BRB No. 07-0597 BLA

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| J.L. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| FRIENDSHIP ENERGY, INCORPORATED | ) | |
| | ) | |
| and | ) | DATE ISSUED: 05/28/2008 |
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| NATIONAL UNION FIRE INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5007) of Administrative Law Judge Alice M. Craft (the administrative law judge) awarding benefits on a subsequent 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] The administrative law judge credited claimant with twenty-eight years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence developed since the prior denial of benefits established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Although the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), she found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203. The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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,

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[1] Claimant filed his first claim on October 20, 1999. Director's Exhibit 1. It was finally denied by the district director on April 18, 2000, by reason of abandonment. *Id*. Claimant filed this claim on September 23, 2004. Director's Exhibit 3.

[2] After noting that the prior claim was denied by reason of abandonment, the administrative law judge concluded that "[c]laimant failed to establish any element of entitlement in the prior claim." Decision and Order at 4. The administrative law judge then found that employer's concession that claimant was totally disabled from a pulmonary or respiratory impairment constituted a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id*.

[3] Because the administrative law judge's findings that claimant established twenty-eight years of coal mine employment, that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), and that the evidence established total disability at 20 C.F.R. §718.204(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

**EXISTENCE OF PNEUMOCONIOSIS**
**Section 718.202(a)(4)**

Employer initially contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We agree. The administrative law judge considered medical treatment records,[4] and the reports of Drs. Baker, Simpao, Dahhan, Selby, Traughber, and Powell. Dr. Baker diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease related to coal dust exposure, and chronic bronchitis related to coal dust exposure. Claimant's Exhibit 6. Dr. Simpao diagnosed coal workers' pneumoconiosis.[5] Director's Exhibit 11. By contrast, Dr. Dahhan opined that claimant does not have clinical pneumoconiosis. Employer's Exhibit 3. Dr. Dahhan also opined that claimant's severe obstructive lung disease was not related to coal dust exposure. *Id*. Dr. Selby opined that claimant does not have coal workers' pneumoconiosis or any coal mine induced respiratory disease. Employer's Exhibits 1, 2. Dr. Traughber diagnosed obstructive ventilatory deficit related to cigarette smoking and chronic bronchitis, based on a history of one-half cup of daily sputum production.[6] Director's Exhibit 1. Dr. Traughber also opined that claimant does not have an occupational lung disease related to coal dust exposure. *Id*. Dr. Powell opined that claimant does not have coal workers'

[4] The administrative law judge stated that "the treatment records do not support a finding of either clinical or legal pneumoconiosis, but they do not weigh against a finding of legal pneumoconiosis." Decision and Order at 16.

[5] The administrative law judge construed Dr. Simpao diagnosis of coal workers' pneumoconiosis as a diagnosis of legal pneumoconiosis. The administrative law judge noted that "Dr. Simpao found the x-ray taken as part of his examination of the [c]laimant to be negative, but nonetheless diagnosed pneumoconiosis based on the pulmonary function testing, physical examination, and symptoms." Decision and Order at 16.

[6] Although Dr. Traughber diagnosed chronic bronchitis, he did not render an opinion regarding the etiology of the condition. Director's Exhibit 1.

pneumoconiosis. *Id.* Although Dr. Powell diagnosed pulmonary emphysema with mild obstructive ventilatory defect, he did not render an opinion regarding the cause of the condition. *Id.*

The administrative law judge found that all of the medical opinions were documented and reasoned. Decision and Order at 16. Nonetheless, the administrative law judge gave less weight to Dr. Baker's diagnosis of clinical pneumoconiosis than to the contrary opinions of Drs. Dahhan, Selby, Traughber, and Powell because she found that they were better supported by the objective evidence. *Id*. Regarding the issue of legal pneumoconiosis, the administrative law judge gave little weight to the opinions of Drs. Traughber and Powell because she found that they did not explain why they attributed claimant's chronic obstructive pulmonary disease (COPD) entirely to cigarette smoking. *Id*. at 17. The administrative law judge next gave less weight to Dr. Dahhan's opinion than to the contrary opinions of Drs. Baker and Simpao, because she found that Dr. Dahhan offered an inadequate explanation for attributing claimant's COPD entirely to cigarette smoking. *Id*. The administrative law judge then gave little weight to Dr. Selby's opinion because "absent evidence of clinical pneumoconiosis, [Dr. Selby] gives little credence to the premise that coal dust contributes to obstructive disease in a miner with a significant smoking history." *Id*. at 18. Hence, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) based on the opinions of Drs. Simpao and Baker. *Id.*

**Dr. Baker**

Employer argues that substantial evidence does not support the administrative law judge's finding that Dr. Baker's diagnosis of legal pneumoconiosis was reasoned. The administrative law judge found that the opinions of Drs. Baker and Simpao, that claimant has legal pneumoconiosis, were documented and reasoned. Decision and Order at 18. In a report dated February 6, 2006, Dr. Baker diagnosed COPD related to coal dust exposure and chronic bronchitis related to coal dust exposure. Claimant's Exhibit 6. In an addendum to this report, Dr. Baker indicated that claimant possibly has legal pneumoconiosis. *Id.* Dr. Baker specifically opined that "[claimant's] possible COPD, chronic bronchitis, and resting arterial hypoxemia may have been caused predominately by his cigarette smoking but his coal dust has been a significant contributing factor." *Id.*

In summarizing the medical opinion evidence, the administrative law judge noted that "[Dr. Baker] said that possible obstructive disease, chronic bronchitis, and resting arterial hypoxemia 'may have been caused predominately by his cigarette smoking but his coal dust has been a significant contributing factor.'" Decision and Order at 12. However, in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge did not address the speculative nature of Dr. Baker's opinion that claimant has legal pneumoconiosis. *Island Creek Coal Co. v. Holdman*, 202 F.3d

873, 22 BLR 2-25 (6th Cir. 2000); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-7, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). In addition, the administrative law judge did not explain why she found that Dr. Baker's diagnosis of legal pneumoconiosis was reasoned. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for reconsideration of Dr. Baker's opinion that claimant has legal pneumoconiosis in accordance with the APA.

**Dr. Simpao**

Employer also argues that substantial evidence does not support the administrative law judge's finding that Dr. Simpao's diagnosis of legal pneumoconiosis was reasoned. As noted above, the administrative law judge found that Dr. Simpao's opinion that claimant has legal pneumoconiosis was documented and reasoned. Decision and Order at 18. However, as employer asserts, the administrative law judge did not explain her conclusion. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz*, 12 BLR at 1-165. Consequently, on remand, the administrative law judge must reconsider Dr. Simpao's opinion in accordance with the APA.

Employer further asserts that Dr. Simpao's opinion that claimant has legal pneumoconiosis was based on a faulty pulmonary function test. In acknowledging that Dr. Simpao diagnosed legal pneumoconiosis, the administrative law judge stated that "Dr. Simpao found the x-ray taken as part of his examination of the [c]laimant to be negative, but nonetheless diagnosed pneumoconiosis based on the pulmonary function testing, physical examination, and symptoms." Decision and Order at 16. An administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indication upon which the medical opinion or conclusion is based. *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). In this case, as employer correctly points out, Dr. Simpao's pulmonary function test incorrectly reported claimant's height and age. In summarizing the pulmonary function study evidence, however, the administrative law judge noted that there was a variance that ranged from 65 inches to 68 inches in the recorded height of claimant, and then permissibly found that the midpoint of 66.5 inches was the correct height to determine whether the results of the tests were qualifying. Decision and Order at 7; *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Consequently, the administrative law judge considered the corrected

height of 66.5 inches for Dr. Simpao's October 8, 2004 pulmonary function study, as opposed to the height of 66 inches that was recorded in that study. Decision and Order at 7 n.3. In addition, although the administrative law judge noted that Dr. Simpao's October 8, 2004 pulmonary function study recorded an incorrect age of sixty-four years, she considered the study based on the corrected age of sixty-five years. *Id*. at 7. The discrepancies in the height and age of claimant did not affect whether the October 8, 2004 pulmonary function study yielded qualifying values. *Cf. Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995) (recognizing that the administrative law judge's failure to resolve height discrepancies affected whether the pulmonary function tests yielded qualifying values). Dr. Simpao's pulmonary function test yielded qualifying values with the height and age recorded in the study as well as with the corrected height and age that were found by the administrative law judge. Director's Exhibit 11.

Further, in summarizing the pulmonary function study evidence, the administrative law judge considered the consulting opinions of Drs. Mettu and Selby with regard to the validity of Dr. Simpao's October 8, 2004 pulmonary function study. The administrative law judge noted that while Dr. Mettu opined that Dr. Simpao's October 8, 2004 pulmonary function study was technically acceptable, Dr. Selby opined that the study was invalid.[7] Decision and Order at 7. In addition, the administrative law judge implicitly acknowledged Dr. Selby's validation report in weighing together all the evidence of total disability at 20 C.F.R. §718.204(b). The administrative law judge specifically stated:

> The pulmonary function tests, on the other hand, have all resulted in qualifying values since June 2004. Moreover, despite the questionable validity of some of the pulmonary function tests, every physician who has given an opinion on the issue, with the exception of Dr. Baker, who was uncertain due to his nonreproducible pulmonary function study, has said that the [c]laimant is disabled.[8]

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[7] During a May 2, 2006 deposition, Dr. Selby opined that Dr. Simpao's pulmonary function test was invalid based on the criteria of the American Thoracic Society, because there was a greater than 5% variation between the best FEV1 reading and the next best FEV1 reading in that study. Employer's Exhibit 2 (Dr. Selby's Deposition at 20); Decision and Order at 12.

[8] The administrative law judge stated that "Dr. Selby said that based on his own studies, the [c]laimant was totally disabled from a pulmonary standpoint from performing the work of a miner or similarly arduous work in a dust-free environment." Decision and Order at 12.

Decision and Order at 13.

Contrary to the administrative law judge's finding, Dr. Selby did not opine that claimant was totally disabled from a pulmonary standpoint. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). While Dr. Selby opined that claimant has a moderate obstructive pulmonary defect, Dr. Selby did not render an opinion with regard to whether claimant could perform his previous coal mine employment. Employer's Exhibit 1. The administrative law judge's mischaracterization of Dr. Selby's opinion may have affected her consideration of the pulmonary function study evidence. *Tackett*, 7 BLR at 1-706. Consequently, because Dr. Simpao's diagnosis of legal pneumoconiosis was based in part on the October 8, 2004 pulmonary function study, the administrative law judge must reconsider the opinions of Drs. Mettu and Selby regarding the validity of this study.

**Dr. Dahhan**

Employer additionally argues that the administrative law judge erred in discounting Dr. Dahhan's opinion regarding legal pneumoconiosis. Dr. Dahhan opined that claimant's obstructive lung disease was not related to coal dust exposure. Employer's Exhibit 3. In considering whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the comments by the Department of Labor (the Department) with regard to the amended regulations. Decision and Order at 16. The administrative law judge found that the Department's position was that coal dust exposure may induce obstructive lung disease, even in the absence of fibrosis or complicated pneumoconiosis. *Id*. The administrative law judge specifically stated:

> The Department concluded that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. **The risk is additive with cigarette smoking.** 65 Fed. Reg. at 79940 (emphasis added).

*Id*.

The administrative law judge also noted that, in addition to citing to studies and medical literature reviews by the National Institute for Occupational Safety and Health (NIOSH), the Department explicitly quoted the following language from NIOSH:

> …COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC. **Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present….**

*Id*. at 16-17.

Further, after noting that the Department concluded that the medical literature supports the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, the administrative law judge then stated:

> Medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, are, therefore, contrary to the premises underlying the regulations. I have considered how to weigh the conflicting medical opinions in this case based on these principles.

*Id*. at 17.

Dr. Dahhan indicated that claimant's obstructive lung disease was not caused by coal dust exposure by stating:

> [Claimant's] obstructive lung disease is severe and associated with 1500 cc loss in his FEV1, an amount that cannot be explained by the possible loss of the FEV1 from 17 years of coal dust exposure; in addition, [claimant] is being treated with multiple bronchodilator agents indicating that his physicians believe it is responsive to such measures, another finding that is inconsistent with the permanent adverse affects (sic) of coal dust on the respiratory system. He has a history of bronchial asthma as well as the 50+ pack years of smoking, both sufficient to cause this degree of pulmonary impairment. Finally, he has no evidence of complicated coal workers' pneumoconiosis or progressive massive fibrosis that could cause a secondary obstructive abnormality.

Employer's Exhibit 3.

The administrative law judge found that Dr. Dahhan's explanation for opining that claimant's obstructive lung disease was not related to coal dust exposure was inadequate by stating:

> First, Dr. Dahhan's comments suggest that in order to attribute any of the [c]laimant's obstructive disease to coal dust exposure, the coal dust exposure would have to account for all of the loss in his FEV1. This approach does not take into account any additive effect of coal dust exposure to the effects of smoking. Second, Dr. Dahhan attributed only 17 years of coal mine employment to the [c]laimant, while I have found 28 years of coal mine employment. Third, the fact that the [c]laimant's

> treating physicians have prescribed bronchodilators does not justify the inference that his obstructive impairment is completely reversible. Indeed, the pulmonary function tests in the record suggest that the [c]laimant's obstructive impairment shows no reversibility with bronchodilators. Fourth, the fact that the [c]laimant's history of smoking and asthma *could* account for his impairment, does not exclude coal dust as an additional component. Finally, the [Department] has concluded that coal dust can cause a loss of lung function, even when neither simple nor clinical pneumoconiosis is present. Dr. Dahhan's last point suggests that he does not accept this conclusion.

Decision and Order at 17.

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, the administrative law judge questioned whether Dr. Dahhan's view regarding the etiology of COPD was inconsistent with the Department's position that coal dust exposure could cause an obstructive lung disease. Decision and Order at 16-17. Although it may be possible to find that Dr. Dahhan's opinion was consistent with the Department's position regarding the causes of an obstructive lung disease, *see generally Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, --- BLR --- (7th Cir. 2008), we refuse to disturb the administrative law judge's credibility determination regarding Dr. Dahhan's opinion. The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *Tackett*, 12 BLR at 1-14; *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Consequently, we reject employer's assertion that the administrative law judge erred in discounting Dr. Dahhan's opinion regarding legal pneumoconiosis.

**Dr. Selby**

Employer further argues that the administrative law judge erred in discounting Dr. Selby's opinion regarding legal pneumoconiosis. Specifically, employer asserts that the administrative law judge erred in finding that Dr. Selby does not credit the concept of legal pneumoconiosis. Dr. Selby opined that claimant does not have a coal mine induced respiratory disease. Employer's Exhibits 1, 2. The administrative law judge concluded that Dr. Selby does not credit the concept of legal pneumoconiosis, based on the following responses on cross-examination by Dr. Selby during a deposition:

> I mean, real pneumoconiosis before it got changed, back when it was straightforward and simple, pneumoconiosis only meant pneumoconiosis; that's a medical term. And medical pneumoconiosis, if you want to look at it that way, is a positive x-ray.
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> …
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> - but I'm a physician not a lawyer, and, so, as a physician, I look at things from a medical standpoint much more closely than from a legal standpoint; and, from a medical standpoint, [the claimant] doesn't have any evidence for pneumoconiosis. If you want to try to say his obstructive lung disease is from coal mining, my answer would be no. Can obstructive lung disease come from coal mining? It's possible.
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> …
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> …I take each case as it comes. If there's an overwhelming amount of smoking – and we know that smoking causes the huge majority of any obstructive lung disease along with asthma in this country, and there's huge controversy about whether coal mine dust causes any clinically significant effective lung disease, you have to decide which path you're going to go down. Common things are common.

Decision and Order at 18.

The administrative law judge also concluded that Dr. Selby gave little credence to the premise that coal dust contributes to obstructive disease in a miner with a significant smoking history in the absence of evidence of clinical pneumoconiosis, based on those responses and other testimony by Dr. Selby. *Id*. However, the administrative law judge does not explicitly identify the other testimony by Dr. Selby that she relied on to render her credibility determination. Further, in the testimony noted by the administrative law judge, Dr. Selby did not foreclose the possibility that coal dust exposure could cause an obstructive lung disease. *See generally Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72 (6th Cir. 1987). Rather, Dr. Selby stated that it was possible that coal dust exposure could cause an obstructive lung disease. Employer's Exhibit 2 (Dr. Selby's Deposition at 32). Thus, the administrative law judge erred in giving little weight to Dr. Selby's opinion at 20 C.F.R. §718.202(a)(4), on the ground that Dr. Selby did not credit the concept of legal pneumoconiosis.

**Dr. Traughber**

In addition, employer argues that the administrative law judge erred in discounting Dr. Traughber's opinion regarding legal pneumoconiosis. As noted above, Dr. Traughber diagnosed obstructive ventilatory deficit related to cigarette smoking. Director's Exhibit 1. The administrative law judge properly accorded little weight to Dr. Traughber's opinion, because "Dr. Traughber…offered [no] explanation why [he] attributed the

[c]laimant's COPD entirely to cigarette smoke." Decision and Order at 17; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Traughber's opinion.

**Dr. Powell**

Employer also argues that the administrative law judge erred in discounting Dr. Powell's opinion regarding legal pneumoconiosis. The administrative law judge stated that "…Dr. Powell offered [no] explanation why [he] attributed the [c]laimant's COPD entirely to cigarette smoke." Decision and Order at 17. While Dr. Powell diagnosed pulmonary emphysema with mild obstructive ventilatory defects, Dr. Powell did not render an opinion regarding the etiology of this condition. Director's Exhibit 1. Thus, the administrative law judge mischaracterized Dr. Powell's opinion. *Tackett*, 7 BLR at 1-706. On remand, the administrative law judge must explain why Dr. Powell's opinion is probative of the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and then weigh it in accordance with the APA. *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165.

**TOTAL DISABILITY DUE TO PNEUMOCONIOSIS**
**Section 718.204(c)**

Employer finally contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). We agree. Based on the disability causation opinions of Drs. Baker and Simpao, the administrative law judge found that claimant established total disability due pneumoconiosis. The administrative law judge specifically stated:

> None of the other doctors who gave an opinion on this issue diagnosed pneumoconiosis. I can find no specific and persuasive reasons for concluding that the other doctors' judgment that coal dust did not contribute to the [c]laimant's disability does not rest upon their disagreement with my finding that the [c]laimant has established that he has legal pneumoconiosis.

Decision and Order at 19-20.

In view of our decision to vacate the administrative law judge's finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

If, on remand, the administrative law judge finds that the evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a), then she must consider whether the evidence establishes that the pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.[9] Further, the administrative law judge must consider whether the evidence establishes total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), if reached.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9] Employer does not explicitly challenge the administrative law judge's finding at 20 C.F.R. §718.203. Nevertheless, because we vacate the administrative law judge's finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence established that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203.