.

As we indicated previously in rejecting employer's argument regarding the progressive nature of pneumoconiosis, *see discussion, supra, at 4*, the administrative law judge did not err when he found Dr. Fino's opinion of no probative value concerning the etiology of claimant's respiratory impairment because the physician excluded coal workers' pneumoconiosis as a diagnosis and cause based on the mistaken assumption that pneumoconiosis cannot develop or progress once a miner ceases coal mine employment. Decision and Order on Remand at 40; *see Mullins, supra*; *Usury, supra*; *Swarrow, supra*; *Lane Hollow, supra*; *Stanley, supra*. Moreover, the administrative law judge acted within his discretion when he found Dr. Fino's report internally inconsistent with respect to etiology because Dr. Fino first attributes claimant's impairment to a non-dust related interstitial lung disease then states that he agrees with Dr. Stewart's description of the etiological possibilities with no further discussion.[8] Decision and Order on Remand at 40; *Justice, supra*. We, therefore, affirm the administrative law judge's treatment of the medical opinion of Dr. Fino.

At Section 718.204(b), the administrative law judge also accorded determinative weight to the medical opinions of Drs. Rasmussen and Jabour, in which they related claimant's respiratory impairment to his pneumoconiosis, and the administrative law judge accorded little weight to the medical opinions of Drs. Stewart, Vasudevan and Taylor, which do not link claimant's respiratory impairment to his pneumoconiosis. Employer does not challenge these findings, thus they are affirmed. *Skrack, supra*. We, therefore, affirm the finding of the administrative law judge that the evidence of record was sufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.*, 914 F.3d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

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[8]In addition to his opinion that claimant's back injury was the cause of his respiratory impairment, Dr. Stewart suggested congestive heart failure, possible venous problem in claimant's legs, possible pulmonary emboli or inflammatory lung disease as possible reasons for claimant's pulmonary impairment. Employer's Exhibits 1, 14.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge