BRB No. 10-0410 BLA

BILLY BANKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/31/2011
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	
and	)	
	)	
UNDERWRITERS SAFETY & CLAIMS	)	
	)	
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 on Remand–Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand–Award of Benefits (04-BLA-6718) of Administrative Law Judge Larry S. Merck rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This claim was filed on July 11, 2003, and is before the Board for the second time. Director's Exhibit 4. In the initial decision, Administrative Law Judge Thomas F. Phalen, Jr. (Judge Phalen), credited claimant with at least seventeen years of coal mine employment,[2] and found that the subsequent claim was timely filed pursuant to 20 C.F.R. §725.308(a). Judge Phalen also found that the new medical evidence established that claimant has a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2), and, thus, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on the merits, Judge Phalen found that claimant established the existence of clinical and legal pneumoconiosis,[3] arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and that pneumoconiosis was a

[1] Claimant filed two prior claims for benefits, and the history of the prior claims is set out in the Board's most recent decision in *B.B.* [*Banks*] *v. Cumberland River Coal Co.*, BRB No. 07-0777 BLA (July 31, 2008)(unpub.), slip op at 2 n.2. Claimant's second claim was finally denied on May 20, 2002, by the district director, upon claimant's second request for reconsideration. Director's Exhibit 2 at 4, 7.

[2] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 5. 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, 1-202 (1989) (*en banc*).

[3] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "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." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). A disease arising out of coal mine employment includes any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

substantially contributing cause of his total disability, pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Phalen awarded benefits.

Pursuant to employer's appeal, the Board vacated Judge Phalen's finding that this claim was timely filed pursuant to Section 725.308(a), and remanded the case for further consideration of this issue. *B.B.* [*Banks*] *v. Cumberland River Coal Co.*, BRB No. 07-0777 BLA (July 31, 2008)(unpub.). The Board also vacated Judge Phalen's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), based on new evidence of total respiratory disability, because the record revealed that the prior denial was actually based on a finding that claimant failed to establish the existence of pneumoconiosis. Additionally, the Board vacated Judge Phalen's findings that the existence of pneumoconiosis was established by the x-ray and medical opinion evidence, pursuant to Sections 718.202(a)(1), (4), and, consequently, vacated his finding that claimant's total disability is due to pneumoconiosis, at 20 C.F.R. §718.204(c). The Board affirmed, as unchallenged, Judge Phalen's findings that claimant established at least seventeen years of coal mine employment, and the existence of a totally disabling respiratory or pulmonary impairment, pursuant to Section 718.204(b)(2).

On remand, the case was reassigned to Administrative Law Judge Larry S. Merck (the administrative law judge), due to Judge Phalen's retirement. The administrative law judge initially found that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308(a), in accordance with the Sixth Circuit's decision in *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), issued subsequent to the Board's decision.[4] The administrative law judge further found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R.

[4] The regulation at 20 C.F.R. §725.308(a) provides in relevant part:

> A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis . . . has been communicated to the miner . . . .

In *Hatfield*, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year statute of limitations, if it was discredited or found outweighed by other evidence in the prior denied claim. *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009). Applying that rule in this case, the administrative law judge found that the opinion of Dr. Rasmussen, which employer had argued was a medical determination that was communicated to claimant in 2000, had to be deemed misdiagnoses, in view of the denial of claimant's previous claim. Decision and Order on Remand at 5-6.

§718.202(a)(4), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d). Considering the claim on the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis, pursuant to Section 718.202(a)(4),[5] and total disability due to legal pneumoconiosis, pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§725.309, 718.202(a)(4) and 718.204(c).[6] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but correctly notes that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, does not apply to this case, because the claim was filed before January 1, 2005. Director's Brief at 1 n.1. Employer agrees that the recent amendments do not apply to this claim. Employer's Brief at 1-2.

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. 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 under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of 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.

Section 725.309(d)-Change in an Applicable Condition of Entitlement

Employer contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Relying on *Tennessee Consolidated Coal Co. v.*

[5] The administrative law judge further found that he need not separately determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), because that finding was subsumed in his finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Kiser v. L & J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order on Remand at 21.

[6] Employer now concedes that the current claim is timely. Employer's Brief at 6 n.3, *citing Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009).

Kirk, 264 F.3d 602, 609, 22 BLR 2-288, 2-300 (6th Cir. 2001) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), employer argues that the administrative law judge erred in not comparing the evidence in the prior claim to the new evidence in the subsequent claim to ensure that there was an "actual difference between the old evidence and the new." Employer's Brief at 14-24. Specifically, employer contends that as Dr. Rasmussen diagnosed legal pneumoconiosis in the prior claim, the diagnoses of legal pneumoconiosis by Drs. Rasmussen and Forehand, in the current claim, do not establish any change in claimant's condition. Employer's Brief at 17-19, 21. We disagree. The Sixth Circuit precedent relied on by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised version of Section 725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[7] *See* 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). Consequently, we reject employer's contention that the administrative law judge was required to conduct a comparison of the old and new evidence, to determine whether "claimant's 'legal' pneumoconiosis changed" since the prior denial, pursuant to 20 C.F.R. §725.309. Employer's Brief at 24.

Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he has pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

We also reject employer's alternative argument that, because Dr. Rasmussen's former diagnosis of pneumoconiosis is deemed a misdiagnosis under *Hatfield*, the administrative law judge could not credit the new medical opinion in which Dr. Rasmussen reached the same conclusion. Although a physician's diagnosis of pneumoconiosis, which predates the prior denial, is deemed a misdiagnosis for the purpose of assessing when the statute of limitations begins to run, the court, in *Hatfield*, did not indicate that a subsequent opinion by the same physician based on new evidence but reaching the same conclusion as a prior opinion, could not be credited. *See Hatfield*, 556 F.3d at 482, 24 BLR at 2-152. Moreover, employer's argument ignores the reality that a miner's condition may worsen over time. *See Hatfield*, 556 F.3d at 482, 24 BLR at

[7] In amending 20 C.F.R. §725.309, the Department of Labor adopted the standard set forth in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), which does not require a qualitative comparison of the old and new evidence.

2-152. Thus, under *Hatfield*, the administrative law judge properly treated the previous determination of Dr. Rasmussen in 2000, that the miner was totally disabled due to pneumoconiosis, as legally insufficient to trigger the statute of limitations, but he was not required to discredit Dr. Rasmussen's similar determination in his 2004 report. Employer's Brief at 11-12, 23.

Employer also argues that the administrative law judge erred in finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the February 26, 2001 and March 29, 2004 reports of Dr. Rasmussen, the July 29, 2003 report of Dr. Forehand, and the September 24, 2003, February 16 and June 28, 2006, reports, and the February 12, 2004 and February 16, 2006 depositions, of Dr. Jarboe. The administrative law judge found that both Dr. Rasmussen and Dr. Forehand opined that claimant suffers from legal pneumoconiosis, in the form of an obstructive ventilatory impairment due to both coal mine dust exposure and cigarette smoking, while Dr. Jarboe opined that claimant does not have any lung disease attributable to his coal mine dust exposure. Claimant's Exhibits 1 at 3-4; 2 at 3, 103; Director's Exhibits 13 at 20; 15 at 6; Employer's Exhibits 3 at 16-18, 20-21; 5 at 2-3; 6 at 21, 26-29, 39-41; 8 at 2-4.

The administrative law found the opinion of Dr. Rasmussen, as supported by the opinion of Dr. Forehand, to be "well reasoned and well-documented" because it was based on the results of physical examination, objective test results, occupational and medical histories, and because his rationale was consistent with the prevailing view of the medical community now codified in the revised regulations. Decision and Order on Remand at 9-12. By contrast, the administrative law judge found the opinion of Dr. Jarboe to be inadequately reasoned and entitled to less weight than the opinions of Drs. Rasmussen and Forehand, because Dr. Jarboe did not adequately explain his reason for excluding claimant's seventeen years of coal mine dust exposure from playing a contributing or aggravating role in claimant's respiratory impairment. Decision and Order on Remand at 12-17. The administrative law judge, therefore, found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Forehand over that of Dr. Jarboe. Employer also argues that the administrative law judge erred in relying on Dr. Rasmussen's February 26, 2001 report, diagnosing legal pneumoconiosis, because it pre-dates the prior denial in 2002.

Initially, we reject employer's contention that Dr. Rasmussen and Dr. Forehand based their diagnoses of legal pneumoconiosis on discredited positive x-rays. Employer's Brief at 28-31. Contrary to employer's argument, substantial evidence supports the administrative law judge's conclusion that while both Dr. Rasmussen and

Dr. Forehand relied on discredited positive x-rays to support their diagnoses of clinical coal workers' pneumoconiosis, they based their additional diagnoses of legal pneumoconiosis on pulmonary function and blood gas studies showing obstructive ventilatory impairments and hypoxemia, together with claimant's coal mine employment and smoking histories. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order on Remand at 9-12.

Nor is there merit to employer's contention that the administrative law judge erred in finding the opinions of Drs. Rasmussen and Forehand to be sufficiently reasoned and documented to support claimant's burden of proof. Contrary to employer's argument, the administrative law judge permissibly concluded that Dr. Rasmussen's opinion, as expressed in his 2004 report, was well-documented and well-reasoned, because Dr. Rasmussen took into account the results of his physical examination and objective testing, and claimant's smoking and coal mine dust exposure histories. Further, Dr. Rasmussen supported his conclusion that both exposures had contributed to the development of claimant's obstructive impairment with references to medical studies, consistent with the Department of Labor's recognition that coal dust and cigarette smoking cause obstructive impairments through similar mechanisms. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. App'x 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); 65 Fed. Reg. 79,943 (Dec. 20, 2000); Decision and Order on Remand at 12.

The administrative law judge also acted within his discretion in finding Dr. Forehand's opinion, that both coal mine dust exposure and smoking contributed to claimant's chronic bronchitis with obstructive impairment, to be a "reasoned and documented diagnosis of legal pneumoconiosis," because it was based on claimant's exposure histories and pulmonary function study results. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003); Decision and Order on Remand at 10. Further, the determination of whether a physician's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *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); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We further reject employer's assertion that the administrative law judge failed to state a valid reason for discounting the opinion of Dr. Jarboe, that claimant's obstructive lung disease is due entirely to smoking. Employer's Brief at 18-20. Contrary to employer's contention, the administrative law judge permissibly found that Dr. Jarboe's opinion was entitled to less probative weight because in relying on the purely obstructive,

and partially reversible, nature of claimant's impairment to support his conclusion that smoking was its sole cause, Dr. Jarboe did not adequately explain why claimant's seventeen years of coal mine dust exposure could not have played a contributing or aggravating role. 20 C.F.R. §718.201(a)(2); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004)(unpub.); Decision and Order on Remand at 15-17. In addition, the administrative law judge rationally found that Dr. Jarboe's opinion, that the miner's pulmonary impairment could not have been attributable to coal mine dust exposure because his coal mine employment ended in 1990, was inconsistent with the premises underlying the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); Decision and Order on Remand at 16-17. We, therefore, affirm the administrative law judge's discounting of Dr. Jarboe's opinion as supported by substantial evidence and in accordance with law. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

Finally, we agree with employer that the administrative law judge erred considering Dr. Rasmussen's February 26, 2001 report diagnosing legal pneumoconiosis, which pre-dates the denial of the prior claim, in determining whether the new evidence established a change in an applicable condition of entitlement pursuant to Section 725.309(d). *Hatfield*, 556 F.3d at 483, 24 BLR at 2-151-52; *Obush*, 24 BLR at 1-122. However, as Dr. Rasmussen expressed the same opinion in his 2001 and 2004 reports, and as the administrative law judge properly considered Dr. Rasmussen's opinion, as expressed in his 2004 report to be the best reasoned and documented opinion of record,[8] the administrative law judge's error in also considering Dr. Rasmussen's 2001 report is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis, in the form of chronic bronchitis and an obstructive ventilatory impairment attributable to coal mine dust exposure and cigarette smoking.

In light of our affirmance of the administrative law judge's finding that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4), we affirm, as supported by substantial evidence, the administrative law

[8] The administrative law judge found that Dr. Rasmussen's 2001 report was "adequately reasoned and documented," but found Dr. Rasmussen's 2004 report to be "well-reasoned and well-documented." Decision and Order on Remand at 11-12.

judge's finding that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final.[9] 20 C.F.R. §725.309.

The Merits of the Claim

Employer argues that the administrative law judge, in considering the merits of the claim, erred in his evaluation of the medical opinion evidence in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Considering the evidence from all three claims, the administrative law judge reasonably discounted the medical opinions from claimant's first, 1992, claim, since they less accurately reflect claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order on Remand at 18.

Having already weighed the medical opinions submitted with claimant's third, current claim, pursuant to Section 725.309(d), the administrative law judge considered the evidence from claimant's second claim, filed in 2000, consisting of the March 15, 2000 report of Dr. Rasmussen, diagnosing legal pneumoconiosis, and the March 22, 2000 report of Dr. Dahhan, concluding that claimant does not have legal pneumoconiosis. Director's Exhibit 2 at 76, 106, 110. The administrative law judge discredited Dr. Rasmussen's 2000 report finding that, while "otherwise reasoned," it was based on inaccurate smoking and coal mine employment histories. Decision and Order on Remand at 19. The administrative law judge discredited Dr. Dahhan's 2000 report because it was "poorly reasoned" in that it was contrary to the "determinations of scientific fact" by the Department of Labor. Decision and Order on Remand at 20. Considering all of the relevant medical opinion evidence together, the administrative law judge found that the previously submitted evidence did not contain a well-documented and well-reasoned opinion on the issue of legal pneumoconiosis, and that, therefore, the credible opinions of Drs. Rasmussen and Forehand, submitted with the current claim, established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

[9] Section 718.202(a) provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Consequently, the administrative law judge's finding that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) was sufficient alone to establish that one of the applicable conditions of entitlement has changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(d).

Employer argues that the administrative law judge erred in crediting Dr. Rasmussen's 2001 and 2004 reports to find that claimant established legal pneumoconiosis. Employer asserts that because the administrative law judge discounted Dr. Rasmussen's 2000 report as based on erroneous coal mine employment and smoking histories, and because Dr. Rasmussen relied on substantially similar histories in his 2001 and 2004 reports, the administrative law judge acted inconsistently in failing to similarly discredit these reports. Employer's Brief at 20, 28-29.

Contrary to employer's contention, the administrative law judge rationally discredited Dr. Rasmussen's 2000 opinion, as the administrative law judge believed the 2000 opinion, unlike the doctor's subsequent opinions, was based on an inflated coal mine employment history, and an understated smoking history. In addition, as employer concedes, all of Dr. Rasmussen's reports are based on substantially similar exposure histories.[10] Moreover, the exposure histories relied upon by Dr. Rasmussen, especially in his 2004 report, comport with the exposure histories found by the administrative law judge.[11] Thus, the administrative law judge's, perhaps erroneous, discrediting of Dr. Rasmussen's 2000 report in no way undermines his permissible crediting of Dr. Rasmussen's subsequent reports. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283.

We also reject employer's contention that the administrative law judge did not provide a valid reason for discrediting Dr. Dahhan's opinion. Employer's Brief at 33-38. Contrary to employer's assertion, the administrative law judge rationally discredited Dr. Dahhan's opinion, that the miner's pulmonary impairment could not have been attributable to coal mine dust exposure since his coal mine employment ended in 1991, because it was inconsistent with the premises underlying the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins*, 484 U.S. at 151, 11 BLR at 2-9; *Odom*, 342 F.3d at 491, 22 BLR at 2-621; Decision and Order on Remand at 20. The administrative law judge also permissibly

[10] In 2000, Dr. Rasmussen recorded a nineteen year coal mine employment history, and a thirty-five pack-year smoking history. Director's Exhibit 2 at 103. In 2001, Dr. Rasmussen recorded a nineteen year coal mine employment history and a thirty-six pack-year smoking history. Claimant's Exhibit 2 at 2. In 2004, Dr. Rasmussen recorded a coal mine employment history of "[seventeen] or more" years, and a smoking history of thirty-eight pack-years, stating that claimant continues to smoke about one-half pack per day. Claimant's Exhibit 1 at 2.

[11] As the administrative law judge found, claimant was credited with "at least" seventeen years of coal mine employment and a thirty-eight pack-year smoking history, continuing at about one-half pack per day. Decision and Order on Remand at 4.

discounted Dr. Dahhan's opinion because Dr. Dahhan did not adequately explain why he believed claimant's treating doctors' prescription of bronchodilators, indicating that claimant's impairment was responsive to medication, was necessarily "inconsistent with the permanent adverse affects of coal dust," since Dr. Dahhan's own pulmonary function studies showed only partial reversibility in claimant's impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483 (an administrative law judge may discredit an opinion that does not explain how partial reversibility in the results of a miner's qualifying pulmonary function studies necessarily eliminates a diagnosis of legal pneumoconiosis); *Swiger*, 98 F. App'x at 237; Decision and Order on Remand at 20-21.

Therefore, as the administrative law judge permissibly concluded that the previously-submitted evidence does not contain any contrary, probative medical opinions, we affirm the administrative law judge's reliance on the new opinions of Drs. Rasmussen and Forehand to find that legal pneumoconiosis was established, on the merits, pursuant to Section 718.202(a)(4).

Employer further challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).[12] Employer's Brief at 10. Drs. Rasmussen[13] and Forehand[14] opined that claimant's total

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

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

20 C.F.R. §718.204(c)(1).

[13] In his 2004 report, Dr. Rasmussen opined that the "two risk factors for [claimant's] disabling lung disease are his cigarette smoking and his coal mine dust exposure. Both contribute. Both cause lung tissue destruction even sharing some cellular and biochemical mechanisms." Claimant's Exhibit 1 at 3. Dr. Rasmussen relied on two

disability is due, in part, to coal dust exposure, while Drs. Jarboe and Dahhan attributed claimant's total disability solely to his smoking history. Director's Exhibits 2 at 76; 15 at 7; Employer's Exhibits 6 at 45; 8 at 4. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Jarboe and Dahhan because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order on Remand at 22; Employer's Brief at 44. Moreover, as the administrative law judge rationally relied on the reasoned and documented opinion of Dr. Rasmussen, as supported by the opinion of Dr. Forehand, to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on Dr. Rasmussen's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003); *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis, on the merits, pursuant to Section 718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d), and the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and total disability due to pneumoconiosis pursuant to Section 718.204(c), on the merits, we affirm the administrative law judge's award of benefits.

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medical articles to support his opinion. *Id*. at 3-4. Dr. Rasmussen concluded that "[claimant's] coal mine dust exposure is a significant contributing factor." *Id*. at 4.

[14] Dr. Forehand stated that, "claimant's cigarette smoking has left him susceptible to the effects of coal mine dust. Were it not for claimant's coal mine employment, respiratory impairment would not be to the same degree." Director's Exhibit 13 at 20.

Accordingly, the administrative law judge's Decision and Order on Remand–Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge