BRB No. 09-0694 BLA

TIMOTHY HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 07/22/2010
	)	
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 Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5709) of Administrative Law Judge Adele H. Odegard awarding benefits on a claim filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Sat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the second

time. In the original Decision and Order, Administrative Law Judge Paul H. Teitler credited claimant with 27 years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Teitler found that the evidence establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)[1] and 718.203(b). Judge Teitler also found that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, Judge Teitler awarded benefits.

In response to employer's appeal, the Board affirmed Judge Teitler's findings that claimant had 27 years of coal mine employment, that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), (3), and that the evidence established total disability at 20 C.F.R. §718.204(b). *T.H.* [*Hensley*] *v. Whitaker Coal Corp.*, BRB No. 07-0442 BLA, slip op. at 2 n.2, 3 (Feb. 29, 2008)(unpub.). However, the Board vacated Judge Teitler's finding that the medical opinion evidence established pneumoconiosis at 20 C.F.R. §718.202(a)(4), and his finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *T.H.* [*Hensley*], slip op. at 6. The Board then instructed Judge Teitler, on remand, to first consider whether the medical opinion evidence established legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *T.H.* [*Hensley*], slip op. at 6-8. Additionally, the Board instructed Judge Teitler to consider whether the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached. *T.H.* [*Hensley*], slip op. at 8.

On remand, the case was transferred to Judge Odegard (the administrative law judge), who found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(a). The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge violated the Administrative Procedure Act (APA) by failing to consider Dr. Rosenberg's deposition testimony. Employer also contends that the administrative law judge erred in relying on Dr. R. Alam's report because it does not comply with the requirements of the evidentiary limitations set forth at 20 C.F.R. §725.414. Further, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer additionally challenges the administrative law judge's finding that the evidence established total

[1] While Administrative Law Judge Paul H. Teitler found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), he found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to employer's brief.[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 supported by substantial evidence, is rational, and is 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Initially, we will address employer's contention that the administrative law judge violated the APA by failing to consider Dr. Rosenberg's deposition testimony. At the August 3, 2006 hearing, Judge Teitler considered admitting Employer's Exhibits 1 through 4 into the record.[4] Although Judge Teitler initially indicated that all of employer's exhibits were admitted into the record, employer's counsel clarified the status of its evidence by stating that it did not have the transcripts for Employer's Exhibits 3 and 4, and then requested an extension of 20 days to submit them into the record. Hearing Transcript at 8-9. Judge Teitler granted employer's counsel's request for additional time.

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[2] Subsequent to the issuance of the administrative law judge's Decision and Order, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. The parties responded to the Board's April 7, 2010 Order, which permitted the parties to submit supplemental briefing in the claim to address the impact, if any, of the 2010 amendments in this case. Because the claim was filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

[3] The record indicates that claimant was last employed in the coal mining industry in Kentucky. Director's Exhibits 3, 6. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] In an evidence summary form, employer listed Dr. Rosenberg's July 21, 2006 deposition, along with Dr. Rosenberg's September 3, 2004 report, as one of the two medical reports it could submit in support of its affirmative case. Employer marked Dr. Rosenberg's deposition as Employer's Exhibit 4.

In his Decision and Order, Judge Teitler stated that Employer's Exhibits 1 through 4 were entered into the record at the August 3, 2006 hearing. 2007 Decision and Order at 5-6. In his summary of the medical opinion evidence, Judge Teitler identified Dr. Rosenberg's September 3, 2004 report as Director's Exhibit 14 and Employer's Exhibit 4. However, Judge Teitler did not consider Dr. Rosenberg's July 21, 2006 deposition. In her Decision and Order on Remand, the administrative law judge considered Dr. Rosenberg's September 3, 2004 report. The administrative law judge also noted that the transcript of the August 3, 2006 hearing indicated that employer was supposed to submit Dr. Rosenberg's deposition into the record post-hearing. Nevertheless, the administrative law judge noted, "the record before me contains no deposition transcript pertaining to Dr. Rosenberg." 2009 Decision and Order on Remand at 4, n.8. An administrative law judge, as trier-of-fact, has broad discretion in dealing with procedural matters. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Based on the particular facts in this case, the administrative law judge reasonably found that Dr. Rosenberg's July 21, 2006 deposition was not admitted into the record after the August 3, 2006 hearing. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider Dr. Rosenberg's deposition testimony.

Next, we address employer's contention that the administrative law judge erred in relying on Dr. R. Alam's report because it does not comply with the requirements of 20 C.F.R. §725.414, as the administrative law judge merely presumed that the records contained in Claimant's Exhibit 2 were the "attached notes" that Dr. R. Alam referred to in a report contained in Claimant's Exhibit 1. By letter dated April 25, 2006, claimant's counsel advised Judge Teitler that he had enclosed Dr. R. Alam's September 7, 2004 report as Claimant's Exhibit 1 and the doctor's treatment records as Claimant's Exhibit 2. In the section of Dr. R. Alam's report that asked the doctor to identify the clinical findings, laboratory results, and pulmonary function test results, Dr. R. Alam noted, "See attached notes." Claimant's Exhibit 1. Dr. R. Alam's treatment records date from December 2000 to July 30, 2004. Claimant's Exhibit 2. It is within an administrative law judge's discretion, as the trier-of-fact, to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Based on the particular facts in this case, the administrative law judge reasonably inferred that the "attached notes" that Dr. R. Alam referred to in his report were the doctor's treatment notes admitted into the record as Claimant's Exhibit 2. *Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR at 1-37. Thus, we reject employer's assertion that the administrative law judge erred in relying on Dr. R. Alam's report because it does not comply with the requirements of 20 C.F.R. §725.414.

Turning to the merits of the case, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the treatment notes of Drs. Gilbert and R. Alam, as well as the reports of Drs. R. Alam, M. Alam, Rosenberg, and Broudy. In his treatment notes, Dr. Gilbert indicated that claimant was treated for upper G.I. bleeding secondary to a gastric ulcer from May 31, 1992 until June 5, 1992. Director's Exhibit 14. Further, in a June 5, 1992 treatment note that listed discharge diagnoses, Dr. Gilbert opined that claimant has chronic obstructive pulmonary disease (COPD) with tobacco abuse. *Id*. In his treatment notes, Dr. R. Alam indicated that claimant was treated for breathing difficulties and was diagnosed with coal workers' pneumoconiosis, COPD, bronchitis, and congestive heart failure. Claimant's Exhibit 2. In a September 7, 2004 report, Dr. R. Alam opined that claimant has coal workers' pneumoconiosis and COPD related to coal dust exposure and smoking. Claimant's Exhibit 1. In an April 14, 2004 report, Dr. M. Alam opined that claimant has chronic bronchitis related to coal dust exposure and tobacco smoking. Director's Exhibit 10. By contrast, in a September 3, 2004 report, Dr. Rosenberg opined that claimant does not have coal workers' pneumoconiosis, and that claimant's COPD was caused by smoking, as opposed to coal dust exposure. Director's Exhibit 14. Similarly, in a June 6, 2006 report, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis, and that claimant's COPD was caused by cigarette smoking.[5] Employer's Exhibit 1. Further, in a July 28, 2006 deposition, Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis and that claimant's obstructive lung condition is not the type that falls under the definition of legal pneumoconiosis. Employer's Exhibit 3 (Dr. Broudy's Deposition at 11-12).

The administrative law judge gave greater weight to Dr. R. Alam's opinion than to the contrary opinions of Drs. Rosenberg and Broudy because of Dr. R. Alam's status as claimant's treating physician. 2009 Decision and Order on Remand at 11, 14. In addition, the administrative law judge gave greater weight to Dr. R. Alam's opinion than to the contrary opinions of Drs. Rosenberg and Broudy because she found that Dr. R. Alam's opinion was better reasoned. *Id*. at 15. Further, the administrative law judge discounted Dr. M. Alam's opinion because she found that it was based on "a limited quantum of evidence," as Dr. M. Alam only considered the evidence generated during his examination of claimant. *Id*. at 12, 15. The administrative law judge gave no weight to Dr. Gilbert's opinion because she found that "[t]he evidence of record does not explain the extent of the treatment relationship between the [c]laimant and Dr. Gilbert." *Id*. at 11. Moreover, the administrative law judge gave no weight to Dr. Gilbert's opinion because Dr. Gilbert did not indicate the basis of his conclusion. *Id*. The administrative law judge,

[5] In a July 6, 2006 report, Dr. Broudy stated that his previous opinions were not changed based on his review of additional medical evidence. Employer's Exhibit 2.

therefore, concluded that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).

Employer argues that substantial evidence does not support the administrative law judge's finding that Dr. R. Alam's opinion was well-reasoned. Specifically, employer asserts that Dr. R. Alam's conclusory statements in a pre-printed form report do not constitute a reasoned medical opinion. In a report dated September 7, 2004, Dr. R. Alam diagnosed "CWP" and "COPD", and checked a box marked "Yes" to indicate that claimant's pulmonary disease was caused, at least in part, by his exposure to coal dust.[6] Claimant's Exhibit 1. Dr. R. Alam noted that claimant's history of exposure to coal dust for 29 years, a pulmonary function study, and a chest x-ray were the bases for his diagnosis of COPD related to coal dust exposure. *Id.* In a section of the report that provided the doctor with an opportunity to identify the clinical findings, laboratory results, and pulmonary function test results that showed claimant's medical impairments, Dr. R. Alam noted, "See attached notes." *Id.* The 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), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge found that Dr. R. Alam's opinion was based on the doctor's ongoing treatment relationship with claimant, the doctor's observations of claimant's condition, and the results of objective medical tests. 2009 Decision and Order on Remand at 11. However, while the administrative law judge's findings indicated that Dr. R. Alam's opinion was documented, her findings do not indicate that the doctor's opinion was reasoned. As employer asserts, Dr. R. Alam did not provide an explanation for his opinion that claimant's COPD was related to coal dust exposure, as the doctor did not explain how the underlying documentation supported his diagnosis. *Clark*, 12 BLR at 1-155. Further, without additional explanation by the administrative law judge, it is unclear how she found that Dr. R. Alam's opinion was well-reasoned regarding the issue of legal pneumoconiosis. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Thus, we hold that the administrative law judge erred in failing to adequately explain why she gave greater weight to Dr. R. Alam's opinion.

Employer also argues that the administrative law judge erred in relying on Dr. R. Alam's opinion because of the doctor's status as claimant's treating physician. In its previous Decision and Order, the Board instructed the administrative law judge to apply the provisions of 20 C.F.R. §718.104(d), when considering the opinions of the treating

[6] Dr. R. Alam noted that the cause of claimant's pulmonary disease was "[p]artly coal dust exposure [and] [p]artly smoking." Claimant's Exhibit 1.

physicians.[7] In her Decision and Order on Remand, the administrative law judge noted the criteria set forth at Section 718.104(d). In considering Dr. R. Alam's opinion that claimant has legal pneumoconiosis, the administrative law judge stated:

> [T]he treatment notes of Dr. R. Alam reflect a physician-patient relationship that endured over several years, involved repeated visits at frequent intervals, and focused on the treatment of the [c]laimant's pulmonary condition. The treatment notes reflect that Dr. R. Alam saw the [c]laimant regularly; recorded observations of the [c]laimant's physical condition; administered various medical tests, including repeated pulmonary function tests; prescribed medications; and adjusted the [c]laimant's treatment regimen, based on the [c]laimant's varying condition.

2009 Decision and Order on Remand at 11. The administrative law judge further found that Dr. R. Alam's opinion was based on the doctor's ongoing treatment of claimant, the doctor's observations of claimant's condition, and the results of claimant's objective medical tests. The administrative law judge then stated, "[t]herefore, I give increased weight to the opinion of Dr. R. Alam under §718.104(d), based on his status as the [c]laimant's treating physician." *Id*. However, as employer argues, the administrative law judge did not adequately explain why she gave greater weight to Dr. R. Alam's opinion based on any of the factors that she noted at Section 718.104(d). *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165. Further, as discussed *supra*, the administrative law judge erred in failing to adequately explain why she found that Dr. R.

[7] Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

Alam's opinion was well-reasoned. *Id*. Consequently, the administrative law judge erred in failing to properly consider Dr. R. Alam's opinion in accordance with the criteria set forth at Section 718.104(d) and *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

Employer additionally argues that the administrative law judge erred in failing to compare Dr. R. Alam's lack of qualifications to the superior qualifications of Drs. Rosenberg and Broudy. In her Decision and Order on Remand, the administrative law judge acknowledged that the record did not contain Dr. R. Alam's professional credentials. The administrative law judge nonetheless found that the professional credentials of a physician were not as critical in assessing the importance of the opinion of a treating physician as the nature of the treatment, frequency of the treatment, and length of contact for the treatment. 2009 Decision and Order on Remand at 14, n.25. Contrary to employer's assertion, the criteria set forth at Section 718.104(d) do not provide that the adjudication officer must consider the qualifications of the treating physician. Nevertheless, on remand, the administrative law judge should consider the qualifications of the physicians. *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

In addition, employer argues that the administrative law judge erred in failing to consider that Dr. R. Alam did not address claimant's current cigarette smoking history. Contrary to employer's assertion that claimant was still smoking when Dr. R. Alam treated him,[8] the administrative law judge reasonably found that claimant stopped smoking shortly after he left the coal mining industry in 1995.[9] 2009 Decision and Order on Remand at 14. Further, the administrative law judge properly found that the value of Dr. R. Alam's opinion was not diminished because it was based on an inadequate assessment of claimant's smoking history. *Id*. at 14. Based on her assessment of the smoking histories noted in the medical reports, the administrative law judge found that "the [c]laimant has a smoking history of up to 60 pack-years (30 years at 2 packs per day)." *Id*. at 10. Further, the administrative law judge reasonably found that the smoking history of two packs per day for 30 years that Dr. R. Alam relied on was among the highest smoking histories contained in the record. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider that Dr. R. Alam did not address claimant's current cigarette smoking history. The Board will not interfere with

[8] Dr. R. Alam indicated that he has treated claimant since December of 2000. Claimant's Exhibit 1.

[9] The administrative law judge found that it was not clear that claimant stopped smoking before he left his coal mine employment in 1995. 2009 Decision and Order on Remand at 14.

credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

Employer also argues that the administrative law judge erred in giving weight to Dr. M. Alam's opinion because it is not documented or supported by the objective evidence. Contrary to employer's assertion, Dr. M. Alam's April 14, 2007 report noted that Dr. M. Alam relied on a physical examination, a smoking history, a coal mine employment history, a chest x-ray, a pulmonary function study, and an arterial blood gas study. *See* Director's Exhibit 10; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In considering Dr. M. Alam's report, the administrative law judge stated, "[Dr. M. Alam] also noted that pulmonary function tests showed moderate to severe obstruction with positive bronchodilator response; chest X-ray showed minimal infiltrates; and arterial blood gas tests showed no significant hypoxia." 2009 Decision and Order on Remand at 12. The administrative law judge therefore stated, "[b]ased on the written report, I find that Dr. M. Alam considered the [c]laimant's work and smoking history (sic) and the results of the medical tests in his conclusion." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in giving weight to Dr. M. Alam's opinion because it is not documented or supported by the objective evidence.

Employer additionally argues that the administrative law judge erred in failing to consider that Dr. M. Alam did not take into account the negative interpretation of the April 14, 2004 x-ray film. Contrary to employer's assertion, the administrative law judge correctly found that Dr. M. Alam noted, "chest X-ray showed minimal infiltrates." 2009 Decision and Order on Remand at 12. An administrative law judge may find that a physician's opinion establishes the existence of pneumoconiosis even if there is a negative x-ray. *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). Thus, we reject employer's assertion that the administrative law judge erred in failing to consider that Dr. M. Alam did not take into account the negative interpretation of the April 14, 2004 x-ray film.

Employer further argues that the administrative law judge erred in failing to consider that Dr. M. Alam's report is too equivocal to establish legal pneumoconiosis. In his report, Dr. M. Alam opined that claimant has chronic bronchitis and that claimant's chronic lung disease was related to tobacco abuse and coal dust exposure. Director's Exhibit 10. Dr. M. Alam also opined that claimant has a mixed respiratory problem pertaining to coal dust exposure and tobacco abuse. *Id*. The administrative law judge did not consider whether Dr. M. Alam's diagnosis of chronic bronchitis related to coal dust exposure constituted an opinion that claimant has legal pneumoconiosis. Rather, the administrative law judge stated, "I find that Dr. M. Alam's opinion, which states that he believes the [c]laimant's condition is a 'mixed respiratory problem' pertaining to coal dust exposure and past tobacco abuse, constitutes an opinion that the [c]laimant has legal

pneumoconiosis, as defined in §718.201(a)(2)." 2009 Decision and Order on Remand at 12. However, Dr. M. Alam made equivocal statements in the section of his report concerning the etiology of claimant's respiratory impairment, inasmuch as the doctor stated that "[s]ince [claimant] quit smoking in 1994 & worked till 1995, [it is] *possible* that coal dust and [tobacco] abuse can be the major cause." *Id*. (emphasis added). Thus, because the administrative law judge's finding that Dr. M. Alam opined that claimant has legal pneumoconiosis was based on the doctor's conclusions regarding the etiology of claimant's respiratory impairment, the administrative law judge erred in failing to consider the effect, if any, of Dr. M. Alam's equivocal statements in weighing the medical opinion evidence at Section 718.202(a)(4). *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

In addition, employer argues that the administrative law judge erred in failing to explain how Dr. M. Alam's consideration of an inaccurate smoking history affected her credibility determination for his opinion. As discussed *supra*, the administrative law judge found that claimant has a 60 pack-year smoking history. 2009 Decision and Order on Remand at 10. In considering Dr. M. Alam's opinion, the administrative law judge found that the smoking history that Dr. M. Alam considered was much less than her smoking-history finding.[10] However, as employer asserts, the administrative law judge erred in failing to explain what impact claimant's smoking history had on the credibility of Dr. M. Alam's opinion. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988).

Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Broudy, as she erroneously substituted her opinion for that of the experts. In considering the opinions of Drs. Rosenberg and Broudy at Section 718.202(a)(4), the administrative law judge stated:

> Both Dr. Broudy and Dr. Rosenberg hinged their conclusions that the [c]laimant's condition was not related to his coal mine dust exposure on the reversibility of his impairment. However, that data indicates the [c]laimant's impairment is only partially reversible. It is possible, therefore, that the [c]laimant may have a reversible pulmonary impairment superimposed upon an irreversible impairment. It is recognized that a

[10] The administrative law judge noted that Dr. M. Alam did not quantify the smoking history he relied on. However, based on Dr. M. Alam's report, the administrative law judge determined that Dr. M. Alam concluded that claimant smoked from 1958 to 1994. The administrative law judge further determined that Dr. M. Alam concluded that claimant smoked less than one cigarette per day on average from 1970 to 1994.

> residual fixed impairment could meet the definition of legal pneumoconiosis.

2009 Decision and Order on Remand at 13. The administrative law judge further stated that "[Dr. Rosenberg's and Dr. Broudy's] failure either to recognize or to discuss that the [c]laimant demonstrated an underlying disabling fixed impairment detracts from the credibility of their conclusions." *Id*.

To the extent that the administrative law judge discounted the opinions of Drs. Rosenberg and Broudy because they did not find that claimant demonstrated an underlying disabling fixed impairment, we hold that the administrative law judge impermissibly discounted those opinions because they did not comply with her own medical conclusion that claimant has a disabling fixed impairment related to coal dust exposure. *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Furthermore, we hold that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Broudy by finding that the doctors hinged their conclusions that claimant's condition was not related to coal mine dust exposure on the reversibility of his impairment, inasmuch as the doctors also based their opinion on the fall in claimant's FEV1% and the marked air trapped in his lungs. *See* Director's Exhibit 14; Employer's Exhibit 3 (Dr. Broudy's Deposition at 8-10); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Employer also argues that the administrative law judge erred in discounting Dr. Broudy's opinion when Dr. Broudy conceded that it was possible for coal dust exposure to cause an obstructive impairment. During a July 28, 2006 deposition, Dr. Broudy stated that coal dust exposure usually causes a restrictive impairment, while cigarette smoking usually causes an obstructive impairment. Employer's Exhibit 3 (Dr. Broudy's Deposition at 10). Further, in addressing whether coal dust exposure can cause an obstructive impairment, Dr. Broudy stated that "it can be a mixed defect with obstruction and restriction; but there's usually … no improvement after bronchodilation with coal-dust exposure whereas there may or may not be with cigarette smoking." Employer's Exhibit 3 (Dr. Broudy's Deposition at 11). After noting that Dr. Broudy remarked that pulmonary impairments related to coal dust exposure are generally restrictive, while impairments related to smoking are generally obstructive, the administrative law judge stated:

> The regulation recognizes that coal dust-related pulmonary conditions may include obstructive impairments. §718.201(a)(2); see also 65 Fed. Reg. 79930-40 (Dec. 20, 2000). Based on Dr. Broudy's testimony, it appears he believes coal dust does not normally cause an obstructive impairment; however, on cross-examination he conceded that it is possible for coal dust to cause such an impairment. EX 3 at 13. Therefore, I find that Dr.

> Broudy's opinion does not necessarily exclude coal dust as a causative factor in obstructive impairments.

2009 Decision and Order on Remand at 14. Nevertheless, the administrative law judge found that Dr. Broudy did not analyze his conclusions regarding the cause of claimant's impairment in light of the Department of Labor's definition of legal pneumoconiosis. *Id*. at 15.

It is within an administrative law judge's discretion to discount a medical opinion that is inconsistent with the medical literature credited by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment.[11] *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117 (2009). In this case, the administrative law judge properly discounted Dr. Broudy's opinion that claimant's COPD was related to cigarette smoking, and not coal dust exposure, because Dr. Broudy did not analyze his conclusions regarding the cause of claimant's impairment in light of the Department of Labor's definition of legal pneumoconiosis. *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 125-26. Thus, we reject employer assertion that the administrative law judge erred in discounting Dr. Broudy's opinion when Dr. Broudy conceded that it was possible for coal dust exposure to cause an obstructive impairment.

Employer additionally argues that the administrative law judge is biased against Dr. Rosenberg. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, we reject employer's assertion. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Finally, employer argues that the administrative law judge's consideration of the medical opinion evidence favorable to claimant was inconsistent with her consideration

[11] The preamble to the amended regulations sets forth how the Department of Labor has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). An administrative law judge may evaluate expert opinions, therefore, in conjunction with the Department of Labor's discussion of sound medical science in the preamble to the amended regulations. *See Zeigler Coal Co. v. Kerr* [*Griskell*], 240 F.3d 572, 22 BLR 2-247 (7th Cir. 2000), *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). However, while the Department of Labor's findings regarding the scientific studies support a view that obstructive lung conditions may be due to coal dust exposure, a claimant is not relieved of the burden of proving that a lung disease falls within the definition of pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4), 718.204(c); *see* 65 Fed. Reg. 79938-44 (Dec. 20, 2000).

of the medical opinion evidence favorable to employer. Specifically, employer asserts that the administrative law judge criticized Dr. Rosenberg's opinion because Dr. Rosenberg cited to medical studies but did not discuss them more fully and she discounted Dr. Broudy's opinion for not citing to scientific studies, yet she credited Dr. R. Alam's opinion, even though the doctor did not cite to supporting scientific studies or offer an explanation for his conclusions. Contrary to employer's assertion, the administrative law judge properly followed the Board's instructions on remand by considering the opinions of Drs. Rosenberg and Broudy with regard to whether the doctors cited to scientific studies and offered an explanation for their conclusion that claimant does not have legal pneumoconiosis. In its Decision and Order, the Board instructed Judge Teitler that he should assess whether the explanations provided by Drs. Rosenberg and Broudy were consistent with the definition of pneumoconiosis adopted by the Department of Labor and the conclusions expressed in the scientific studies that it relied on in drafting the definition. *T.H.* [*Hensley*], slip op. at 8. Thus, because the administrative law judge properly followed the Board's instructions on remand with regard to whether the opinions of Drs. Rosenberg and Broudy were consistent with the definition of pneumoconiosis adopted by the Department of Labor and the conclusions expressed in the scientific studies that it relied on in drafting the definition, we reject employer's assertion that the administrative law judge's consideration of the opinions of Drs. Rosenberg and Broudy was inconsistent with her consideration of the opinions of Drs. R. Alam and M. Alam.

In view of the foregoing, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and remand the case for further consideration of the medical opinion evidence in accordance with the APA.

On remand, when considering the medical opinion evidence, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Because we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established that claimant's legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(a).[12]

[12] On remand, if the administrative law judge finds that the medical opinion

Furthermore, because we herein vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and remand the case for further consideration of all the evidence in accordance with the APA.

If reached, on remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[13] *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). The administrative law judge must specifically consider whether legal pneumoconiosis contributed to claimant's totally disabling respiratory impairment at 20 C.F.R. §718.204(c).

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evidence establishes the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), then she need not separately determine the etiology of the disease at 20 C.F.R. §718.203, as her findings at Section 718.202(a)(4) will necessarily subsume that inquiry. *Kiser v. L&J Equipment Co.*, 23 BLR 1-146, 1-159, n.18 (2006).

[13] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.[14]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[14] Claimant's counsel submitted an attorney fee petition, requesting a payment of $225.00 for 1 hour of legal services rendered before the Board from December 5, 2008 to June 21, 2009 at an hourly rate of $225.00. Employer filed a response in which it asserts that claimant's counsel's fee petition is premature. We decline to address the fee petition at this stage in the proceedings because the extent of claimant's success in prosecuting the claim is yet to be determined. 20 C.F.R. §802.203; *see Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(*en banc*)(Brown, J., concurring); *Markovich v. Bethlehem Steel Corp.*, 11 BLR 1-105 (1987).