U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0529 BLA

ROBERT E. HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/28/2017
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 Granting Claimant's Request for Modification, Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Claimant's Request for Modification, Awarding Benefits (2008-BLA-5992) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves claimant's request for modification of the prior denial of his claim filed on June 29, 2004, and is before the Board for the second time.

In a Decision and Order dated December 7, 2007, Administrative Law Judge Jeffrey Tureck found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and denied benefits. Claimant filed a timely request for modification on January 2, 2008. The district director denied modification and, at claimant's request, forwarded the case to the Office of Administrative Law Judges (OALJ) for a hearing, which was held on August 25, 2009 before Administrative Law Judge Daniel F. Solomon.

In a March 11, 2010 Decision and Order, Judge Solomon accepted employer's concession that claimant had at least fourteen years of coal mine employment, and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. Judge Solomon found that the evidence was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and denied benefits.

Following an appeal by claimant without the assistance of counsel, the Board vacated Judge Solomon's evidentiary rulings because it was unclear whether the parties were permitted to submit their full complement of evidence allowed under 20 C.F.R. §§725.414 and 725.310(b). The Board also vacated Judge Solomon's findings on modification because he did not consider whether there was a change in conditions regarding the existence of pneumoconiosis or whether there was a mistake in a determination of fact with regard to Judge Tureck's denial of benefits. Judge Solomon was instructed on remand to reconsider the evidentiary record and to determine whether claimant established a basis for modification of the denial of benefits by Judge Tureck pursuant to 20 C.F.R. §725.310. *Hill v. Island Creek Coal Co.*, BRB No. 10-0426 BLA (Apr. 29, 2011) (unpub.).

On remand, Judge Solomon issued an Order dated January 19, 2012 in which he remanded the case to the district director based on the submission of new evidence by claimant and the district director. Judge Solomon found that the interests of justice required that the case be developed further because the new evidence may have constituted a second request for modification. The case was subsequently returned to the OALJ and assigned to Administrative Law Judge Alice M. Craft (the administrative law judge), who held a hearing on March 17, 2015.

In a May 24, 2016 Decision and Order, which is the subject of the current appeal, the administrative law judge determined that claimant's original request for modification was still pending. The administrative law judge performed a de novo review of the evidence and found that claimant established the existence of legal pneumoconiosis[1] pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). In light of these findings, the administrative law judge determined that claimant established a mistake in a determination of fact by Judge Tureck and granted claimant's request for modification. The administrative law judge concluded that granting claimant's request for modification would render justice under the Act, and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer further contends that the administrative law judge misapplied the preamble to the 2001 regulations. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, urges affirmance of the award of benefits. In separate reply briefs, employer reiterates its previous contentions.[2]

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

[1] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes any "chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 39.

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17.

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Legal Pneumoconiosis

Employer contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), and argues that she misapplied the preamble to the 2001 regulations in evaluating this evidence.

The administrative law judge considered the medical opinions of Drs. Simpao, Rasmussen, James, Houser, Hippensteel, Selby, and Tuteur, and the treatment notes and deposition testimony of Dr. Culbertson. Decision and Order at 16-27, 32-36; Director's Exhibits 13, 15, 16, 18, 65-166, 65-182, 65-225, 83-200, 83-380, 83-468, 83-733, 83-743, 83-889; Claimant's Exhibit 5; Employer's Exhibits 1, 3, 4, 5, 6, 8. Drs. Simpao, Rasmussen, James, and Houser diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) with emphysema due to cigarette smoking and coal dust exposure. Director's Exhibits 13, 15, 16, 65-166, 65-182, 83-200, 83-380, 83-468; Claimant's Exhibit 5.

Conversely, Drs. Hippensteel, Selby, Tuteur, and Culbertson opined that claimant does not suffer from legal pneumoconiosis. Dr. Hippensteel diagnosed bullous emphysema, scarring from severe pneumonia, and chronic bronchitis associated with long-term cigarette smoking. Employer's Exhibits 3, 6; Director's Exhibit 83-889. Dr. Selby attributed claimant's COPD and bullous emphysema to primary and secondary exposure to cigarette smoke and asthma. Director's Exhibits 18; 65-225; 83-743. Dr. Tuteur diagnosed COPD with emphysema and chronic bronchitis, which he attributed to primary and secondary exposure to cigarette smoke and fumes from biomass and fossil fuels.[4] Employer's Exhibits 1, 5, 8 at 22-24. Dr. Culbertson, one of claimant's treating physicians, diagnosed COPD due primarily to cigarette smoking. Employer's Exhibit 4; Claimant's Exhibit 8; Director's Exhibits 83-714.

[4] Dr. Tuteur noted that in claimant's childhood home, coal and wood were used for cooking and heating. Employer's Exhibit 8 at 13.

Finding that Drs. Hippensteel, Selby, Tuteur and Culbertson did not credibly explain how they eliminated the miner's coal dust exposure as a source of his COPD/emphysema, the administrative law judge discounted their opinions as inadequately explained and not well-reasoned. Decision and Order at 35. The administrative law judge accorded the greatest probative weight to the diagnoses of legal pneumoconiosis made by Drs. Rasmussen and Houser, finding them to be well-reasoned, well-documented, consistent with the premises underlying the regulations, and supported by the well-reasoned and documented opinions of Drs. Simpao and James, who, she determined, have "lesser qualifications."[5] Decision and Order at 36. The administrative law judge therefore found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer initially argues that the administrative law judge misapplied the preamble in assessing the medical opinion evidence, resulting in a presumption that all COPD arises from coal mine employment, and thus reversing the burden of proof. Employer's Brief at 11-21. We disagree.

The administrative law judge permissibly relied on the preamble as a guide in assessing the credibility of the medical evidence in this case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Contrary to employer's contention, the administrative law judge did not use the preamble as a legal rule or presumption that all obstructive lung disease is pneumoconiosis. Rather, she consulted it as a statement of credible medical research findings accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). The administrative law judge specifically noted that the issue of whether a particular miner's impairment arose out of dust exposure in coal mine employment "must be resolved on a claim-by-claim basis," and that "the burden of proof remains on the miner to show that his obstructive lung disease arose out of his coal mine employment." Decision and Order at 32. Thus, we reject employer's assertion that she improperly applied a presumption that reversed the burden of proof.

Employer next contends that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Houser to find legal pneumoconiosis established. Employer asserts that neither physician considered evidence after 2009 and that the

[5] Dr. Simpao is a general practitioner. Director's Exhibit 65-64. Dr. James is Board-certified in family practice. Director's Exhibit 65-97.

administrative law judge failed to explain how their opinions were "more complete" or "in better accord" with the weight of the medical evidence. Thus, employer maintains that these opinions cannot satisfy claimant's burden of proof.[6] Employer's Brief at 21-24. Employer's argument lacks merit.

In crediting Dr. Rasmussen's determination that claimant suffers from legal pneumoconiosis in the form of COPD/emphysema, the administrative law judge noted that Dr. Rasmussen based his opinion on a review of claimant's medical records from 2004 through 2009, including treatment records, pulmonary function testing, x-rays, CT scans, and the medical reports and depositions of various physicians. Decision and Order at 21, 33-34; Director's Exhibit 83-468. The administrative law judge further noted that Dr. Rasmussen explained that it is impossible to distinguish the effects of claimant's cigarette smoking from the effects of his coal dust exposure by physical, physiologic, or radiographic means. The administrative law judge determined that while Dr. Rasmussen acknowledged that there has been a greater contribution from claimant's smoking history, he concluded that claimant's coal dust exposure was sufficient to cause his disabling lung disease. The administrative law judge found that Dr. Rasmussen's opinion was documented and reasoned, consistent with the premises underlying the regulations, and well-supported by the evidence he reviewed. *Id.*

Similarly, the administrative law judge noted that Dr. Houser examined claimant and based his diagnosis of legal pneumoconiosis on claimant's symptoms, occupational and smoking histories, family and medical histories, x-ray, and pulmonary function testing. Decision and Order at 22, 34; Director's Exhibit 83-380. The administrative law judge found that Dr. Houser's determination that claimant's COPD/emphysema was due to cigarette smoking and the inhalation of coal and fluorspar mine dust was documented and reasoned and well-supported by his examination and other testing. The administrative law judge concluded that Dr. Houser's opinion was entitled to probative weight, as it was consistent with the evidence available to him and the premises underlying the regulations. *Id.* The administrative law judge also found that the reasoning and explanations in support of the conclusions provided by Drs. Rasmussen and Houser were "more complete and thorough" than those provided by the other physicians. Decision and Order at 36.

Contrary to employer's argument, the administrative law judge was not required to discount the opinions of Drs. Rasmussen and Houser on the ground that they did not consider the most recent medical evidence. Rather, as she determined that Drs.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. Simpao's opinion that claimant has legal pneumoconiosis merited probative weight. Decision and Order at 33; Director's Exhibits 13, 16, 65; *see Skrack*, 6 BLR at 1-711.

Rasmussen and Houser set forth the rationale for their findings based on their respective interpretations of the medical evidence they considered, and persuasively explained why they concluded that claimant's disabling COPD was due to both smoking and coal dust exposure, the administrative law judge permissibly found that the opinions of Drs. Rasmussen and Houser are well-reasoned and documented and entitled to probative weight. Decision and Order at 36; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Tennessee 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). The administrative law judge also permissibly accorded greater weight to the opinions of Drs. Rasmussen and Houser because she found that they are consistent with the scientific premises underlying the regulations that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that the effects of cigarette smoking and coal mine dust exposure are additive. Decision and Order at 32-34, 36; *see* 65 Fed. Reg. 79,920, 79,940-43 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

The determination of whether a medical opinion is documented and reasoned is for the administrative law judge, and the Board may not substitute its judgment for that of the administrative law judge. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985). The administrative law judge's decision reflects that she considered the quality of the reasoning of Drs. Rasmussen and Houser in light of the objective evidence of record, and explained why she credited their conclusions that the miner's disabling COPD/emphysema was due, in part, to coal dust exposure. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the opinions of Drs. Rasmussen and Houser are sufficiently reasoned to support a finding of legal pneumoconiosis. *See 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); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

Employer also argues that the administrative law judge provided invalid reasons for discrediting the opinions of Drs. Tuteur and Hippensteel that claimant's obstructive lung disease was due solely to smoking and/or biomass or fossil fuels.[7] Employer's Brief at 24-26. We disagree.

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that the Dr. Selby's opinion that claimant does not have legal pneumoconiosis merited little weight. Decision and Order at 35; Director's Exhibits 18, 65-225, 83-743; *see Skrack*, 6 BLR at 1-711.

The administrative law judge rationally discounted the opinions of Drs. Tuteur[8] and Hippensteel[9] because she found that neither physician credibly explained how he eliminated the miner's significant coal dust exposure as a contributing or aggravating factor in his obstructive impairment in light of the scientific premises underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms

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[8] Dr. Tuteur provided medical reports dated February 9, 2015 and March 3, 2015 and provided deposition testimony on March 12, 2015. Employer's Exhibits 1, 5, 8. Dr. Tuteur identified childhood pneumonia, primary and secondary cigarette smoke, biomass and fossil fuel fumes, coal dust exposure, and gastroesophageal reflux disease as potential causes of claimant's chronic obstructive pulmonary disease (COPD). Dr. Tuteur explained that based on medical literature, about 20% of people with a cigarette smoking history similar to that of claimant develop clinically meaningful COPD, and that the rate of development of COPD among nonsmokers who are exposed to fossil fuel combustion fumes is about the same. He indicated that the risk of developing COPD from childhood pneumonia and smoking as a young adult is in the range of 40-60%, while the risk from coal dust exposure for sixteen years as a nonsmoker would be 1% or less. Dr. Tuteur concluded that using the relative risk reasoning process, claimant's COPD phenotype was caused by the inhalation of tobacco smoke and biomass fuel or fossil fuel. He noted that it is possible for coal dust to be a cause, but that it was not a cause in this case. Employer's Exhibit 8 at 22-25.

[9] Dr. Hippensteel prepared medical reports dated June 24, 2009, September 15, 2009, and April 6, 2015 and provided deposition testimony on July 30, 2009 and February 26, 2015. Director's Exhibits 83-389, 83-889, 83-927; Employer's Exhibits 3, 6. Dr. Hippensteel noted that claimant's x-rays and CT scans show bullous emphysema and chronic bronchitis associated with smoking. He concluded:

> Since coal workers' pneumoconiosis should not wax and wane or disappear on such a sensitive test as a chest CT scan, I think it can be stated with a reasonable degree of medical certainty that [claimant] does not have either medical or legal coal workers' pneumoconiosis. He has evidence of bullous emphysema, scarring from severe pneumonia and chronic bronchitis associated with his long-term continuing cigarette smoking and unrelated to his prior coal mine dust exposure.

Director's Exhibit 83-897; *see also* Employer's Exhibit 3 at 16-17.

and have additive effects.[10] Decision and Order at 35; *see* 65 Fed. Reg. 79,940-43; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *see also Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, BLR (10th Cir. 2017). The administrative law judge, therefore, permissibly accorded less weight to the opinions of Drs. Tuteur and Hippensteel. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Employer next argues that the administrative law judge erred in crediting the opinion of Dr. James over that of Dr. Culbertson, asserting that Dr. Culbertson possesses superior qualifications and that his opinion is better explained by his treatment notes and deposition testimony. Employer's Brief at 27-31. Employer's argument lacks merit.

[10] We agree with our dissenting colleague that a medical opinion that a claimant's "cigarette smoking was the sole cause of his emphysema" or that a claimant's "years of coal dust exposure played no role" in his impairment is not contrary to the preamble or the Act. As the Director correctly asserts, however, the administrative law judge's award is not based on this premise. Director's Brief at 3-4. Instead, the administrative law judge repeatedly acknowledged that the burden of proof remains on the miner to show that his COPD either arose from, or was aggravated by, his coal mine employment. *See, e.g.*, Decision and Order at 28 ("only [COPD] caused by coal mine dust constitutes legal pneumoconiosis"); 32 ("the regulations require that the issue of whether a miner's disability is due to coal mine employment or smoking must be resolved on a claim-by-claim basis."). She rationally determined that claimant met this burden through the "complete and through" opinions of Drs. Rasmussen and Houser, which she found more persuasive than the contrary opinions of Drs. Tuteur and Hippensteel, based on "the overall weight of the medical evidence of record." *Id.* at 36. In doing so, she permissibly consulted the preamble as a guide for part of her analysis. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012). For that reason, as well as the independent reasons cited by the Director in his brief, we affirm her determination that Drs. Tuteur and Hippensteel did not creditably explain their conclusions. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002) (determining the credibility of the medical experts is committed to the discretion of the administrative law judge); Director's Brief at 4 (noting that Dr. Tuteur impermissibly based his opinion on statistical generalities rather than the facts of this case and that Dr. Hippensteel's assertion that claimant's bronchitis could not be due to coal dust because it persisted after he left the mines contradicts 20 C.F.R. §718.201(c)) (citation omitted).

In reviewing the opinions of Drs. Culbertson and James, the administrative law judge acknowledged their status as treating physicians and determined that Dr. Culbertson is Board-certified in pulmonology and Dr. James is Board-certified in family practice. Decision and Order at 19, 26, 31; Director's Exhibit 65-97; Employer's Exhibit 4. In determining that Dr. Culbertson's opinion was not well-reasoned, the administrative law judge noted that, although Dr. Culbertson acknowledged claimant's occupational history, he "appeared to believe that coal dust exposure could account for nodules in the lung, but would not be a factor in COPD." Decision and Order at 34. The administrative law judge found that Dr. Culbertson failed to explain why he excluded coal dust exposure as a possible cause of claimant's obstructive disease.[11] Decision and Order at 26, 34, 35. Conversely, the administrative law judge determined that while Dr. James was not a pulmonologist, his diagnosis of legal pneumoconiosis was documented and reasoned and consistent with the medical evidence available to him and with the premises underlying the regulations. The administrative law judge therefore permissibly found Dr. James' opinion to be entitled to "some weight," and sufficient to support the opinions of Drs. Rasmussen and Houser. Decision and Order at 32-33, 35; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003)(opinions of treating physicians get the deference they deserve based on their power to persuade).

As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). We also affirm, as supported by substantial evidence, her finding that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and established a basis for modification. *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012); Decision and Order at 22-23.

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[11] When asked if claimant's work in the coal mines caused any significant part of his obstructive disease, Dr. Culbertson stated:

> I don't think it's the cause of his obstructive lung disease. I mean, it's possible it could account for some of the small scars or nodules in the lung just because he's had significant exposure before. That's the only reason I would suggest that possibility. Because up until I knew that he had been a coal miner or worked in fluorspar mines, I felt that it was all COPD and scarring from previous pneumonia.

Employer's Exhibit 4 at 16.

Total Disability Due to Pneumoconiosis

Although employer does not raise any specific arguments challenging the administrative law judge's determination that claimant established that his totally disabling impairment was caused by pneumoconiosis, employer asserts that the administrative law judge's errors in weighing the evidence on the issue of legal pneumoconiosis "infect" her disability causation findings at 20 C.F.R. §718.204(c). Employer's Reply to the Director's Brief at 8.

Under 20 C.F.R. §718.204(c), the administrative law judge rationally gave less weight to the opinions of Drs. Tuteur, Hippensteel, Selby, and Culbertson because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a), which we have affirmed. Decision and Order at 40; *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 25 BLR 2-713 (4th Cir. 2015); *Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). As substantial evidence supports the administrative law judge's permissible finding that the opinions of Drs. Simpao, Rasmussen, and Houser are well-reasoned and establish that pneumoconiosis is a substantially contributing cause of claimant's disability, we affirm her finding of disability causation pursuant to 20 C.F.R. §718.204(c).

Because employer has not challenged the administrative law judge's findings that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 and that granting modification would render justice under the Act, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Granting Claimant's Request for Modification, Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority opinion, with the exception of its affirmance of the administrative law judge's rejection of Dr. Tuteur's and Dr. Hippensteel's medical opinions. In finding their opinions to be "not well-reasoned" and entitled to "little weight," the administrative law judge stated:

> [Neither physician] offered any creditable explanation how they were able to exclude[] coal dust as a contributing factor to the [c]laimant's obstructive disease. Their view that the [c]laimant's cigarette smoking was the sole cause of his emphysema . . . and the [c]laimant's years of coal mine dust exposure played no role, is contrary to the premises underlying the regulations that coal dust and smoking cause damage to the lungs by similar mechanisms and have additive effects[.]

Decision and Order at 35. Contrary to the administrative law judge's assertion, there is nothing in the preamble, the regulations, or the Act that would permit the outright

rejection, without further explanation, of a medical opinion that a claimant's "cigarette smoking was the sole cause of his emphysema" or that a claimant's "years of coal dust exposure played no role" in his impairment.[12] *See, e.g.*, *Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, 2-651 (6th Cir. 2003) ("[O]nly COPD caused by coal dust constitutes legal pneumoconiosis. . . . Otherwise, everyone who developed COPD from smoking would have legal pneumoconiosis."); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) (affirming denial of benefits based on opinions that miner employed in coal mines approximately forty years had obstructive lung disease attributable solely to cigarette smoking and not pneumoconiosis). Although the administrative law judge stated that neither physician offered a "creditable explanation," she did not identify the portions of their opinions that she found objectionable, or otherwise explain how their opinions contradict the premises underlying the regulations that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms" or that the risks associated with coal dust exposure and smoking are "additive." *See* 65 Fed. Reg. 79,920, 79,940, 79,943 (Dec. 20, 2000); Decision and Order at 35.

In other words, it is improper, as the administrative law judge appears to have done, to reject a medical opinion simply because a physician diagnoses a smoking-related impairment rather than pneumoconiosis. *See Stiltner*, 86 F.3d at 339-340, 20 BLR at 2-259. Without further explanation, the administrative law judge's conclusion that the opinions of Drs. Tuteur and Hippensteel are contrary to the preamble cannot be affirmed. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).[13]

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[12] In her recitation of the law, the administrative law judge made a similar, overbroad statement that because "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms[,]" medical opinions that are "based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease . . . are therefore contrary to the premises underlying the regulations." Decision and Order at 32, referencing the preamble to the 2001 regulations at 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). The fact that dust-induced emphysema and smoke-induced emphysema occur through "similar mechanisms" does not mean that coal dust-related impairments and smoking-related impairments cannot be "distinct" diseases. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 515, 22 BLR 2-625, 2-651 (6th Cir. 2003); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

[13] The administrative law judge also failed to explain her conclusion that the opinions of Drs. Tuteur and Hippensteel are contrary to the concept that "coal dust

Consequently, I would remand the claim for the administrative law judge to reconsider the medical opinions of Dr. Tuteur and Dr. Hippensteel on the issues of legal pneumoconiosis and disability causation.

GREG J. BUZZARD
Administrative Appeals Judge

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exposure can cause clinically significant obstructive disease even in the absence of clinical pneumoconiosis." *See* Decision and Order at 35. That finding, therefore, cannot be affirmed. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also* 20 C.F.R. §718.201(a)(2); 65 Fed. Reg. 79,943.