BRB No. 13-0459 BLA

HERBERT BLEVINS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE ELKHORN MINING COMPANY	)	DATE ISSUED: 06/19/2014
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2010-BLA-05148) of Administrative Law Judge Larry S. Merck with respect to a miner's claim filed on February 10, 2009, 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 found that claimant established 13.85 years of surface coal mine employment, and that the claim was timely filed, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge determined that claimant did not establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), but established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), based on the newly submitted evidence, and the evidence of record as a whole. The administrative law judge also found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), based on the newly submitted evidence and the evidence of record as a whole, and disability causation at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[3] and awarded benefits.

[1] In a memorandum to the record, a representative of the Office of Workers' Compensation Programs indicated that in a Decision and Order issued on January 30, 1987, the Board affirmed an administrative law judge's denial of a claim filed on January 23, 1981. Director's Exhibit 1. The representative also noted that claimant filed a second claim on July 5, 1994, which was denied by the district director on December 12, 1994. *Id*. The representative further stated, these "closed claims were forwarded to the Federal Records Center for storage" and "[s]everal attempts have been made to retrieve the LM-1 and LM-2 claims from storage but regretfully the claims cannot be located at this time." *Id*. As the basis of the previous denial of benefits could not be discerned, the administrative law judge assumed, "for purposes of" 20 C.F.R. §725.309, that none of the applicable conditions of entitlement was previously established. Decision and Order at 15.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary 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). Amended Section 411(c)(4) does not apply in this case, as the administrative law judge found that claimant did not establish at least fifteen years of qualifying coal mine employment. Decision and Order at 10.

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R.

On appeal, employer argues, in its brief and reply brief, that the claim is time-barred, based on the medical determination of total disability due to pneumoconiosis made in connection with claimant's state claim for disability benefits in 1980. Employer also asserts that the administrative law judge violated its due process rights by not giving it the opportunity to rebut his reliance on the preamble when weighing the medical opinion evidence. Further, employer contends that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a), 718.204(b)(2)(iv), (c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, maintaining that the Board should reject employer's arguments concerning whether the claim was timely filed and the administrative law judge's reliance on the preamble.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

I. Timeliness of the Claim

Claimant has been receiving state workers' compensation benefits pursuant to an order by the Commonwealth of Kentucky Workers' Compensation Board, dated February 22, 1982. Director's Exhibit 10. The administrative law judge determined:

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§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] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 7, 10. Accordingly, 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 (1989)(en banc).

> The order granting benefits in Claimant's state workers' compensation claim includes a statement that medical testimony from six physicians who diagnosed Claimant with coal workers' pneumoconiosis was considered in that board's decision to grant benefits. However, Claimant filed his first claim for benefits under the Act on January 3, 1981 and his claim was ultimately denied by the Board on January 30, 1987. (DX 1). Thus, the diagnoses of pneumoconiosis submitted in relation to Claimant's claim for Commonwealth of Kentucky workers' compensation benefits were rendered invalid by the ultimate denial of Claimant[']s initial claim for benefits under the Act. Accordingly, I find that Employer has failed to rebut the presumption that Claimant's current claim for benefits was timely filed pursuant to §725.308(a).

Decision and Order at 13.

Relying on *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, BLR (6th Cir. 2013), employer argues that claimant received a medical determination of total disability due to pneumoconiosis in his state claim for disability benefits in 1980 and this was sufficient to trigger the limitations period, pursuant to 30 U.S.C. §923(f), requiring a claim to be "filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." Employer's Brief in Support of Petition for Review at 12. Employer further states that the administrative law judge erred in assuming that the medical opinions filed in the state claim were the same medical opinions filed in connection with claimant's initial claim for federal benefits, and in assuming that claimant's federal claim was denied because claimant did not establish the existence of pneumoconiosis. Employer explains that there is no support for these assumptions in the record because claimant's prior claims are not available. Employer contends that the Department of Labor's loss of the record impaired its defense and, therefore, it should be dismissed as the responsible operator. In the alternative, employer argues that, as in *Brigance*, claimant "sat on his rights under the [Act]," inasmuch as "there was no reason not to file a subsequent claim within three years of the denial of his initial federal claim," based on the award of benefits in the state claim. *Id*. at 14. Consequently, employer asserts that claimant's claim was filed outside of the limitations period and the administrative law judge's finding must be reversed.[5] The Director

[5] We reject employer's assertion, that the "misdiagnosis rule" that the administrative law judge relied on only applies if a claim has been rejected based on the absence of pneumoconiosis, as the law does not want to penalize a miner who acted prematurely, as it is based on a misreading of *Brigance*. Employer's Brief in Support of Petition for Review at 13; *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, BLR (6th Cir. 2013). The Sixth Circuit held that "because of the progressive nature of the disease, we have held that a misdiagnosis does not constitute a

disagrees, arguing that the claim was timely filed, and that employer has not met its burden of proving otherwise.

Pursuant to 30 U.S.C. §932(f), "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." Under the implementing regulation, which is set forth in 20 C.F.R. §725.308(a), such a determination must be "communicated to the miner." Contrary to employer's contention, claimant's successful state workers' compensation claim did not constitute a "medical determination" of total disability because, although the 1982 state workers' compensation board's opinion referred to medical testimony diagnosing pneumoconiosis, there was no medical determination on the issue of total disability. *See* Director's Exhibit 10. Therefore, the state opinion did not contain the required medical determination of total disability due to pneumoconiosis. *See Brigance*, 718 F.3d at 594.

In addition, even if a medical determination of total disability due to pneumoconiosis was made, it was considered a "misdiagnosis," as a matter of law, based on the denial of benefits in claimant's subsequent 1987 and 1994 federal claims and, therefore, is legally insufficient to trigger the statute of limitations for subsequent claims.[6] See *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Further, this case is distinguishable from *Brigance*, in that claimant did not "sit on his rights" under the Act while awaiting the outcome of his state claim, but rather he filed his initial federal claim at the same time that he filed his state claim. *See* Director's Exhibits 1, 10. Claimant then filed for federal benefits again in 1994, which claim was denied, and filed

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'medical determination' within the meaning of the statute," but did not indicate that it only applies in this situation. *Brigance*, 718 F. 3d at 594.

[6] We reject employer's argument that, because the Department of Labor did not perform its duty as custodian to protect the record, employer was unable to adequately prepare its defense and, thus, should be dismissed as the responsible operator. Contrary to employer's contention, the lack of access to the files of the previous claim did not deprive employer of its ability to defend the current claim based on timeliness or on the merits. Any medical evidence from the previous, closed claims that could have triggered the statute of limitations was invalidated by the Board's 1987 denial of the initial claim and the district director's 1994 denial of the second claim. Additionally, the administrative law judge found that the evidence submitted in the previous claims would not be probative of claimant's current pulmonary condition. *See* Decision and Order at 34.

his current claim in 2009. Director's Exhibits 1, 3. Consequently, to rebut the timeliness presumption, employer needed to show that a medical determination of total disability due to pneumoconiosis was communicated to claimant after the 1994 denial of his prior claim but more than three years before he filed his current claim, which it has not done. *See Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Therefore, we affirm the administrative law judge's finding that the current claim was timely filed.

II. Total Disability

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains three newly submitted pulmonary function studies, dated March 31, 2009, August 8, 2009, and April 22, 2010. The March 31, 2009 study was qualifying before the administration of bronchodilators and non-qualifying after the administration of bronchodilators.[7] Director's Exhibit 14. The August 8, 2009 study was non-qualifying before the administration of bronchodilators and qualifying after the administration of bronchodilators. Director's Exhibit 16. The April 22, 2010 study was non-qualifying before and after the administration of bronchodilators. Employer's Exhibit 3. The administrative law judge gave "the most weight to the [pulmonary function study] dated April 22, 2010 because it is the most recent evaluation of Claimant's pulmonary condition." Decision and Order at 30. Therefore, the administrative law judge found that the newly submitted pulmonary function studies were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. In addition, as none of the newly submitted blood gas studies was qualifying, the administrative law judge found that total disability was not established at 20 C.F.R. §718.204(b)(2)(ii). *Id*.

Considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv),[8] the administrative law judge gave "full probative weight" to Dr. Mettu's opinion, that claimant had a totally disabling respiratory impairment, as he found that it was well-reasoned and documented, and based on the objective evidence. Decision and Order at 32; *see* Director's Exhibit 14; Employer's Exhibit 4. The administrative law judge gave less weight to the opinions of Drs. Jarboe and Rosenberg, that claimant did not have a

[7] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge determined that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as he failed to present any evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 30.

totally disabling respiratory impairment, as he found that they did not address the qualifying pulmonary function study dated March 31, 2009, or explain why they found that the non-qualifying April 22, 2010 study was more indicative of claimant's pulmonary condition. Decision and Order at 32-33; Employer's Exhibits 3, 6, 7. The administrative law judge did not give any weight to Dr. Potter's opinion, as it did not address total disability. Decision and Order at 33; Director's Exhibit 17. Therefore, the administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), based on the newly submitted evidence. Decision and Order at 34. Weighing all of the evidence together, the administrative law judge gave more weight to the newly submitted evidence and determined that claimant established total disability at 20 C.F.R. §718.204(b)(2). *Id*.

Employer argues that the administrative law judge did not consider that Drs. Jarboe and Rosenberg disagreed with Dr. Mettu's diagnosis of an obstructive impairment "because the FEV%, FEV1, and FVC values . . . did not satisfy the medical standard for diagnosing an obstruction." Employer's Brief at 20. In addition, employer asserts that the administrative law judge did not address the fact that Dr. Mettu observed a moderate improvement in claimant's respiratory function after the administration of bronchodilators. Employer also contends that the administrative law judge erred in ignoring Dr. Mettu's testimony that his finding of total disability was based, in part, on claimant's age, and in neglecting to consider that Dr. Mettu determined that claimant was totally disabled without discussing the exertional requirements of claimant's usual coal mine employment. Employer further asserts that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Rosenberg, as he shifted the burden of proof to employer "by requiring them to explain not only why they did not find an obstruction when Dr. Mettu did, but faulting them for not rendering their opinions in light of earlier pulmonary function studies[,]" especially when the administrative law judge found that the more recent tests, that they relied on, were more probative of claimant's current respiratory condition.[9] Employer's Brief at 22.

Employer's arguments have merit, in part. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a physician

[9] The administrative law judge stated:

> Although I am unable to review and consider the evidence from Claimant's prior claim, because of the age of the prior evidence, I find that, even if it were available, it would be less probative of Claimant's current pulmonary condition.

Decision and Order at 34.

should demonstrate knowledge of the exertional requirements of a miner's usual coal mine employment in assessing whether a respiratory impairment precludes the performance of a miner's usual duties. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). In this case, employer is correct in asserting that Dr. Mettu did not indicate that he considered, or was aware of, the exertional requirements of claimant's previous coal mine employment in stating that claimant has a totally disabling respiratory impairment. *See* Director's Exhibit 14; Employer's Exhibit 4. Employer is also correct in maintaining that it was inconsistent for the administrative law judge to give more weight to the more recent April 22, 2010 pulmonary function study when determining that claimant did not establish total disability at 20 C.F. R. §718.204(b)(2)(i), but then discredit the opinions of Drs. Jarboe and Rosenberg for relying on that same study in finding that claimant was not totally disabled at 20 C.F.R. §718.204(b)(2)(iv). *See* Decision and Order at 30, 32-33; Employer's Exhibits 3, 6, 7. Consequently, we vacate the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996).

On remand, the administrative law judge must reconsider the opinions of Drs. Mettu, Jarboe and Rosenberg pursuant to 20 C.F.R. §718.204(b)(2)(iv). In so doing, the administrative law judge must identify claimant's usual coal mine work and determine the exertional requirements of that work.[10] He must then assess whether, in light of these exertional requirements, Dr. Mettu rendered a reasoned and documented diagnosis of total disability.[11] The administrative law judge must also reconsider the opinions of Drs.

[10] On Form CM-911a, entitled "Coal Mine Employment History," claimant identified his usual coal mine occupations as "laborer" and "heavy equipment." Director's Exhibit 4. On Form CM-913, entitled "Description of Coal Mine Work and Other Employment," claimant indicated that as an end loader operator, he "[r]an [front end] [l]oader and did maint[e]nance and general [l]abor." Director's Exhibit 5. Claimant also stated that his employment required him to sit and stand for eight hours a day and carry fifty pounds five to ten times a day, for a variety of distances. *Id*.

[11] Contrary to employer's assertion, however, the administrative law judge need not discredit a physician's diagnosis of total disability solely because he relied on a non-qualifying objective study; nor can he summarily conclude that the non-qualifying or inconclusive objective studies outweigh the diagnoses of total disability. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *see also Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984)(The determination of the significance of a test is a medical assessment for the doctor, rather than the administrative law judge). Test results that exceed the applicable table values may document a diagnosis of a totally disabling respiratory or pulmonary impairment if the

Jarboe and Rosenberg to determine whether they sufficiently explained their determinations that claimant did not have a totally disabling respiratory impairment, given the exertional requirements of his previous coal mine work. The administrative law judge must also address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Finally, the administrative law judge is required to set forth his findings in detail, including the underlying rationale, in compliance with the Administrative Procedure Act.[12] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In the event that the administrative law judge finds that total disability has been established under 20 C.F.R. §718.204(b)(2)(iv), he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). If the administrative law judge determines that claimant has failed to establish total disability under 20 C.F.R. §718.204(b)(2), an award of benefits is precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

However, should the administrative law judge again find total disability established, the propriety of his determinations that claimant established that he has legal pneumoconiosis,[13] and is totally disabled by it, become relevant. Therefore, in the interest of judicial economy, we will address employer's arguments on these issues.

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physician provides a reasoned explanation of his or her diagnosis. *See Marsiglio*, 8 BLR at 1-192.

[12] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[13] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment."

III. Legal Pneumoconiosis and Total Disability Causation

In weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinions of Drs. Potter, Jarboe, Rosenberg, and Mettu.[14] The administrative law judge gave little weight to Dr. Potter's opinion, diagnosing "black lung," as he did not explain the bases of his diagnosis. Director's Exhibit 17; *see* Decision and Order at 27. The administrative law judge also gave less weight to the opinions of Drs. Jarboe and Rosenberg, who opined that claimant did not have legal pneumoconiosis. Decision and Order at 21-27; Employer's Exhibits 3, 6, 7. In contrast, the administrative law judge gave "full probative weight" to Dr. Mettu's opinion, that claimant has legal pneumoconiosis, as he found that it was well-reasoned, and documented, and supported by the objective medical evidence. Decision and Order at 20-21; *see* Director's Exhibit 14; Employer's Exhibit 4. The administrative law judge relied on the findings that he made at 20 C.F.R. §718.202(a)(4) to determine that claimant established that he is totally disabled due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Decision and Order at 34.

Employer argues that, in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge "accepted Dr. Mettu's opinion at face value, but picked apart the explanations provided by both Drs. Rosenberg and Jarboe." Employer's Brief at 18. Employer also states that the administrative law judge mischaracterized Dr. Mettu's opinion concerning the extent and cause of claimant's impairment, as Dr. Mettu did not mention the existence of obstructive lung disease on his evaluation form. Concerning Dr. Rosenberg's opinion, employer argues that the

[14] Employer argues that the administrative law judge erred in not considering Dr. Dahhan's opinion even though it was designated by employer as evidence. *See* Director's Exhibit 16. However, contrary to employer's contention, the administrative law judge accurately noted that Dr. Dahhan's August 13, 2009 report was not designated as affirmative medical report evidence, pursuant to 20 C.F.R. §725.414, by either party. Decision and Order at 30 n.16. On March 5, 2012, employer submitted its most recent designation of evidence, designating the opinions of Drs. Jarboe and Rosenberg as its two affirmative medical reports. Also, employer did not claim that Dr. Dahhan's report was part of its affirmative case in its May 23, 2012 brief to the administrative law judge. Further, employer has not at any time asserted that good cause exists to exceed the evidentiary limitations and consider Dr. Dahhan's opinion. *See* 20 C.F.R. §725.456(b)(1); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006). Therefore, remand is not required on this issue.

administrative law judge erred in discrediting it as contrary to the preamble,[15] because Dr. Rosenberg found that claimant did not have a chronic obstructive impairment and, therefore, it was irrelevant whether or not coal mine dust caused the condition. Employer contends that the administrative law judge also erred in determining that Dr. Rosenberg's reliance on the significance of claimant's remote exposure to coal dust was contrary to the preamble, as Dr. Rosenberg agreed that industrial bronchitis can progress after coal mine employment ends but "[t]here is no science . . . that suggests that 'legal' pneumoconiosis can manifest itself, decades after exposure ends." Employer's Brief at 17-18.

Contrary to employer's contention, Dr. Mettu noted on the report of the March 23, 2009 pulmonary function study that the results were indicative of "moderate obstructive airway disease," and explicitly stated in his report of the physical examination that coal dust exposure caused claimant's pulmonary impairment. Director's Exhibit 14 at 7, 27. The administrative law judge acted within his discretion in considering Dr. Mettu's opinion in its entirety, including the comments written on the pulmonary function study test results. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, the administrative law judge permissibly found that Dr. Mettu's opinion, diagnosing a pulmonary impairment caused by coal dust exposure, was entitled to full probative weight, as it was based on a variety of factors, including his examination of claimant and the objective study results. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26.

Further, contrary to employer's contention, the fact that Dr. Rosenberg did not diagnose an obstructive impairment did not preclude the administrative law judge from discrediting his opinion. The administrative law judge observed correctly that the definition of legal pneumoconiosis includes "any chronic restrictive or obstructive

[15] We reject employer's assertion that the administrative law judge violated its due process rights by denying its Motion for Written Declaration of any documents, such as the preamble, of which the administrative law judge intended to take judicial notice, filed on August 1, 2011. Decision and Order at 3 n.3. The Sixth Circuit has explicitly held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *see also 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), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Therefore, it was not error for the administrative law judge to deny employer's motion.

pulmonary disease arising out of coal mine employment," and that Dr. Rosenberg diagnosed claimant with a mild restrictive impairment. 20 C.F.R. §718.201(a)(2); *see* Decision and Order at 24-27; Employer's Exhibit 6. Therefore, the administrative law judge rationally found that Dr. Rosenberg's opinion was entitled to diminished weight, as he did not adequately explain why coal dust could not have contributed to claimant's respiratory impairment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; *Cornett*, 227 F.3d at 576, 121, 22 BLR at 2-121. As employer has not raised any meritorious allegations of error regarding the administrative law judge's consideration of the medical opinions of Drs. Mettu and Rosenberg, and does not challenge the administrative law judge's discrediting of the opinions of Drs. Jarboe and Potter, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Employer has not raised any arguments specific to the administrative law judge's finding that claimant established disability causation at 20 C.F.R. §718.204(c). We, therefore, affirm this finding as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Should the administrative law judge find on remand that claimant has established total disability at 20 C.F.R. §718.204(b)(2), he may reinstate his determinations that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c), and further reinstate his award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge