BRB No. 08-0467 BLA

O.T.M. (Widow of and on behalf of R.M.) Claimant-Petitioner v. PEABODY COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Benefits and Decision on Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Renae Reed Patrick (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits and Decision on Motion for Reconsideration (2004-BLA-145 and 2004-BLA-6785) of Administrative Law Judge Daniel L. Leland (the administrative law judge), with respect to a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et*

seq. (the Act).[1] This is the second time that this case has been before the Board. In the Board's prior Decision and Order, the Board vacated the administrative law judge's findings in the miner's claim that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). With respect to the survivor's claim, the Board vacated the administrative law judge's determination that claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board remanded the case to the administrative law judge for reconsideration of these issues. [*O.T.M.*] *v. Peabody Coal Co.*, BRB No. 06-0499 BLA (Mar. 28, 2007) (unpub.).

On remand, claimant and employer asked the administrative law judge to provide them with the opportunity to file briefs before he undertook the reconsideration of both claims. The administrative law judge did not respond to these requests, but rather issued a Decision and Order in which he determined that the evidence was insufficient to establish the existence of legal pneumoconiosis in either claim. The administrative law judge further found that because he had not altered his previous determination that the

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[1] Claimant is the miner's surviving spouse. The miner filed an application for benefits on May 7, 1996. Living Miner's Claim (LMC) Director's Exhibit 1. In a Decision and Order issued on July 14, 2003, Administrative Law Judge Richard A. Morgan awarded benefits. LMC Director's Exhibit 36. After considering employer's appeal, the Board vacated the award of benefits and remanded the case to Judge Morgan for reconsideration of the evidence relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis. [*R.M.*] *v. Peabody Coal Co.*, BRB No. 98-1166 BLA (Aug. 4, 1999) (unpub.); LMC Director's Exhibit 44. Judge Morgan denied benefits on remand, determining that the miner did not establish that he was totally disabled due to pneumoconiosis. LMC Director's Exhibit 45. The miner filed a request for modification. The miner died on March 27, 2003. Judge Morgan denied the request for modification in a Decision and Order issued on July 14, 2003, finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. LMC Director's Exhibit 103. Claimant filed an application for survivor's benefits on July 25, 2003. Survivor's Claim (SC) Director's Exhibit 2. On her husband's behalf, claimant also filed a request for modification of Judge Morgan's decision in the miner's claim on September 24, 2003. LMC Director's Exhibit 107. The claims were consolidated by the district director and transferred to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Daniel L. Leland (the administrative law judge). The administrative law judge subsequently issued a Decision and Order in which he denied both claims. This Decision and Order was the subject of claimant's first appeal to the Board.

miner's chronic obstructive pulmonary disease (COPD) was not related to coal dust exposure, he was not required to revisit his prior determinations that pneumoconiosis did not play a role in the miner's total disability or his death. Accordingly, the administrative law judge denied benefits in both claims. Claimant filed a Motion for Reconsideration in which she contended that the administrative law judge did not properly consider the medical opinions relevant to total disability and death causation. The administrative law judge rejected claimant's allegations of error and reaffirmed the denial of benefits in both claims.

In the present appeal, claimant argues that the administrative law judge erred in failing to give the parties the opportunity to file briefs on remand. Claimant also contends that the administrative law judge did not properly weigh the medical opinion evidence relevant to Sections 718.202(a)(4), 718.204(c), and 718.205(c). Employer responds, urging the Board to affirm the denial of both the miner's claim and the survivor's claim. Employer also maintains that the Board should have granted its Motion to Dismiss claimant's appeal on the ground that claimant did not appeal from the appropriate decision. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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.[2] 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).

I. Procedural Issues

A. Employer's Request to Dismiss Claimant's Appeal

Employer argues that the Board was required to dismiss claimant's appeal for lack of jurisdiction. In the caption of the Notice of Appeal, which claimant filed on March 19, 2008, claimant set forth the case numbers assigned by the district director to the miner's claim and the survivor's claim. In the body of the pleading, claimant specifically requested that the Board review the administrative law judge's Decision and Order on Remand – Denying Benefits dated November 20, 2007. Notice of Appeal at 1, 2 [unpaginated]. In her Supporting Brief, filed on May 12, 2008, claimant alleged errors in the Decision and Order on Remand – Denying Benefits and the Decision on Motion for

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); LMC Director's Exhibit 3.

Reconsideration. *See* Claimant's Supporting Brief at 3, 8, 16. On June 11, 2008, employer submitted a Motion to Dismiss, contending that the Board did not have jurisdiction to consider claimant's appeal, as the Decision and Order on Remand – Denying Benefits was "supplanted" by the Decision on Motion for Reconsideration that the administrative law judge issued on February 22, 2008. Employer's Motion to Dismiss at 3. Employer cited the decision of the United States Court of Appeals for the Fourth Circuit in *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), in support of its argument that claimant is seeking review of an unreviewable order. *Id*. The Board denied employer's Motion to Dismiss, holding that claimant adequately identified the decisions she wished to appeal. [*O.T.M.*] *v. Peabody Coal Co*., BRB No. 08-0467 BLA (Sept. 4, 2008) (unpub. Order).

We again reject employer's request that the Board dismiss claimant's appeal for lack of jurisdiction. Contrary to employer's argument, the administrative law judge's Decision on Motion for Reconsideration did not render the Decision and Order on Remand – Denying Benefits unreviewable. In *Stanley*, the Fourth Circuit held that it did not have jurisdiction to review an order in which the Board summarily denied the claimant's second request for reconsideration. *Stanley*, 194 F.3d at 496, 22 BLR at 2-8. The court further indicated, however, that the Board's decision granting the claimant's first request for reconsideration was reviewable because it concerned the substance of the proceedings and resulted in an order "setting forth the rights and obligations of the parties." *Id*. Because the Decision and Order on Remand – Denying Benefits in the present case was substantive in nature and set forth the administrative law judge's determination that entitlement to benefits was not established in either the miner's claim or the survivor's claim, it is not the type of disposition that the Fourth Circuit deemed unreviewable in *Stanley*. *Id*.

Moreover, employer has not identified any support in the regulations for its position that the administrative law judge's Decision on Motion for Reconsideration had the effect of nullifying his Decision and Order on Remand – Denying Benefits. To the contrary, the regulations indicate that an administrative law judge's Decision and Order and his disposition of a request for reconsideration of that Decision and Order are interdependent. Under 20 C.F.R. §§725.479(b), (c), 802.206(a), (d), claimant's filing of a Motion for Reconsideration of the Decision and Order on Remand – Denying Benefits, prevented that decision from becoming final *and* suspended the running of the time limit for filing a Notice of Appeal with the Board. 20 C.F.R. §§725.479(b), (c), 802.206(a), (d). Because the administrative law judge granted claimant's motion (although he rejected claimant's allegations of error), the thirty day time limit for filing a Notice of Appeal did not begin to run until February 27, 2008, the date on which the administrative law judge's Decision on Motion for Reconsideration was filed in the district director's office. 20 C.F.R §802.206(d). Thus, claimant's Notice of Appeal, filed on March 19,

2008, was timely with respect to the Decision and Order on Remand – Denying Benefits and the Decision on Motion for Reconsideration.

We also hold that, under the facts of this case, claimant provided the parties with adequate notice that she was seeking Board review of the Decision and Order on Remand – Denying Benefits and the Decision on Motion for Reconsideration. Claimant referenced the case numbers that appeared on both of the administrative law judge's decisions and referred to the Decision on Motion for Reconsideration in her Supporting Brief. *See* Notice of Appeal at 1 [unpaginated]; Claimant's Supporting Brief at 1, 3, 8, 16. Finally, employer has not identified any prejudice to its interests that will occur as a result of the Board's review of the administrative law judge's Decision and Order on Remand – Denying Benefits and the administrative law judge's Decision on Motion for Reconsideration. We reaffirm, therefore, our denial of employer's Motion to Dismiss claimant's appeal.

B. Claimant's Request to File a Brief on Remand

The second procedural issue that we must address concerns claimant's argument that the administrative law judge should have allowed the parties to file briefs on remand. In a letter dated April 5, 2007, employer requested that the administrative law judge provide the parties with at least thirty days prior to beginning the adjudication of the case on remand so that the parties could be given the opportunity to request permission to submit additional briefing or take other action to ensure a full and fair hearing. Employer's Letter dated April 5, 2007. Claimant submitted a letter dated April 9, 2007, in which she requested that the administrative law judge issue an order "to brief this claim on remand." Claimant's Letter dated April 9, 2007. The administrative law judge issued his Decision and Order on Remand – Denying Benefits without responding to either letter.

Claimant asserts that the administrative law judge was required to allow the parties to submit briefs on remand under the Administrative Procedure Act (APA), which provides, in pertinent part, that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit[.]" 5 U.S.C. §554(c)(2), as incorporated into the Act by 5 U.S.C. §554(a), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Claimant further alleges that she was harmed because the absence of briefs on remand caused the administrative law judge to commit the errors that claimant has identified in her Supporting Brief. Claimant's contentions are without merit. The administrative law judge is afforded considerable discretion in adjudicating claims under the Act and there is no statute or regulation requiring him to permit the parties to submit briefs at any stage of the proceedings. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). Furthermore,

claimant has not identified any actual harm, but merely speculates as to the impact a remand brief would have had on the administrative law judge's consideration of the miner's claim and the survivor's claim on remand from the Board. *See Worrell v. Consolidation Coal Co.*, 8 BLR 1-158, 1-162 (1985); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-188, 1-191 (1983). We hold, therefore, that the fact that the administrative law judge did not grant claimant's request for a briefing order on remand was not an abuse of discretion. *See Worrell*, 8 BLR at 1-162; *Williams*, 6 BLR at 1-191.

II. The Merits of Entitlement

A. Claimant's Burden of Proof in Each Claim

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

To establish entitlement to survivor's benefits, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 506 U.S. 1050 (1993).

B. The Existence of Legal Pneumoconiosis

In its prior Decision and Order, the Board vacated the administrative law judge's finding that the medical opinions of Drs. Cohen and Green did not support a finding of legal pneumoconiosis pursuant to Section 718.202(a)(4), in either the miner's claim or the survivor's claim, and instructed the administrative law judge to reconsider on remand

whether the medical opinions of record are sufficient to establish the existence of legal pneumoconiosis.[3] [*O.T.M.*], slip op. at 6. Dr. Cohen reviewed the miner's medical records and diagnosed coal workers' pneumoconiosis and severe obstructive lung disease. Living Miner's Claim (LMC) Director's Exhibit 83; Survivor's Claim (SC) Claimant's Exhibits 5, 7. Dr. Cohen attributed the miner's severe obstructive lung disease to centrilobular emphysema caused by cigarette smoking and coal dust exposure. *Id*. Dr. Green reviewed the report of the miner's autopsy, the tissue slides obtained during the autopsy, and the miner's medical records. SC Claimant's Exhibits 2, 6. Dr. Green diagnosed simple pneumoconiosis and COPD comprised of emphysema and chronic bronchitis. *Id*. Regarding the cause of the miner's COPD, Dr. Green indicated that cigarette smoking was responsible for two-thirds of the disease and that coal dust exposure was responsible for the remaining third. *Id*.

The record also contains the medical opinions of Drs. Naeye, Zaldivar, Renn, Fino and Branscomb. Dr. Naeye reviewed the autopsy slides and the miner's medical records and diagnosed very severe centrilobular emphysema and minimal coal workers' pneumoconiosis. SC Employer's Exhibits 2, 7. Dr. Zaldivar examined the claimant on November 27, 1996 and later reviewed the miner's medical records. LMC Director's Exhibits 30, 68, 71, 73, 79, 82; SC Employer's Exhibit 3. Dr. Zaldivar determined that the miner suffered from emphysema due to cigarette smoking. *Id*. Dr. Renn reviewed the miner's medical records and diagnosed COPD caused by smoking. LMC Director's Exhibits 30, 34, 67, 77; SC Employer's Exhibit 6. Dr. Fino also performed a record review and found that the miner had simple coal workers' pneumoconiosis and COPD. LMC Director's Exhibits 30, 34, 69, 75; SC Employer's Exhibit 4. Dr. Fino indicated that the miner's COPD was not caused by coal dust exposure. *Id*. Dr. Branscomb assessed the miner's medical records and diagnosed minimal coal workers' pneumoconiosis and bullous emphysema. LMC Director's Exhibits 70, 78; SC Employer's Exhibit 9. Dr. Branscomb concluded that the miner's emphysema was caused solely by smoking. *Id*.

In his Decision and Order on Remand , the administrative law judge found that Dr. Cohen's opinion was not entitled to any weight on the issue of the cause of the miner's emphysema, in light of his failure to cite any medical literature in support of his view that

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[3] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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).

coal dust exposure is a known cause of centrilobular emphysema. Decision and Order on Remand at 3. The administrative law judge acknowledged that Drs. Naeye and Zaldivar, who stated that centrilobular emphysema is caused by smoking, also did not provide any documentation for their opinions, but determined that "to the extent that their opinions corroborate each other, I find that they outweigh the conflicting opinion of Dr. Cohen." *Id*. The administrative law judge concluded that "the weight of the evidence does not support a finding that the miner had legal pneumoconiosis." *Id*.

The administrative law judge found that Dr. Green based his opinion, that coal dust exposure caused one-third of the miner's COPD, on studies indicating that smoking and coal dust exposure contribute to losses in FEV1 in a ratio of 1:1. Decision and Order on Remand at 3; SC Claimant's Exhibit 2 at 5. The administrative law judge noted that Dr. Zaldivar disputed Dr. Green's view of the dose relationship between smoking and coal dust exposure, stating that the medical literature establishes that smoking has a much greater effect on FEV1, with the ratio ranging from 3:1 to 5:1. *Id*.; SC Employer's Exhibit 8 at 29-33. The administrative law judge found that Dr. Green's opinion was contrary to the medical literature because he did not explain why he continued to rely upon the 1:1 ratio, even after acknowledging "that there is medical evidence that would contradict the ratio he applies[.]" Decision and Order on Remand at 3. The administrative law judge concluded, therefore, that Dr. Green's opinion regarding the cause of claimant's COPD was entitled to little weight. *Id*. In his Decision on Motion for Reconsideration, the administrative law judge again determined that the opinions of Drs. Cohen and Green were insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order on Motion for Reconsideration at 2-4.

Claimant argues on appeal that the administrative law judge erred in discrediting Dr. Cohen's diagnosis of legal pneumoconiosis on the ground that Dr. Cohen did not provide a documented rationale for his conclusion that coal dust exposure was a contributing cause of the miner's centrilobular emphysema. Claimant asserts that the administrative law judge did not adequately explain his findings on the issue of centrilobular emphysema. Claimant's contentions are without merit. As indicated, the administrative law judge explained that he gave little weight to Dr. Cohen's opinion, because the doctor "did not cite any medical literature to support [his] opinion regarding the cause(s) of centrilobular emphysema." Decision and Order on Remand at 2. This finding was within the administrative law judge's discretion as fact-finder. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge also noted correctly that the Board's statement that Dr. Cohen provided a basis for his opinion was not a binding determination that Dr. Cohen's rationale for attributing a portion of the miner's centrilobular emphysema to coal dust exposure was persuasive or credible. Decision on Motion for Reconsideration at 2;

see [*O.T.M.*], slip op. at 5. We affirm, therefore, the administrative law judge's finding that Dr. Cohen's opinion was insufficient to establish the existence of legal pneumoconiosis under Section 718.202(a)(4).

Regarding the administrative law judge's consideration of Dr. Green's opinion, claimant argues that the administrative law judge did not properly resolve the conflict between Dr. Green and Dr. Zaldivar regarding the dose relationship of smoking and coal dust exposure. Claimant maintains that the administrative law judge did not adequately explain his finding that Dr. Green's opinion is contrary to the medical literature and less well-reasoned than Dr. Zaldivar's opinion. We disagree. In discussing the merits of Dr. Green's view regarding the dose relationship, the administrative law judge stated:

> Dr. Green does not refer to which article(s) he relied on to support his conclusions. Rather, Dr. Green lumps all the medical literature together. The medical literature cited by Dr. Green appears under the heading "References Supporting an Association Between Exposure to Coal and Other Mineral Deposits and Chronic Obstructive Lung Disease." It is undisputed that coal dust exposure *may* cause obstructive impairment. What this list of medical literature citations does not do is demonstrate the validity of Dr. Green's rule of thumb; a 1:1 ratio between coal dust exposure and cigarette smoking. Dr. Green's failure to cite to, or explain the results, of any of these studies makes it impossible for the court to assess the accuracy of the 1:1 ratio that Dr. Green applies. Dr. Green himself acknowledges that there is variation in this ratio, and Dr. Zaldivar has also called the accuracy of this ratio into question. By simply citing to medical literature that proves an association between coal dust and obstructive lung disease, Dr. Green has not provided a sufficient basis for his strictly adhered to ratio.

Decision on Motion for Reconsideration at 3 n.3 (emphasis in original). The administrative law judge rationally found that he was not required to analyze the medical literature to determine whether it supported Dr. Green's conclusion that the correct dose relationship ratio is 1:1, in light of Dr. Green's failure to identify the medical literature or explain how it supported his opinion. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge permissibly determined, therefore, that Dr. Green's opinion regarding the dose relationship ratio was not well-documented and acted within his discretion as fact-finder in concluding that Dr. Green's opinion was insufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). *Id.*

Because we have affirmed the administrative law judge's decision to discredit the medical opinions supportive of a finding of legal pneumoconiosis, we also affirm the

administrative law judge's determination that claimant did not establish the existence of legal pneumoconiosis under Section 718.202(a)(4). Furthermore, we hold that in light of our affirmance of administrative law judge's findings regarding the opinions of Drs. Cohen and Green, we need not consider claimant's allegations of error regarding the administrative law judge's weighing of the contrary medical opinions relevant to Section 718.202(a)(4). *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-383 n.4 (1983).

C. Total Disability and Death Due to Legal Pneumoconiosis

Claimant next contends that the administrative law judge erred in finding that because he again determined that claimant did not establish the existence of legal pneumoconiosis, he was not required to reconsider the findings set forth in his initial Decision and Order, that claimant did not establish total disability or death due to pneumoconiosis at Sections 718.204(c) and 718.205(c). Claimant maintains that notwithstanding the administrative law judge's discrediting of the opinions in which Drs. Cohen and Green attributed the miner's pulmonary disease, in part, to coal dust exposure, the Board's remand instructions required the administrative law judge to consider whether their opinions were sufficient to establish that legal pneumoconiosis was a contributing cause of the miner's total disability and death pursuant to Sections 718.204(c) and 718.205(c).[4]

[4] We reject claimant's related assertion that the administrative law judge should have considered whether, in acknowledging that the medical literature supported a 5:1 or 3:1 dose relationship between smoking and coal dust exposure, Dr. Zaldivar, in essence, opined that coal dust exposure was at least a contributing cause of the miner's total disability. Although claimant has accurately described Dr. Zaldivar's summary of the medical literature, Dr. Zaldivar did not indicate that it was his opinion that coal dust exposure was a factor that contributed to the miner's total disability. Rather, Dr. Zaldivar stated that the objective data in this case led him to conclude that smoking was the sole cause of the miner's totally disabling pulmonary disease. LMC Director's Exhibits 30, 68, 71, 73, 79, 82; SC Employer's Exhibit 3. Moreover, the administrative law judge could not independently determine whether the medical literature, as characterized by Dr. Zaldivar, supported a finding that coal dust exposure was a contributing cause of the miner's total disability, as this would require the administrative law judge to act as a medial expert, a role that he is not empowered to perform. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

In its prior Decision and Order, the Board noted that claimant challenged the administrative law judge's determination that the medical evidence of record was insufficient to establish total disability due to pneumoconiosis and death due to pneumoconiosis under Sections 718.204(c) and 718.205(c). The Board set forth the requirements in the regulations and the case law interpreting these requirements. The Board then held:

> The administrative law judge's findings regarding disability causation and death due to pneumoconiosis at [Sections] 718.204(c) and 718.205(c), respectively are largely dependent on his findings that claimant failed to establish the existence of legal pneumoconiosis at [Section] 718.202(a)(4), which we have vacated. Therefore, we also vacate his findings regarding disability causation and death due to pneumoconiosis at [Sections] 718.204(c) and 718.205(c), respectively, and instruct the administrative law judge to reweigh the relevant evidence under the proper causation standards.

[*O.T.M.*], slip op. at 6. In his Decision and Order on Remand, the administrative law judge stated, "[s]ince my finding regarding the presence of legal pneumoconiosis has not changed upon reconsideration of the opinions of Drs. Green and Cohen, my original findings [on] disability causation and death causation are unaffected." Decision and Order on Remand at 3. The administrative law judge subsequently rejected claimant's challenge to this determination in her Motion for Reconsideration, indicating that:

> In the Remand Order, the Board vacated my findings on disability and death causation because they were largely based on the finding that the miner did not have legal pneumoconiosis. There is nothing in Board's Decision . . . that requires that I revisit my findings on disability and death causation having, once again, found that the [c]laimant has failed to establish the presence of legal pneumoconiosis.

Decision on Motion for Reconsideration at 4.

The administrative law judge correctly determined that his findings pursuant to Section 718.202(a)(4) rendered moot a consideration of whether legal pneumoconiosis was a contributing cause of the miner's total disability or death under Sections 718.204(c) and 718.205(c). When the existence of legal pneumoconiosis is at issue, there is considerable overlap among Sections 718.202(a)(4), 718.204(c) and 718.205(c), because under each regulation, claimant is required to establish that a causal relationship exists between coal dust exposure and, respectively, the miner's impairment, disability, or death. 20 C.F.R. §§718.201(b)(2), 718.202(a)(4), 718.204, 718.205; *see Williams*, 453 F.3d at 622, 23 BLR at 2-352; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR

2-162 (4th Cir. 2000); *Shuff*, 967 F.2d at 979-80**,** 16 BLR at 2-92-93. In this case, the administrative law judge permissibly determined, pursuant to Section 718.202(a)(4), that the evidence indicating that a relationship existed between coal dust exposure and the miner's COPD/emphysema was of little probative value. *See* discussion *supra*, slip op. at 13-16. Accordingly, the administrative law judge acted within his discretion as fact-finder in declining to revisit his prior findings that claimant did not establish that pneumoconiosis was a contributing cause of the miner's total disability or death under Sections 718.204(c) and 718.205(c).

D. Total Disability and Death Due to Clinical Pneumoconiosis

Finally, claimant alleges that the administrative law judge erred in determining that clinical pneumoconiosis was not a contributing cause of the miner's total disability or death.[5] Claimant contends that in addressing Dr. Cohen's opinion under Sections 718.204(c) and 718.205(c), the administrative law judge did not properly apply the standards set forth by the Board in *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004) and by the Fourth Circuit in *Shuff*.[6] Claimant raises the same allegation of error with respect to the administrative law judge's consideration of Dr. Green's opinion pursuant to Section 718.205(c). Claimant's arguments are without merit.

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[5] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[6] In *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004), the Board held that a medical opinion in which the physician identifies pneumoconiosis as one of two separate causes of a miner's totally disabling impairment can establish, pursuant to 20 C.F.R. §718.204(c), that pneumoconiosis is a substantially contributing cause of the impairment. In *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied* 506 U.S. 1050 (1993), the Fourth Circuit held that pneumoconiosis is a substantially contributing cause of the miner's death if it hastens the miner's death.

The administrative law judge determined correctly that Dr. Cohen did not identify clinical pneumoconiosis as a contributing cause of the miner's disabling impairment or his death. Decision on Motion for Reconsideration at 4; LMC Director's Exhibit 83; SC Claimant's Exhibits 5, 7. In addition, the administrative law judge rationally concluded, based upon his findings at Section 718.202(a)(4), that to the extent that Dr. Cohen "focused on the miner's emphysema," his opinion on causation was entitled to little weight under Sections 718.204(c) and 718.205(c). *Id*.; *see Williams*, 453 F.3d at 622, 23 BLR at 2-345; *Shuff*, 967 F.2d at 979-80**,** 16 BLR at 2-92-93.

With respect to Dr. Green's opinion, the administrative law judge determined that it was insufficient to establish that clinical pneumoconiosis hastened the miner's death pursuant to Section 718.205(c). Dr. Green stated:

> [I]t is my opinion that the underlying cause of death was [the miner's] chronic lung condition, which included simple coal workers' pneumoconiosis and COPD. It is also my opinion that pneumonia was the immediate cause of death and that the risk factors for this included the myelodysplastic syndrome as well as the COPD and pneumoconiosis. The simple coal workers' pneumoconiosis was due entirely to coal dust exposure and one-third of the COPD was, in my opinion, due to inhalation of coal mine dust. Taken together, it is my opinion that pneumoconiosis was the major causal factor in [the miner's] death and that cigarette smoking and the myelodysplastic syndrome were significant factors contributing to death.

Claimant's Exhibit 2 at 5. The administrative law judge found that Dr. Green did not identify clinical pneumoconiosis as a contributing cause of death with sufficient specificity, stating:

> Dr. Green's opinion . . . fails to distinguish between clinical pneumoconiosis, found at autopsy, and legal pneumoconiosis. Dr. Green has not opined that the miner's clinical pneumoconiosis substantially contributed to or hastened the miner's death, as opposed to clinical pneumoconiosis combined with COPD, and, as such, his opinion does not meet the criteria for establishing that the miner's death was due to pneumoconiosis.

Decision on Motion for Reconsideration at 5. The administrative law judge is responsible for engaging in the *de novo* consideration of the medical opinion evidence and is granted broad discretion in resolving any ambiguities in this evidence. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §§725.351(b), 725.477; *Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441,

21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In the present case, the administrative law judge did not abuse his discretion in determining that because Dr. Green referred to simple coal workers' pneumoconiosis and COPD jointly as contributing causes of the miner's death, he did not identify simple pneumoconiosis, standing alone, as a condition that hastened the miner's death. *See Bill Branch Coal Co. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Shuff*, 967 F.2d at 979-80**,** 16 BLR at 2-92-93; *Clark*, 12 BLR at 1-153. We affirm, therefore, the administrative law judge's finding that Dr. Green's opinion was insufficient to establish that clinical pneumoconiosis was a contributing cause of the miner's death under Section 718.205(c).

Because we have affirmed the administrative law judge's decision to discredit the opinions supportive of findings of total disability and death due to pneumoconiosis under Sections 718.204(c) and 718.205(c), we affirm his determination that claimant has not satisfied her burden of proof under these regulations. Furthermore, we hold that in light of our affirmance of the administrative law judge's regarding the opinions of Drs. Cohen and Green, we need not consider claimant's allegations of error with respect to the administrative law judge's weighing of the contrary medical opinions relevant to Sections 718.204(c) and 718.205(c). *See Searls*, 11 BLR at 1-164; *Kozele*, 6 BLR at 1-382-383 n.4.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge