BRB No. 13-0423 BLA

PEARL SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINE BRANCH COAL SALES, INCORPORATED	)	DATE ISSUED: 06/18/2014
	)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

Maia S. Fisher (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05165) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim filed on January 22, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with 13.5 years of coal mine employment with "2.4 years of underground coal mining and 11.1 years of surface mining." Decision and Order at 7. Based on his finding that claimant established fewer than fifteen years of coal mine employment, the administrative law judge determined that claimant was unable to invoke the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] However, the administrative law judge determined that the newly submitted evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] In consideration of the merits of the claim, the administrative law judge determined that claimant established the existence of legal pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant

[1] Claimant filed a claim for benefits on June 11, 1992, which was denied by Administrative Law Judge J. Michael O'Neill on May 31, 1994, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on August 16, 2001, which was denied by Administrative Law Judge Alice M. Craft on July 28, 2004, because claimant again did not establish any of the requisite elements of entitlement. *Id*. Claimant filed a third claim for benefits on August 25, 2005, which was denied by Administrative Law Judge Donald W. Mosser on December 16, 2008, because claimant still did not establish any of the requisite elements of entitlement. *Id*. Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibit 3.

[2] Amended Section 411(c)(4) provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis if he establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The language set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[4] "'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in evaluating the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer contends that the administrative law judge mischaracterized Dr. Jarboe's opinion and erred in according it less weight. Employer asserts that Dr. Ammisetty's opinion is legally insufficient to establish the existence of legal pneumoconiosis.[5] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, asserting that the administrative law judge properly considered the preamble in resolving the conflict in the medical opinion evidence. Employer has filed a reply brief, reiterating its arguments.[6]

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.[7] 33 U.S.C. §921(b)(3), as incorporated by 30

[5] We affirm, as unchallenged by employer on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Additionally, although employer generally asserts that the administrative law judge "overestimated [claimant's] work history by 1.7 years," employer does not explain with specificity the administrative law judge's alleged error. Employer's Brief in Support of Petition for Review at 5 n.2. We therefore affirm the administrative law judge's finding that claimant established 13.5 years of coal mine employment. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[6] In its Reply Brief, employer alleges that a Senate investigation, completed since the administrative law judge issued his Decision and Order, reveals that Dr. Ammisetty engaged in inappropriate collusion when issuing medical opinions in Social Security Disability Claims. Employer asserts that this issue bears on the credibility of Dr. Ammisetty's opinion, and should be considered by the administrative law judge. The Board, however, is limited to review of the record that was filed and admitted before the administrative law judge, which does not include evidence referred to by employer. *See generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). Consequently, the Board will not consider employer's allegations on this issue.

[7] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4;

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is 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. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. LEGAL PNEUMOCONIOSIS

In considering whether claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge observed that "there appears to be a consensus that [claimant] has developed disabling [chronic obstructive pulmonary disease (COPD)]/emphysema since his last claim for benefits." Decision and Order at 28. The administrative law judge noted that Dr. Ammisetty attributed claimant's disabling COPD, chronic bronchitis and bronchial asthma to cigarette smoking, but also opined that coal dust exposure "significantly exacerbated" his respiratory disease. *Id*. at 29. The administrative law judge found that Dr. Ammisetty's opinion supported a finding of legal pneumoconiosis, and was entitled to controlling weight, because it was documented, reasoned and consistent with the preamble to the regulations. *Id*. at 32-33. The administrative law judge determined that while Dr. Baker also diagnosed legal pneumoconiosis, in the form of COPD substantially related to, and aggravated by, coal dust exposure, his opinion was entitled to "reduced" weight "due to his reliance on an overstated coal mine employment history and an understated smoking history." *Id*. at 33. The administrative law judge also considered Dr. Jarboe's opinion, that claimant's disabling COPD/emphysema was due entirely to smoking and was not related to coal dust exposure, and found it to be unpersuasive, inconsistent with the preamble, and entitled to "little weight." *Id*. at 38. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

A. Preamble to the Regulations

A substantial portion of employer's brief is devoted to its assertion that the administrative law judge erred in relying on the preamble as the "criterion for crediting or

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Hearing Transcript at 16.

discrediting" the medical opinions, in violation of the Administrative Procedure Act.[8] Employer's Brief in Support of Petition for Review at 18-27. Employer argues that use of the preamble without notice to the parties deprived employer of its constitutional right to a fair hearing; and that, because the preamble was not subject to notice and comment rulemaking, the discussion in the preamble is entitled to no weight. Employer's arguments are without merit.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has acknowledged that the preamble sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135 (6th Cir. 2012). The court held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12. The court concluded, therefore, that an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *Id*.

The administrative law judge conducted a proper analysis in this case, determining whether the opinions of Drs. Jarboe and Ammisetty were reasoned, and documented, and consistent with the principles underlying the regulations, as set forth in the preamble. Accordingly, we reject employer's assertion that the administrative law judge erred in using the preamble as guidance in evaluating the medical opinion evidence. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). Additionally, as discussed *infra*, we reject employer's contention that the administrative law judge misinterpreted the preamble in reaching his credibility determinations. Rather, the administrative law judge properly stated the medical principles that have been accepted by the DOL in revising the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See* 20 C.F.R. §718.201.

[8] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

B. The opinion of Dr. Jarboe

We reject employer's argument that the administrative law judge mischaracterized Dr. Jarboe's opinion in finding that he expressed views that are inconsistent with the preamble. The administrative law judge noted correctly that Dr. Jarboe "relies on a decreased FEV1/FVC ratio to rule out coal dust exposure as a cause of [claimant's] obstructive impairment." Decision and Order at 36. Specifically, Dr. Jarboe cited to a study indicating that "[s]moking [is] associated with a reduction in the ratio of FEV1/FVC (i.e. FEV1 was reduced more than FVC), but dust exposure was not related to this ratio." Employer's Exhibit 8. Dr. Jarboe stated that "when the inhalation of coal mine dust causes an impairment[,] there tends to be a proportionate or parallel reduction of FVC and FEV1." *Id*. Dr. Jarboe reasoned that coal dust exposure was not a cause of claimant's respiratory impairment because his "FEV1 is reduced far out of proportion to the FVC." Employer's Exhibit 1. The administrative law judge rationally assigned less weight to Dr. Jarboe's opinion to the extent that it is contrary to the position of the DOL that "coal dust exposure can cause clinically significant obstructive lung disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV1/FVC ratio." 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Banks*, 690 F.3d at 489, 25 BLR at 2-151; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 36.

Furthermore, as a basis for his opinion that claimant does not suffer from legal pneumoconiosis, Dr. Jarboe noted that testing of claimant's "total lung capacity confirms that [claimant] has no true restrictive defect." Employer's Exhibit 1. The administrative law judge rationally assigned less weight to Dr. Jarboe's opinion because the definition of "legal pneumoconiosis encompasses restrictive and obstructive lung impairments." Decision and Order at 35, *citing* 20 C.F.R. §718.201(a)(2); *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Dr. Jarboe also indicated that "[a]nother finding not characteristic of coal dust induced lung disease is the fact that [claimant] has reversible airway disease (asthma)." Employer's Exhibit 1. However, the administrative law judge noted correctly that claimant's "pulmonary function studies were still qualifying [for total disability] under the tables after the use of bronchodilators" and "therefore, a substantial portion of the Claimant's impairment is fixed and nonreversible." Decision and Order at 35. The administrative law judge permissibly found that "Dr. Jarboe does not adequately explain how a component of partial reversibility due to asthma would allow him to rule out coal dust exposure as a significant cause or aggravating factor with regard to the fixed, non-reversible component of the Claimant's obstructive defect." *Id.*; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.).

Finally, the administrative law judge observed correctly that Dr. Jarboe excluded coal dust exposure as a potential cause of claimant's emphysema because Dr. Jarboe reasoned that "there should be some evidence of at least minimal deposition of dust in the lungs in the form of nodular opacities." Employer's Exhibit 10 at 21-22; *see* Decision and Order at 37-38. The administrative law judge rationally determined that Dr. Jarboe's position is "contrary to the DOL position . . . which holds that coal dust can cause emphysema independent of the presence of clinical pneumoconiosis."[9] Decision and Order at 37-38, *see* 65 Fed. Reg. 79,939 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Banks*, 690 F.3d at 489, 25 BLR at 2-151. Thus, for all of the above stated-reasons, we affirm the administrative law judge's decision to give Dr. Jarboe's opinion little probative weight.

C. The opinion of Dr. Ammisetty

Employer also contends that the administrative law judge erred in relying on Dr. Ammisetty's opinion to find that claimant has legal pneumoconiosis. Employer maintains that Dr. Ammisetty's statement, that claimant's COPD was "significantly *exacerbat*[*ed*]" by coal dust exposure, does not meet the regulatory definition of legal pneumoconiosis. Director's Exhibit 12 (emphasis added). Employer argues that the administrative law judge substituted his opinion for that of a medical expert by conflating "Dr. Ammisetty's use of the term exacerbated with the term aggravation found in the definition of legal pneumoconiosis." Employer's Brief in Support of Petition for Review at 16 (internal quotations omitted). We reject employer's arguments as they are without merit.

The administrative law judge acknowledged that the "definition of legal pneumoconiosis refers to aggravation, not exacerbation." Decision and Order at 32 (internal quotations omitted). Contrary to employer's argument, the administrative law judge permissibly concluded that Dr. Ammisetty's use of the term "exacerbation" in his report was not "significantly discrediting" since Dr. Ammisetty also specifically

[9] To support his exclusion of coal dust exposure as a causative factor, Dr. Jarboe cited to studies indicating that "a miner would have to work 35 years with [a mean respirable dust level of 2 mg per cubic meter] to develop clinically important (not necessarily disabling) loss of FEV1 attributable to dust." Employer's Exhibit 1. The administrative law judge rationally concluded that Dr. Jarboe expressed views that are inconsistent with the science cited in the preamble, indicating that the "incidence of non-smoking miners with intermediate exposure developing severe airways obstruction (FEV1 of less than 65%) is equal to the incidence of severe obstruction in non-mining smokers." Decision and Order at 36, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012).

diagnosed "legal pneumoconiosis," in the same report. Decision and Order at 32; *see* Director's Exhibit 12. Moreover, the administrative law judge noted that, during his deposition conducted on October 11, 2011, Dr. Ammisetty clarified his opinion, stating that coal dust "definitely" was a "significant contributing factor in [claimant's] pulmonary status even though he is smoking." Employer's Exhibit 11 at 39-40. Based on this testimony, the administrative law judge reasonably concluded that Dr. Ammisetty's opinion is supportive of a finding of legal pneumoconiosis under the regulations.[10] *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Moreover, we reject employer's contention that Dr. Ammisetty's opinion does not satisfy claimant's burden of proof because he did not specifically differentiate how much of claimant's respiratory impairment was due to smoking as opposed to coal dust exposure. Employer's Brief in Support of Petition for Review at 16-17. Even though a physician cannot establish the precise percentage of lung obstruction attributable to cigarette smoke and coal dust exposure, such exact findings are not required for claimant to establish that he has a chronic respiratory condition arising out of coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

Employer also asserts that the administrative law judge should have rejected Dr. Ammisetty's opinion because he did not have an accurate understanding of the nature of claimant's coal mine work and the length of his coal dust exposure. We disagree. Where a discrepancy exists between the administrative law judge's finding as to a miner's length of coal mine employment and the assumption by the physicians regarding that miner's length of coal mine employment, the administrative law judge must note the discrepancy, determine whether it is significant, and explain how it affects the credibility of the physicians' opinions. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709, 11 BLR 2-86, 2-91 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993);

[10] The administrative law judge stated that he "interpret[ed]" Dr. Ammisetty to be diagnosing a permanent exacerbation because he "examined the Claimant after his retirement from coal mining[.]" Decision and Order at 32. The administrative law judge concluded that Dr. Ammisetty "considered the Claimant's coal dust exposure to have been responsible for increasing the severity of the Claimant's disease or symptoms." *Id*. Although employer contends that the administrative law judge erred in drawing conclusions from Dr. Ammisetty's opinion, we consider any error by the administrative law judge in this regard to be harmless, as we affirm his reliance on Dr. Ammisetty's actual statements during his deposition to find legal pneumoconiosis established. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Clark, 12 BLR at 1-155. In this case, the administrative law judge conducted the proper analysis. When weighing Dr. Ammisetty's opinion, the administrative law judge acknowledged that "Dr. Ammisetty relied upon a coal mine employment history of seventeen years, instead of the 13.5 years" the administrative law judge found to be established. Decision and Order at 30. The administrative law judge observed correctly that, when asked to assume a coal mine employment history of twelve years, Dr. Ammisetty "maintained his opinion on legal pneumoconiosis."[11] *Id*. Because we discern no abuse of discretion, we affirm the administrative law judge's finding that Dr. Ammisetty's opinion was credible, despite his reliance on a coal mine history of seventeen years. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122.

Furthermore, although employer is correct that Dr. Ammisetty did not know that claimant's coal mine work was on the surface, the administrative law judge specifically discussed how this influenced the weight to accord his opinion. The administrative law judge noted that "Dr. Ammisetty indicated that he was operating on the assumption that the Claimant's coal mine history was primarily underground, whereas [the administrative law judge] found that his coal mine employment was primarily aboveground." Decision and Order at 30. The administrative law judge acknowledged that "this discrepancy casts doubt on the reliability" of Dr. Ammisetty's opinion "[b]ecause Dr. Ammisetty indicated on deposition that he considered work on the surface, and specifically, driving a coal truck, less injurious than coal mining in terms of dust exposure." *Id*. at 31. However, contrary to employer's argument, the administrative law judge rationally concluded that "these doubts may be allayed" with "evidence establishing that the Claimant's dust exposure as an aboveground miner was substantially similar to that of an underground miner." *Id*.

The administrative law judge extensively summarized claimant's hearing testimony regarding his dust exposure on the surface driving a truck and bulldozer, working in the pit and on "the crusher used to make stoker coal," and working with the

[11] There is no merit to employer's assertion that the administrative law judge mischaracterized Dr. Ammisetty's testimony. *See* Employer's Brief in Support of Petition for Review at 12-13. Employer specifically argues that, when asked to assume a shorter coal mine employment history, Dr. Ammisetty maintained his opinion that claimant is totally disabled from a respiratory impairment, but never testified that claimant still suffers from legal pneumoconiosis. *Id*. However, the record reflects that Dr. Ammisetty was asked to assume twelve years of coal mine employment, and stated that "[fourteen or twelve] years of coal mines, definitely [is] a contributing factor" to claimant's impairment. Employer's Exhibit 11 at 40-42.

powder crew as a mechanic. Decision and Order at 31-32; *see* Hearing Transcript at 24-25, 27, 54-62. Based on claimant's testimony, the administrative law judge permissibly found that "regardless of when the Claimant moved from working underground to working on the surface, he nonetheless continued to experience levels of dust that were substantially similar to those he had previously experienced underground [and] many . . . were actually dustier[.]"[12] Decision and Order at 32; *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Creech*, 841 F.2d at 709, 11 BLR at 2-91; *Worhach*, 17 BLR at 1-110 (1993); *Clark*, 12 BLR at 1-155.

Because the administrative law judge has discretion to determine the credibility of the evidence, we affirm the administrative law judge's finding that Dr. Ammisetty's opinion is documented and reasoned.[13] *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Banks*, 690 F.3d at 489, 25 BLR at 2-151; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 33. Thus, we affirm the administrative law judge's decision to give controlling weight to Dr. Ammisetty's

[12] Contrary to employer's assertion, claimant was not required to explain how each individual job he performed on the surface was "dusty or dustier than the conditions he experienced underground." Employer's Brief in Support of Petition for Review at 11. Rather, it was sufficient for the administrative law judge to consider whether claimant's surface coal mine working conditions regularly exposed him to coal mine dust, in finding that claimant showed substantial similarity. *See* 78 Fed. Reg. at 59,105; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80, 22 BLR 2-265, 2-275 (7th Cir. 2001); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

[13] Employer argues that the administrative law judge's decision to credit Dr. Ammisetty's opinion is inconsistent with the Board's holding in *W.P.* [*Penrod*] *v. Peabody Coal Co.*, BRB No. 08-0609 BLA (June 26, 2009) (unpub). We disagree. In *Penrod*, the Board instructed the administrative law judge to address whether a physician's diagnosis of legal pneumoconiosis was reasoned and documented, in addition to being consistent with the preamble to the regulations, taking into consideration the objective evidence, and the underlying documentation and rationale provided by the physician. Because the administrative law judge explained why he found Dr. Ammisetty's opinion to be reasoned and documented, he has done exactly what the Board required in *Penrod*.

opinion, and his finding that claimant established the existence of legal pneumoconiosis.[14]

II. DISABILITY CAUSATION

The regulations provide that a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis 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). Because the administrative law judge found that the evidence was "sufficient to establish that [claimant] has legal pneumoconiosis on the basis of COPD/emphysema significantly related to, or substantially aggravated by, coal dust exposure," the administrative law judge concluded that claimant also satisfied his burden of proof under 20 C.F.R. §718.204(c). Decision and Order at 42.

Contrary to employer's contention, the administrative law judge properly rejected the opinion of Dr. Jarboe relevant to the issue of disability causation because he did not diagnose pneumoconiosis, contrary to the administrative law judge's findings. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom*., *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 42. Because the administrative law judge permissibly determined that Dr. Ammisetty provided a reasoned and documented opinion, that coal dust exposure substantially contributed to claimant's disabling COPD, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); Decision and Order at 42.

[14] Because we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis, based on Dr. Ammisetty's opinion, it is not necessary that we address employer's arguments relating to Dr. Baker. *See Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

_____
BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge