BRB Nos. 10-0191 BLA
and 10-0192 BLA

GAY NELL SEXTON (Widow of and on behalf of FRABLE SEXTON)	)	
Claimant-Respondent	)	
v.	)	
BUCK CREEK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/11/2011
and	)	
OLD REPUBLIC INSURANCE 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 – Award of Benefits in Miner's Claim and Award of Benefits in Survivor's Claim of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

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

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

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order – Award of Benefits in Miner's Claim and Award of Benefits in Survivor's Claim (2005-BLA-6156 and 2005-BLA-6157) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), rendered on a miner's subsequent claim and a survivor's claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case has a lengthy history.[1] The relevant procedural history of this case is as follows: The miner filed a subsequent claim on April 12, 2001 and the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibits 3, 30. Employer requested a hearing. Director's Exhibit 33. The miner died on March 28, 2004, while his claim was pending before the Office of Administrative Law Judges (OALJ). Director's Exhibit 41. Claimant filed her survivor's claim on April 29, 2004. Director's Exhibit 43. The district director issued a Proposed Decision and Order awarding benefits in the survivor's claim, and employer requested a hearing. Director's Exhibits 89, 90. On June 16, 2004, Administrative Law Judge Rudolph L. Jansen remanded the miner's claim to

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[1] Claimant is the widow of Frable Sexton, the deceased miner. Director's Exhibit 34. The miner initially filed an application for benefits on July 11, 1973, which was denied by Administrative Law Judge John W. Earman on March 2, 1984, because the miner failed to establish that he was totally disabled. Director's Exhibit 1. The miner appealed the denial of benefits, but the Board dismissed the appeal as untimely. *Sexton v. Buck Creek Coal Co.*, BRB No. 84-0678 BLA (Sept. 23, 1986) (unpub.). The miner filed a request for modification on April 13, 1987, which was denied by Administrative Law Judge Bernard J. Gilday, Jr., on October 3, 1990. Director's Exhibit 1. Judge Gilday found that, although the miner was totally disabled, he was not totally disabled due to pneumoconiosis and, therefore, did not establish a change in conditions at 20 C.F.R. §725.310 (2000). *Id*. The miner appealed, and the Board vacated the denial of benefits because the administrative law judge erred in failing to consider the evidence under Part 727 of the regulations. *Sexton v. Buck Creek Coal Co.*, BRB No. 91-0191 BLA (Aug. 19, 1992) (unpub.). The Board also held, as a matter of law that, insofar as Judge Gilday found that the miner was totally disabled, the miner established a change in conditions and was entitled to have his claim considered on the merits. *Id*. The Board ultimately affirmed the January 22, 1998 Decision and Order on Remand of Administrative Law Judge Rudolph L. Jansen denying benefits because the miner failed to establish that his total disability was due to pneumoconiosis. *See Sexton v. Buck Creek Coal Co.*, BRB No. 98-0637 BLA (Feb. 3, 1999) (unpub.); Director's Exhibit 1. The miner then filed a claim for benefits on May 8, 2000. However, the district director granted the miner's subsequent request to withdraw his claim.

the district director for a complete pulmonary evaluation because Dr. Hussain did not provide sufficient information in his July 27, 2001 medical report. Director's Exhibit 41 at 762. Subsequently, both the miner's claim and the survivor's claim were consolidated and sent to OALJ for a hearing, which was held on October 28, 2008. Director's Exhibit 99.

In a Decision and Order dated November 4, 2009, the administrative law judge found that the miner had twenty-five years of coal mine employment and adjudicated both claims pursuant to the regulations at 20 C.F.R. Part 718. With respect to both claims, the administrative law judge determined that the medical evidence was sufficient to establish that the miner suffered from clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). With respect to the miner's claim, the administrative law judge determined that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c) and, therefore, found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge weighed the newly submitted evidence against the evidence from the prior claims, and found that the preponderance of the evidence established that the miner was totally disabled due to pneumoconiosis. With respect to the survivor's claim, the administrative law judge found that the evidence was sufficient to establish that pneumoconiosis substantially contributed to, and/or hastened, the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in both the miner's claim and the survivor's claim.

On appeal, employer challenges the administrative law judge's finding, in the miner's claim, that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Specifically, employer asserts that the administrative law judge was precluded from finding that there had been a "material change" in the miner's condition since the denial of his prior claim. Employer's Brief in Support of Petition for Review at 17-18. In support of its contention, employer asserts that the miner's subsequent claim must be barred under the principles of *res judicata*. Moreover, although employer does not challenge the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), employer contends that the administrative law judge erred in finding that claimant also established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) in both claims. In addition, regarding the survivor's claim, employer argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the administrative law judge performed the proper analysis under 20 C.F.R.

§725.309 and that, contrary to employer's assertion, the subsequent claim is not barred by the principles of *res judicata*. Employer has filed a reply brief reiterating its arguments on appeal.[2]

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

I. The Miner's Subsequent Claim

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In addition, when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final."

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[2] By Order dated April 14, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Sexton v. Buck Creek Coal Co.*, BRB Nos. 10-0191 BLA & 10-0192 BLA (April 14, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs, have responded and assert that Section 1556 is not applicable to these claims because they were filed before January 1, 2005. Claimant has responded and asserts that Section 1556 is applicable to both claims. Based upon the parties' responses and our review of the record, we hold that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the miner's subsequent claim and the survivor's claim were filed before January 1, 2005. Director's Exhibits 1, 2, 43.

[3] 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 4.

20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, the miner's prior claim was denied because the evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing this element of entitlement in order to have the administrative law judge review the subsequent claim on the merits. *See White*, 23 BLR at 1-3.

A. Change In An Applicable Condition of Entitlement

Employer challenges the administrative law judge's finding that claimant established a change in an applicable condition of entitlement in the miner's claim. Employer asserts that, because the miner was determined to be totally disabled by his cigarette smoking in the prior claim, and did not return to work after that finding, there is no evidence to support a finding of "a material change in condition[s]." Employer's Brief in Support of Petition for Review at 17-18. Employer maintains that the "fact that Dr. Alam – or anyone else – now says that coal mining is also the source of [the miner's] disease and disability provides no valid reason to find entitlement." *Id*. at 18. Employer further contends that, because the miner did not establish disability causation in the prior claim, common law principles of *res judicata* preclude reconsideration of whether the miner's disabling respiratory impairment is due to coal dust exposure in this subsequent claim, as the etiology of the miner's disabling respiratory condition is not subject to change. *Id*. Employer also argues that the "[administrative law judge's] decision[,] coupled with [20 C.F.R.] §725.309, as interpreted by [the Department of Labor,] erects an irrebuttable presumption that a person who can prove entitlement after his claim has been denied has experienced a material change in condition and should be able to relitigate. The fact irrebuttably presumed is that his condition changed due to black lung whether or not that is a medical possibility in a given case." *Id*. at 21-22. Employer asserts that it "is manifestly unfair to impose a perpetual litigation regime on mine operators where, as here, there is no valid justification for doing so," and urges the Board to vacate the administrative law judge's findings pursuant to 20 C.F.R. §725.309. *Id*.

Employer's allegation, that claimant is unable to establish a "material change" in his condition, is without merit. Employer's Brief in Support of Petition for Review at 17. Although the prior version of 20 C.F.R. §725.309 required a claimant to demonstrate a "material change in condition," the revised version of 20 C.F.R. §725.309 requires a claimant to demonstrate a "change in an applicable condition of entitlement" by submitting new evidence establishing an element of entitlement previously adjudicated

against claimant.[4] *See White*, 23 BLR at 1-3; s*ee also* 65 Fed. Reg. 79,920, 79,968 (Dec. 20, 2000). Accordingly, the administrative law judge applied the proper standard in assessing the miner's subsequent claim.

We also reject employer's assertion that the regulation at 20 C.F.R. §725.309 is invalid because it permits a claimant to relitigate the denial of an earlier claim in contravention of the principles of *res judicata*. Requiring that claimant submit newly developed evidence sufficient to establish a change in an applicable condition of entitlement ensures that claimant is not merely relitigating the prior claim. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993). Under the terms of 20 C.F.R. §725.309(d)(4), if a claimant establishes a change in one of the applicable conditions of entitlement, "no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see [20 C.F.R.] §725.463), shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4); *see Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009). In determining whether a claimant has satisfied his burden of proof under 20 C.F.R. §725.309, therefore, the adjudicator is bound by the final denial of the prior claim, but compares the new medical evidence with the legal conclusions reached in the prior claim, to determine whether a claimant has established a change in one of the applicable conditions of entitlement. *See Hatfield*, 556 F.3d at 482, 24 BLR at 2-152; *Sellards*, 17 BLR at 1-79. By requiring a claimant to prove a change in an applicable condition of entitlement with new evidence, the regulation ensures that the claimant is not simply seeking reconsideration of the prior, finally denied claim. Accordingly, the doctrine of *res judicata* does not preclude a subsequent claim, where the issue is claimant's physical condition at entirely different times. *See White*, 23 BLR at 1-3; *Sellards*, 17 BLR at 1-79. In addition, contrary to employer's assertion, because claimant is required to establish a change in an applicable condition of entitlement by a preponderance of the relevant evidence, and employer has the right to submit evidence to defeat claimant's proffer, there is no irrebuttable presumption implicated by 20 C.F.R. §725.309. We therefore reject employer's arguments regarding the validity of 20 C.F.R. §725.309.

[4] The Department of Labor (DOL) revised the regulations implementing the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). These regulations apply to all claims filed after January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations.

B. The Merits of Entitlement

We initially affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner suffered from clinical pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We also affirm, as unchallenged, the administrative law judge's determination that the miner suffered from a disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. Thus, the question presented on appeal in the miner's claim is whether the administrative law judge permissibly found that the more recent evidence established that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Hussain,[5] Jarboe, Alam, and Breeding.[6] Dr. Hussain examined the miner on July 27, 2001, at the request of the Department of Labor (DOL). Director's Exhibit 9. He diagnosed severe chronic obstructive pulmonary disease (COPD) and pneumoconiosis and, in response to a question posed on DOL Form CM-988, indicated that the etiology of the diagnosed conditions was coal dust exposure and cigarette smoking. *Id*.

Dr. Jarboe examined the miner on September 20, 2001. Director's Exhibit 12. He diagnosed pulmonary emphysema and concluded that, while severe emphysema can be caused by coal dust exposure, "it almost always is proportionate to the amount of dust retention in the lungs . . . manifested by an abnormal chest x-ray." *Id*. He determined that the miner was totally disabled due to smoking. *Id*. In a supplemental report dated September 4, 2004, Dr. Jarboe diagnosed bronchial asthma, based on the presence of nasal polyps and a significant reversible component in the obstructive impairment. Employer's Exhibit 3.

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[5] Dr. Hussain's opinion was only considered in the living miner's claim as claimant did not designate Dr. Hussain's report for submission in the survivor's claim.

[6] The administrative law judge also considered treatment notes from Ridge Crest Manor Nursing Home and from Drs. Alam and Breeding. Director's Exhibit 41; Employer's Exhibits 3, 5. The administrative law judge noted that this material did not include a diagnosis of legal pneumoconiosis or any discussion of the cause of the miner's death. Decision and Order at 32-33, 44.

Dr. Alam examined the miner on September 24, 2001, and diagnosed COPD, coal workers' pneumoconiosis, coronary artery disease and hypertension. Director's Exhibit 10. He identified the etiology of these conditions as "coal dust/tobacco abuse." *Id*. He opined that the miner was totally disabled, and that COPD was responsible for forty percent of the disability, while coal workers' pneumoconiosis was responsible for the remaining sixty percent of the disability. *Id*. Dr. Alam reiterated his diagnoses in a supplemental report dated May 31, 2002, and in a deposition conducted on March 23, 2004.[7] *Id*.; Director's Exhibit 41.

Dr. Breeding examined the miner on September 25, 2001, and diagnosed cor pulmonale, COPD, and coal workers' pneumoconiosis all due to "CWP." Director's Exhibit 13. He concluded that the miner suffered from a severe impairment, with the diagnosed conditions fully contributing to the impairment. *Id*.

In weighing the medical opinion evidence in the miner's claim, the administrative law judge assigned less weight to Dr. Hussain's diagnosis of legal pneumoconiosis because it is insufficiently reasoned. Decision and Order at 29. The administrative law judge found that Dr. Jarboe's opinion is well-documented, but insufficiently explained, insofar as he focused on clinical pneumoconiosis and, therefore, accorded it little weight. *Id*. at 32. Moreover, the administrative law judge assigned little weight to Dr. Breeding's diagnosis of legal pneumoconiosis because it is inconsistent. *Id*. at 31-32. In contrast, the administrative law judge assigned Dr. Alam's diagnosis of legal pneumoconiosis full probative weight, based on the "minimal, but accurate, linkage of his conclusions regarding his determination that the [m]iner at least had simple coal workers' pneumoconiosis and COPD[,] and his conclusions regarding the interaction and effects of

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[7] Dr. Alam testified that, while the miner underwent treatment with other physicians for general health, he specifically treated the miner for lung problems. Director's Exhibit 41 at 3. He testified that his diagnosis of coal workers' pneumoconiosis was not based on the presence of clinical pneumoconiosis on x-ray, but on his diagnosis of emphysema. *Id*. at 4-7, 34-35. He also testified that the diagnosis was based on the miner's chronic symptoms, including chronic pulmonary symptoms and severe hypoxemia, along with claimant's work history, pulmonary function testing and the fact that the miner quit smoking eight to ten years before he began treating him. *Id*. at 4-9, 34-35. Moreover, while the miner's smoking history was sufficient to cause his symptoms, Dr. Alam testified that, because the miner's respiratory impairment worsened from 1999 to 2002, the miner's coal mine employment likely was the cause of the worsening emphysema because pneumoconiosis is a progressive disease. *Id*. at 12-16. Dr. Alam further reiterated that the miner was totally disabled beginning in 1999, and that his coal mine employment contributed to the impairment. *Id*. at 36.

coal dust exposure, coal workers' pneumoconiosis, and COPD . . . ." *Id*. at 30-31. Accordingly, the administrative law judge found that claimant established, in the miner's claim, that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

On appeal, employer initially challenges the administrative law judge's decision to assign little weight to Dr. Jarboe's opinion regarding legal pneumoconiosis, while finding Dr. Alam's opinion to be sufficient to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's allegation of error is without merit, as the administrative law judge acted within his discretion in finding that Dr. Jarboe did not sufficiently explain why the miner's coal mine employment had no role in the development of his emphysema and focused "on the lack of clinical pneumoconiosis." Decision and Order at 32; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-308, 23 BLR 2-261, 2-284-287 (6th Cir. 2005); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). As the administrative law judge noted, Dr. Jarboe partly based his opinion, attributing the miner's emphysema solely to smoking, on his view that "emphysema 'almost always is proportionate to the amount of dust retention in the lungs, . . . [and] should be manifested by an abnormal chest x-ray.'" Decision and Order at 32, *quoting* Director's Exhibit 12. The administrative law judge also cited Dr. Jarboe's statement that he attributed the emphysema to the miner's smoking history "because 'there is not one [x-ray] reading which describes a nodulation or dust retention in [the miner's] lungs.'"[8] Decision and Order at 32, *quoting* Employer's Exhibit 3.

We also reject employer's contention that the administrative law judge impermissibly credited Dr. Alam's opinion as sufficient to establish the existence of legal pneumoconiosis. The administrative law judge acted within his discretion in finding that Dr. Alam's diagnosis is supported by his discussion of "the relationship of the [m]iner's symptoms to both coal workers' pneumoconiosis and COPD[,] and his conclusions

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[8] We are not persuaded by our dissenting colleague's view that Dr. Jarboe's reliance upon the amount of dust retention in the miner's lungs to determine that coal dust exposure did not play a role in causing the miner's emphysema is consistent with the relevant regulations. Dr. Jarboe's explicit references to the need for x-ray evidence of nodulation or dust retention cannot be reconciled with either the definition of legal pneumoconiosis or the terms of 20 C.F.R. §718.202(a)(4), which provide that "[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, *notwithstanding a negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis *as defined in* [*20 C.F.R.*]*§ 718.201*." 20 C.F.R. §718.202(a)(4) (emphasis added).

regarding the interaction and effects of coal dust exposure, coal workers' pneumoconiosis, and COPD . . . ."[9] Decision and Order at 31; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge also rationally determined that Dr. Alam's opinion is "internally consistent, credible and capable of controlling weight," and supported his finding by noting that Dr. Alam's treatment notes "reveal that he considered numerous x-rays, [pulmonary function tests and arterial blood gas tests], and . . . that he rightfully considered and credited the [m]iner's stated [twenty-seven] years of coal mine employment in executing his treatment plan." Decision and Order at 31; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The administrative law judge also permissibly found that the treatment plan "clearly demonstrates [Dr. Alam's] understanding that [the miner] suffered from a severe, and finally fatal, pulmonary condition which required hospitalization, frequent office visits, and a wide span of ventilatory medications as well as continuing his 24/7 oxygen prescription and usage" and that "[t]hese all stemmed from a disease triggered by both coal mine dust exposure and cigarette smoking."[10] Decision and Order at 31; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-151.

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[9] Contrary to employer's contention, the administrative law judge did not ignore "his own conclusion that the treatment notes[,] while voluminous, were not diagnostic of pneumoconiosis . . . ." Employer's Brief in Support of Petition for Review at 23. Whether the conclusions set forth in a medical opinion are reasoned and documented is a determination committed to the administrative law judge's discretion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We conclude that the administrative law judge acted within his discretion in finding that the absence of an explicit diagnosis of pneumoconiosis in Dr. Alam's treatment notes detracted from the credibility of his determination that the miner had legal pneumoconiosis. *Id*.

[10] We reject employer's argument that the administrative law judge's decision to credit Dr. Alam's opinion amounts to a "presumption or assumption" of legal pneumoconiosis because Dr. Alam could not distinguish the effects of smoking from coal dust exposure. Employer's Brief in Support of Petition for Review at 23-24. The DOL and Sixth Circuit have recognized that a physician's statement that he cannot distinguish between the effects of smoking and coal dust exposure does not, by itself, render unreasoned a physician's identification of coal dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 65 Fed. Reg. 79,946 (Dec. 20, 2000); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-120-21 (6th Cir. 2000).

In addition to rationally finding that Dr. Alam's opinion is sufficient to link the miner's obstructive impairment to his coal dust exposure, the administrative law judge permissibly determined that Dr. Alam's opinion was entitled to "full probative weight," based on his status as the miner's treating physician. The administrative law judge considered Dr. Alam's opinion in accordance with the criteria set forth at 20 C.F.R. §718.104(d).[11] Decision and Order at 31; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge set forth his rationale as follows:

> Dr. Alam's "treatment plan" was rather immediately instituted for [the miner] in 1999-2000 and consisted of periodic visits to his office and monitoring until June 2003 prior to [the miner's] nursing home stay. It was riveted on his continuing attention to [the miner's] total respiratory failure. No other physician of record . . . was ever in a better position to evaluate [the miner's] pulmonary condition (which was once a week according to [c]laimant's testimony) and to determine the cause or causes of that condition. . . . I find that Dr. Alam's medical opinion was reasonably based upon his continuing evaluation of [the miner's] pulmonary condition over a three-year period.

Decision and Order at 30 n.56. Because determining the credibility of the medical experts is committed to the discretion of the administrative law judge, we affirm his decision to accord full probative weight to Dr. Alam's opinion, and little weight to Dr. Jarboe's opinion, pursuant to 20 C.F.R. §718.202(a)(4). *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, 12 BLR at 1-151.

Employer further alleges that the administrative law judge should have determined that the credibility of Dr. Jarboe's opinion was supported by his diagnosis of simple

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[11] Contrary to employer's contention, it is within the administrative law judge's discretion to choose the amount of weight to accord to a medical opinion, based upon the author's status as a treating physician, and therefore it is not inconsistent for the administrative law judge to choose to assign an opinion "full probative weight," rather than greater weight. Decision and Order at 31; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

clinical pneumoconiosis, based on the pathology reports. Employer also maintains that the administrative law judge should have found that Dr. Alam's conclusion, that claimant's x-rays did not reveal clinical pneumoconiosis, diminished the probative value of his opinion, as it was contrary to the administrative law judge's finding of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2). Employer's contentions amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See* Brief in Support of Petition for Review at 22-23, 25; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Anderson*, 12 BLR at 1-114; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Lastly, we reject employer's assertion that the administrative law judge erred in finding that claimant established that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge properly weighed the medical opinion evidence, as discussed *supra*, and found that Dr. Alam provided a well-reasoned and well-documented opinion that the miner's clinical and legal pneumoconiosis were substantially contributing causes of his totally disabling respiratory impairment. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); Decision and Order at 40. In addition, the administrative law judge acted within his discretion in determining that Dr. Alam's opinion is "sufficiently supported by the treatment records," and that Dr. Alam based his disability causation opinion on the miner's "chronic bronchitis/emphysema, chronic pulmonary symptoms, oxygen dependency, and his end-stage lung disease." Decision and Order at 40; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. The administrative law judge also rationally found that Dr. Alam's opinion was supported by his acknowledgment of the miner's significant smoking history, while noting "that [the miner] quit smoking a long time ago and that his condition continued to worsen . . . ." Decision and Order at 40; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Furthermore, the administrative law judge permissibly accorded "little weight" to Dr. Jarboe's disability causation opinion, because he "did not find legal pneumoconiosis, contrary to my finding." Decision and Order at 40; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Rowe*, 710 F.2d at 251, 5 BLR at 2-99; *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). Therefore, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), that the miner was totally disabled due to pneumoconiosis. Based upon these holdings, we also affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

Moreover, the administrative law judge properly weighed the evidence from the miner's previous claims, with the newly submitted evidence, and reasonably concluded that, because the prior evidence is "over ten years old," and given "the latent and progressive nature of pneumoconiosis," the evidence from the prior claims "is not probative." Decision and Order at 23; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997). Thus, because the administrative law judge acted within his discretion in rendering his credibility determinations, and substantial evidence supports his finding that the more recent evidence establishes that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.204(b)(2)(i), (iii), (iv), (c), we affirm the award of benefits in the miner's claim.

II. The Survivor's Claim

In order to establish her entitlement to survivor's benefits, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In this survivor's claim, filed after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis or if the presumption relating to complicated pneumoconiosis, set forth in 20 C.F.R. §718.304, is applicable. *See* 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. *See* 20 C.F.R. §718.205(c)(5); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that the evidence submitted in the survivor's claim was sufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2) and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). As discussed *supra*, we have affirmed, as unchallenged, the administrative law judge's finding that the miner suffered from clinical pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) and 718.203. Thus, the question presented on appeal in the survivor's claim is whether the administrative law judge permissibly found that the miner suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Relevant to the issue of legal pneumoconiosis, the administrative law judge weighed the medical opinions of Drs. Alam, Breeding, Jarboe[12] and Naeye,[13] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge again assigned full probative weight to Dr. Alam's opinion, because it is sufficiently well-documented and well-reasoned, and assigned little weight to the opinions of Drs. Breeding and Jarboe because their opinions were not sufficiently reasoned. Decision and Order at 32, 34-36. In addition, the administrative law judge assigned little weight to Dr. Naeye's opinion because he found that, while it is sufficiently documented, it is insufficiently reasoned. *Id*. at 36.

Employer argues that the administrative law judge erred in assigning little weight to Dr. Naeye's opinion that the miner did not have legal pneumoconiosis. Contrary to employer's contention, the administrative law judge acted within his discretion in finding Dr. Naeye's opinion to be insufficiently reasoned. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. The administrative law judge noted that Dr. Naeye testified at his deposition that the miner's chronic bronchitis is unrelated to his coal dust exposure

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[12] The administrative law judge noted that: Dr. Alam reiterated the conclusions set forth in the reports submitted in the miner's claim regarding whether the miner suffered from legal pneumoconiosis, Decision and Order at 16, *citing* Director's Exhibit 51 and Claimant's Exhibit 1; Dr. Breeding restated his legal pneumoconiosis diagnosis in a report dated August 18, 2004, Decision and Order at 15, *citing* Claimant's Exhibit 1; and Dr. Jarboe reiterated his conclusions in a deposition conducted on February 17, 2005, and in a supplemental report dated February 20, 2005, Decision and Order at 17, *citing* Employer's Exhibits 1, 4.

[13] Dr. Naeye reviewed the miner's autopsy slides and other evidence and prepared a report dated July 25, 2004. Director's Exhibit 52. He noted that the autopsy slides revealed that the miner suffered from acute lobular pneumonia, mild to moderate centrilobular emphysema and mild to moderate coal workers' pneumoconiosis, with the centrilobular emphysema being the dominant disorder. *Id*. He also noted that the miner's pulmonary function testing revealed severe airway obstruction, "so both bronchitis and bronchiolitis were undoubtedly severe in this man. These lung disorders were the direct cause of both his disability and his death." *Id*. Although he noted that coal mine dust exposure can cause emphysema, chronic bronchitis and bronchiolitis, he concluded that "cigarette smoking rather than occupational exposures to coal mine dust was the cause of" the miner's disabling emphysema, bronchitis, and bronchiolitis and death. *Id*. Dr. Naeye reiterated his conclusions in a deposition conducted on December 16, 2004. Director's Exhibit 55.

because chronic bronchitis "almost always disappears after retirement when the ex-miner had never smoked[,] whereas it persist[s] and often increase[s] in severity in the lungs of cigarette smokers, even when they had quit smoking . . . ." Decision and Order at 20, quoting Employer's Exhibit 1 at 13-14. However, as the administrative law judge determined, this view conflicts with the Department of Labor's view that "pneumoconiosis is a latent and progressive condition that may be detectable after exposure to coal dust has ceased." Decision and Order at 35; *see* 65 Fed. Reg. at 79,971; *Odom*, 342 F.3d at 491, 22 BLR at 2-621; *Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993).

The administrative law judge also indicated, in support of his decision to accord little weight to Dr. Naeye's opinion, that Dr. Naeye excluded coal dust exposure as a cause of the miner's centrilobular emphysema, based on the fact that "centrilobular emphysema is something that is generally found in smokers as opposed to coal miners." Decision and Order at 36. The administrative law judge reasonably determined, however, that Dr. Naeye's statement runs counter to the DOL's view, as reflected in the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2), that centrilobular emphysema can be causally related to coal dust exposure.[14] *Id*.; *see* 65 Fed. Reg. at 79,941-79,942. The administrative law judge also permissibly assigned little weight to Dr. Naeye's opinion because Dr. Naeye's testimony "is confusing and . . . appears to conflate the concepts of legal and clinical pneumoconiosis – discounting the role of coal dust in the [m]iner's emphysema and bronchitis because there was little free silica to cause fibrosis."[15] Decision and Order at 36; *see* 20 C.F.R. §718.201; *Cornett*,

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[14] Contrary to employer's contention, by citing to the Board's decision in *Blankenship v. Clinchfield Coal Co*., BRB No. 07-0622 BLA (May 21, 2008) (unpub.), the administrative law judge did not apply a *per se* rule "that Dr. Naeye's opinion is not reasoned in every case." Employer's Brief in Support of Petition for Review at 29. Rather, the administrative law judge permissibly acknowledged the persuasive reasoning in that case, as support for his own credibility findings with regard to Dr. Naeye. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding that the court is permitted to consider the persuasive reasoning of unpublished cases).

[15] The administrative law judge noted as follows:

> Dr. Naeye stated that what actually causes the bronchitis and the emphysema . . . is the actual composition of the individual mine dust. And the big issue there is the amount of free silica that's available. He noted that there was not much evidence of silicosis[,] and where there was fibrous tissue[,] there was little free silica. He continued by stating that free silica

227 F.3d at 576-77, 22 BLR at 2-121-22; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-151.

In addition, contrary to employer's argument, the administrative law judge acted within his discretion in assigning little weight to Dr. Jarboe's opinion, that the miner did not have legal pneumoconiosis, because his opinion was insufficiently explained and focused on the lack of clinical pneumoconiosis. *See* discussion *supra* at 16-17; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Anderson*, 12 BLR at 1-111; *Clark*, 12 BLR at 1-151. Furthermore, the administrative law judge rationally determined that Dr. Jarboe's reasoning, that "once a miner leaves the industry, he will [not] get progression unless there is evidence of dust retention that will cause this progression," conflicted with the DOL's position that "pneumoconiosis is a latent and progressive condition . . . ." Decision and Order at 36, *quoting* Employer's Exhibit 1 at 13-14; 65 Fed. Reg. at 79,971; *Odom*, 342 F.3d at 491, 22 BLR at 2-621; *Woodward*, 991 at 319, 17 BLR at 2-84.

The administrative law judge also was not persuaded by Dr. Jarboe's reliance, in part, on the fact that the miner's pulmonary function testing revealed significant FEV1 reversibility after the use of bronchodilators and that "coal dust inhalation will tend to cause a fixed impairment, not a reversible impairment." Decision and Order at 36, *quoting* Employer's Exhibit 1 at 9-10. The administrative law judge indicated correctly that the miner's pulmonary function testing revealed values that were qualifying, both before and after the use of bronchodilators and, therefore, he reasonably determined that Dr. Jarboe "did not discuss the role coal dust played in the residual disabling impairment." *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227 (4th Cir. May 11, 2004) (unpub.).

In addition, we hold that the administrative law judge permissibly assigned probative weight to Dr. Alam's opinion, and determined that it is sufficient to meet claimant's burden of establishing the existence of legal pneumoconiosis. The administrative law judge rationally concluded that Dr. Alam sufficiently linked the miner's obstructive impairment to his coal dust exposure and that Dr. Alam's opinion

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> must be present because coal dust itself[,] the worst thing it can do is cause some bronchitis. It won't cause any fibrosis and destroy the walls . . . and lung tissues.

Decision and Order at 36, *citing* Employer's Exhibit 1 (internal quotations omitted).

was entitled to full probative weight, based on his status as a treating physician.[16] *See* discussion *supra* at 16-17; *Williams*, 338 F.3d at 501, 22 BLR at 2-625; *Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-151; *Fields*, 10 BLR at 1-19; Decision and Order at 35. Because the administrative law judge reasonably exercised the broad discretion granted to him in assessing the credibility of the medical experts, we affirm the administrative law judge's decision to assign little weight to the opinions of Drs. Naeye and Jarboe, while assigning full probative weight to Dr. Alam's opinion. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) in the survivor's claim.

Finally, employer argues that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis. Pursuant to 20 C.F.R. §718.205(c), the administrative law judge considered the medical opinions of Drs. Chan, Dennis, Oesterling, Naeye, Breeding, Jarboe and Alam. Dr. Chan, the autopsy prosector, submitted a report, dated April 7, 2004, in which he diagnosed coal workers' pneumoconiosis, bilateral centriacinar emphysema, bilateral pleural adhesions and bronchopneumonia. Director's Exhibit 49. Dr. Chan did not offer an opinion as to the cause of the miner's death.

Dr. Dennis reviewed ten pathology slides and submitted a report dated February 6, 2008. Claimant's Exhibit 3. Dr. Dennis diagnosed the presence of anthracosilicosis,

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[16] As the administrative law judge noted:

> [Dr. Alam] elaborated on the bases for his diagnoses, stating that the [m]iner had severe airflow obstruction on [pulmonary function testing], severe hypoxemia on [arterial blood gas testing] and a chest x-ray with severe emphysema. He attributed the [m]iner's pulmonary impairment, in part, to coal dust. I find that the treatment records provide support for Dr. Alam's legal pneumoconiosis opinion by providing the pulmonary function and arterial blood gas studies and x-rays that he reviewed. While his written report did not reference the [m]iner's coal mine employment and stated only that the [m]iner's pulmonary condition is related to "coal dust," the treating notes contain a reference to [twenty-seven] years of coal mine employment, indicating that Dr. Alam properly considered the [m]iner's employment history.

Decision and Order at 35.

emphysema, fibronodular infiltrate, fibrosis, features compatible with progressive massive fibrosis and coal workers' pneumoconiosis, moderate to severe bronchopneumonia, severe emphysema, pulmonary congestion and edema. *Id*. Dr. Dennis opined that the miner "died a pulmonary death or at least a contribution to the patient's death was because of the underlying pulmonary disease and the presence of bronchopneumonia." *Id*.

Dr. Oesterling reviewed ten pathology slides and produced a report dated May 8, 2008. Employer's Exhibit 5. He concluded that the miner suffered from mild macular coal workers' pneumoconiosis, with a predominant pleural deposition, foci of micronodular change, marked panlobular emphysema and other pulmonary diseases. *Id*. He concluded there was "limited structural change due to coal workers' pneumoconiosis," but that the miner's emphysema "would produce significant alterations in oxygenation and therefore would alter pulmonary function." *Id*. He also concluded that bronchitis and bronchiolitis lead to bronchopneumonia with microabscess formation, but that these disease processes were unrelated to coal dust inhalation. *Id*.

Dr. Naeye concluded, based upon his review of the pathology slides and the miner's records, that "the micronodules of simple clinical coal workers' pneumoconiosis in [the miner's] lungs were too small and too few in number" to have caused the miner's death. Director's Exhibit 52. Although he noted that coal mine dust exposure can cause emphysema, chronic bronchitis and bronchiolitis, he concluded that "cigarette smoking rather than occupational exposures to coal mine dust was the cause of" the miner's disabling emphysema, bronchitis, and bronchiolitis and death. *Id*. Dr. Naeye reiterated his conclusions in a deposition conducted on December 16, 2004. Director's Exhibit 55.

Dr. Breeding indicated, in a report dated August 18, 2004, that pneumoconiosis contributed to the miner's death. Claimant's Exhibit 1. Dr. Jarboe concluded that the immediate cause of the miner's death was infection, with severe emphysema being an underlying cause. Employer's Exhibits 1, 4. In his August 30, 2004 report, Dr. Alam concluded that pneumoconiosis hastened the miner's death. Claimant's Exhibit 1.

In weighing these medical opinions, the administrative law judge determined that Drs. Chan and Oesterling did not offer an opinion as to death causation. Decision and Order at 42. The administrative law judge further found that the opinions of Drs. Breeding and Alam are entitled to little weight because they are insufficiently reasoned and documented, and that Dr. Jarboe's opinion is entitled to little weight because it is insufficiently reasoned. *Id*. at 42-44. In contrast, the administrative law judge accorded "probative weight" to Dr. Dennis's death causation statement and found that it is sufficient to establish death due to pneumoconiosis, because it is well-documented and supported by the opinions of Drs. Oesterling and Naeye. *Id*. at 42. Accordingly, the administrative law judge awarded benefits in the survivor's claim. *Id*. at 44.

Employer maintains that the administrative law judge did not adequately set forth the rationale underlying his finding that Dr. Dennis's opinion constituted a reasoned and documented determination that pneumoconiosis substantially contributed to, or hastened, the miner's death. *See* 20 C.F.R. §718.205(d)(5); *Conley v. Nat'l Mines Corp*., 595 F.3d 297, 303, --- BLR --- (6th Cir. 2010); *Griffith*, 49 F.3d at 186, 19 BLR at 2-116; *Brown*, 996 F.2d at 817, 17 BLR at 2-140. We agree. The Sixth Circuit has held that in order to establish that the miner's death was hastened by pneumoconiosis, a doctor's opinion must show that pneumoconiosis hastened death "through a specifically defined process that reduces a miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. In this case, the administrative law judge has not explained how Dr. Dennis's opinion meets this standard. Thus, the administrative law judge's Decision and Order does not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), 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), which requires that an administrative law judge provide an explanation for all of his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

We, therefore, vacate the administrative law judge's finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and the award of benefits in the survivor's claim, and remand the case for further consideration. We instruct the administrative law judge, on remand, to make specific findings as to whether the evidence is sufficient to establish that pneumoconiosis caused or substantially contributed to the miner's death in accordance with the Sixth Circuit's holding in *Williams*. The administrative law judge must also set forth his findings in detail, including the underlying rationale, as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in Miner's Claim and Award of Benefits in Survivor's Claim is affirmed with respect to the miner's claim, affirmed in part and vacated in part with respect to the survivor's claim, and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur with my colleagues that, in both claims, the administrative law judge permissibly credited Dr. Alam's diagnosis of legal pneumoconiosis and permissibly discredited Dr. Naeye's opinion as to legal pneumoconiosis because he rejected the possibility that centrilobular emphysema could be caused by coal dust inhalation, contrary to the finding of the Department of Labor (DOL), based on accepted medical studies. I also concur in the majority's rejection of employer's arguments that the administrative law judge violated the doctrine of *res judicata* in finding that a change in an applicable condition of entitlement was established in the miner's claim pursuant to 20 C.F.R. §725.309(d) and that 20 C.F.R. §725.309(d) establishes an impermissible irrebuttable presumption. Additionally, I agree that the survivor's claim must be

remanded to the administrative law judge for the reasons set forth by the majority.[17] However, I respectfully differ with my colleagues regarding certain of the grounds on which the administrative law judge discredited Dr. Jarboe's opinion in both the miner's claim and the survivor's claim.

In the miner's claim, Dr. Jarboe found that there was pathological, but not clinical, evidence that the miner had coal workers' pneumoconiosis. Employer's Exhibit 4. He also concluded that the miner had emphysema, but that it was not caused by coal dust exposure because the development of emphysema in coal miners is proportionate to the degree of dust retention in the lungs, and there was no evidence establishing that the miner experienced sufficient dust retention. Director's Exhibit 12; Employer's Exhibits 3, 4. Dr. Jarboe further determined that the results of the miner's pulmonary function studies were characteristic of a cigarette smoking-induced impairment, rather than a coal dust-induced impairment. *Id*. In the survivor's claim, Dr. Jarboe opined that the autopsy slides showed evidence of very mild simple coal workers' pneumoconiosis, which would not have affected the miner's lung function. Employer's Exhibit 1 at 27. He also stated that there was no evidence of the significant dust retention, which would have been expected if coal dust exposure caused the miner's emphysema. *Id*. at 14. Dr. Jarboe opined that the abnormalities on the miner's pulmonary function tests were consistent with an impairment attributable to cigarette smoking or asthma, rather than coal dust inhalation. *Id*. at 15-18. He concluded that the miner's pulmonary impairment, and disability, were caused by smoking and bronchial asthma, and did not arise out of his coal mine employment. *Id*. at 23-24. Based on the nursing home records, the results of the objective tests and the autopsy findings, Dr. Jarboe determined that the immediate cause of the miner's death was infection and that the underlying cause was severe emphysema caused by smoking and, to a lesser extent, asthma. *Id*. at 31, 42.

The administrative law judge discredited Dr. Jarboe's opinion on the ground that he focused his rationale on the lack of clinical pneumoconiosis. Decision and Order at 32, 36. Employer argues that, in so doing, the administrative law judge substituted his opinion for that of a medical expert and mischaracterized, or ignored, relevant evidence. Employer maintains that Dr. Jarboe, consistent with the DOL's preamble to the revised

[17] I also concur in the majority's affirmance of the administrative law judge's unchallenged findings that the miner suffered from clinical pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203, and that the miner suffered from a disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).

regulations, based his opinion as to the cause of the miner's emphysema on the amount of dust retained in the miner's lungs. This argument has merit.[18]

Although the DOL did not specifically state in the preamble to its final regulations that emphysema is caused by coal dust exposure only when dust is retained in the lungs, it cited, with approval, studies finding that the extent of emphysema is related to the amount of dust in the lungs, and used them as support for including obstructive pulmonary diseases in the definition of legal pneumoconiosis, *i.e.*, finding obstructive lung disease can be caused by coal dust exposure.[19] 65 Fed. Reg. 79,920, 79,941-79,942

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[18] In contrast to his treatment of Dr. Jarboe's opinion, the administrative law judge rationally determined that Dr. Naeye's opinion, that the miner's emphysema was not related to coal dust exposure, conflicted with the scientific evidence underlying the definition of legal pneumoconiosis. Dr. Naeye opined that silica in coal dust could cause lung disease, but that coal dust itself can cause, at most, only mild bronchitis. Director's Exhibit 55 at 7, 14-16. Because Dr. Naeye found only small amounts of silica in his review of lung tissue slides, he concluded that the miner's emphysema was not caused by coal dust exposure. *Id*. at 15-16. Dr. Naeye did not cite any evidence to support his opinion that it is only the silica in coal dust that causes lung disease. As the administrative law judge noted, in amending its regulations, the Department of Labor (DOL) reviewed, and cited with approval, studies establishing that emphysema was causally related to coal dust exposure. Decision and Order at 36. The studies cited by the DOL included research finding that the extent of emphysema correlated with the coal dust content of the lungs, but did not correlate with silica content. 65 Fed. Reg. 79,920, 79,942 (Dec. 20, 2000), *citing* Leigh, *Occ. Environ. Med.* 51:400. Consequently, the administrative law judge permissibly discounted Dr. Naeye's unsupported assertion concerning the cause of the miner's centrilobular emphysema. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009).

[19] The findings in the studies cited by the DOL in support of its position include the following:

> Centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers. The severity of the emphysema was related to the amount of dust in the lungs. These findings held even after controlling for age and smoking habits.
>
> . . . .

(Dec. 20, 2000). The DOL's use of these studies to support its definition of *legal* pneumoconiosis, as distinguished from its separate definition of *clinical* pneumoconiosis, logically indicates that relating coal dust retention to coal dust causation is appropriate to a consideration of legal pneumoconiosis, and does not narrowly focus on clinical pneumoconiosis, as the administrative law judge found.[20]

Moreover, it is unclear why the administrative law judge discredited Dr. Jarboe's opinion addressing the miner's emphysema in terms of its relationship to coal dust

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> Leigh performed a multiple regression analysis to assess the effects of total lung coal content . . . on pulmonary function, extent of emphysema, and extent of fibrosis. . . . He made the following important findings: (1) The extent of emphysema was strongly related to the total coal content of the lung, age and smoking; (2) in miners who were life-long non-smokers, the extent of emphysema was strongly related to coal content and age . . . . The authors concluded that "these results provide strong evidence that emphysema in coal workers is causally related to lung coal content."
>
> Ruckley and colleagues achieved similar results in examining the lungs of 450 coal workers to determine the association between coal mine dust exposure and dust-related fibrosis and emphysema. . . . The authors found . . . increasing coal lung dust was associated with the presence of emphysema. . . . Ruckley concluded that "the results support the conclusion that the relationship observed between respirable dust and emphysema in coal workers is, in some way, causal.

65 Fed. Reg. at 79,941-79,942 (citations omitted) (emphasis added).

[20] In affirming the administrative law judge's discrediting of Dr. Jarboe's opinion, the majority cites Dr. Jarboe's statement concerning the lack of x-ray evidence of nodulation or dust retention. Slip op. at 14 n.8. The majority has ignored the fact, however, that Dr. Jarboe's analysis of the causality issue rests upon his review of the miner's CT scans, pulmonary function studies, autopsy reports, and employment and smoking histories, in addition to the miner's x-rays, as is evident from a review of his testimony, including his summary of his rationale which was admitted in both the miner's case and the survivor's case, and his deposition testimony in the survivor's case. *See* Director's Exhibit 12; Employer's Exhibits 1 at 14-15, 2 at 5, 3, 4. Thus, the majority's rejection of Dr. Jarboe's conclusion is based upon a selective reading of the evidence and a mischaracterization of the bases for Dr. Jarboe's opinion.

retention, as focusing on the lack of clinical pneumoconiosis.[21] It may be that the administrative law judge blurred the distinction between clinical pneumoconiosis and legal pneumoconiosis, as employer suggests. *See* Employer's Brief in Support of Petition for Review at 25. More fundamentally, however, the administrative law judge's assertion also falls short of constituting a valid explanation for discrediting Dr. Jarboe's opinion.[22] Thus, with respect to this ostensible rationale for discrediting Dr. Jarboe's opinion, the administrative law judge has failed to comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ."[23] 5 U.S.C. §557(c)(3)(A), as

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[21] In the survivor's claim, this is particularly puzzling, since Dr. Jarboe explicitly stated in his deposition testimony that emphysema is to be considered in the context of legal, not clinical, pneumoconiosis. Employer's Exhibit 1. Dr. Jarboe's deposition contained the following colloquy:

> Q: Now, Doctor, how would a chest x-ray with changes compatible with severe emphysema be supportive of a diagnosis of clinical pneumoconiosis?
>
> A: Well, in my opinion it would not . . . . The fact that the x-ray showed emphysema, in my opinion, would not really allow you to make a diagnosis of clinical pneumoconiosis. You could have emphysema, as we've just discussed, in pneumoconiosis, but I would think more in terms of legal pneumoconiosis . . . in a person who had only emphysema on his chest x-ray.

Id. at 22-23.

[22] As *Martin* v. *Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005) teaches, an individual who has clinical pneumoconiosis necessarily has legal pneumoconiosis as well. Thus, merely sticking a label of clinical pneumoconiosis here does not constitute an explanation. The physicians in this case agreed that the miner had emphysema, but they differed as to its causation. It was this aspect of the opinions that the administrative law judge needed to address.

[23] Determining the credibility of the medical experts is committed, of course, to the discretion of the administrative law judge, and his findings will not be disturbed unless they are not rational or are not supported by substantial evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002);

incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In the survivor's claim, the administrative law judge found that Dr. Jarboe's statements regarding dust retention were contrary to the concept that legal pneumoconiosis is a latent and progressive condition that may only become detectable after exposure to coal dust has ceased.[24] Decision and Order at 36. Employer argues that the administrative law judge's determination is belied by the studies cited approvingly by the DOL, which find that the degree of emphysema is correlated with the amount of coal dust retained in the lungs. As discussed *supra* at 23 n.20, employer's argument has merit. Moreover, the DOL's comments regarding its revised definition of pneumoconiosis, establish that, in this context, the term "exposure" refers to the miner being in an environment in which coal dust outside the body of the miner can be inhaled.[25] Because

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Peabody Coal Co. v. Groves, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

[24] Pursuant to 20 C.F.R. §718.201(c), "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). This provision has been interpreted to mean that pneumoconiosis can be a latent and progressive disease, but is not always, or typically, a latent and progressive disease. *See* 68 Fed. Reg. 69,930-31 (Dec. 15, 2003); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 at 862, 869 (D.C. Cir. 2002).

[25] The following constitutes a sampling of some, but not all, of the instances in which the DOL's statements show that it employs the term "exposure" as described *supra*. In the first notice of proposed rulemaking regarding the revised definition of pneumoconiosis, the DOL stated:

> The Department has long maintained the view that simple pneumoconiosis is an irreversible disease, which may cause progressive deterioration of the lung even after the miner has ceased inhaling coal mine dust . . . . Current medical science supports the Department's position that pneumoconiosis may progress . . . . The authors [of a French study] suggest that pneumoconiosis at all stages progresses, based on "dust loading in the lung, and once this has reached some critical level, *it is not much affected by removal from exposure*."

62 Fed. Reg. 3,343-3,344 (Jan. 22, 1997) (citations omitted) (emphasis added). In its second notice of proposed rule-making, the DOL quoted a statement in which the National Institute of Occupational Safety and Health reported that it:

"dust retention" within the body is not "coal mine dust exposure," as the DOL has used the term, Dr. Jarboe's testimony regarding dust retention does not contravene the regulatory concept that pneumoconiosis may first become detectable "after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Consequently, the administrative law judge erred in considering Dr. Jarboe's statements regarding dust retention within the

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> [A]lso supports the revision of the definition of pneumoconiosis to reflect the scientific evidence that pneumoconiosis is an irreversible progressive condition that may become detectable *only after cessation of coal mine employment*, in some cases.

64 Fed. Reg. 54,978-54,979 (Oct. 8, 1999) (citations omitted) (emphasis added). In the preamble to the final version of the revised regulations, the DOL stated:

> [A] number of medical references document the latent, progressive nature of the disease. [One] contains the observation that "[progressive massive fibrosis (PMF)] . . . may occur *after dust exposure has ceased, even when the miner has left the industry with no apparent simple pneumoconiosis, although this will only occur if the miner has had substantial dust exposure."*
>
> Moreover, . . . the study conducted by Donnan et al. did find significant evidence of latency . . . . Their tables . . . compare [x]-rays taken within two years of the dates on which the 200 miners *left the coal mining industry* with [x]-rays taken 10 years later. They demonstrate that of 138 ex-miners whose early [x]-rays were read as 0/0 or 0/1, 11 had later [x]-rays read as positive for either simple or complicated pneumoconiosis. *This proportion*, 7.97%, has epidemiological significance, and *supports the authors' conclusion that "[t]he results have demonstrated that progression does occur after cessation of exposure."*
>
> Finally, there is also evidence that lung function can continue to deteriorate *after a miner leaves the coal mining industry*. [Another study] demonstrated a decline of pulmonary function in both smoking and non-smoking coal miners that continues over time *even after retirement from mining.*

65 Fed. Reg. 79,970-79,971 (Dec. 20, 2000) (citations omitted) (emphasis added).

body of the miner to be contrary to the Department's recognition of "pneumoconiosis" as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c).

For the foregoing reasons, in addition to vacating the administrative law judge's finding that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(c) in the survivor's claim, I would vacate the administrative law judge's finding, in both claims, that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). I would also vacate the administrative law judge's finding that total disability due to pneumoconiosis was established in the miner's claim, as the administrative law judge's determination, made pursuant to 20 C.F.R. §718.204(c), was based upon his finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). I would instruct the administrative law judge to reconsider the issue of legal pneumoconiosis in both claims, and the issue of total disability due to pneumoconiosis in the miner's claim, in light of a weighing of all relevant evidence, including Dr. Jarboe's opinion.

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JUDITH S. BOGGS
Administrative Appeals Judge