BRB No. 03-0141 BLA

HAROLD L. TERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	
	)	DATE ISSUED: 10/31/2003
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

James M. Talbert-Slagle (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1383) of Administrative Law Judge Daniel F. Sutton awarding benefits on a 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 instant case involves a duplicate claim filed on October 18, 1993 and is before the Board for the third time. In its most recent consideration of this case, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(c) and 725.309 (2000). *Terry v. Hobet Mining, Inc*., BRB No. 01-0212 BLA BLA (Nov. 15, 2001) (unpublished). The Board, however, vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). *Id.* The Board instructed the administrative law judge, on remand, to weigh the relevant evidence together pursuant to 20 C.F.R. §718.202(a) pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id.* The Board also vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) (2000).[2] *Id.*

On remand, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After weighing all the relevant evidence together pursuant to *Compton*, the administrative law judge found that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of "legal" pneumoconiosis. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. Employer further contends that the administrative law judge erred by retroactively applying the amended regulations to the instant claim. Claimant responds in support of the administrative law judge's award

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

of benefits.[3] The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the administrative law judge did not err in his application of the amended regulations.[4]

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).

Employer contends that the administrative law judge committed numerous errors in finding the medical opinion evidence sufficient to establish the existence of "legal" pneumoconiosis.[5] *See* 20 C.F.R. §718.201(a)(2). After determining that the evidence was insufficient to establish the existence of "clinical" pneumoconiosis, the administrative law judge considered whether the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that the opinions of Drs. Rasmussen, Doyle, Koenig, Cohen, Figueroa supported a diagnosis of "legal" pneumoconiosis, the administrative law judge credited these opinions over the contrary opinions of Drs. Zaldivar, Fino and Hippensteel.[6] Decision and Order on Remand at 24-27; Director's Exhibits 30, 35, 41-43; Claimant's Exhibits 3, 4, 16, 27, 32; Employer's Exhibits 1, 3, 6, 7, 10, 16, 17; Transcript at 59-169. The administrative law judge, therefore, found that the medical opinion evidence was sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer initially contends that the administrative law judge erred in discrediting

---

[3] On July 11, 2003, claimant's counsel notified the Board that claimant died on July 2, 2003.

[4] By Order dated March 19, 2003, the Board denied employer's motion for oral argument. *Terry v. Hobet Mining, Inc.*, BRB No. 03-0141 BLA (Mar. 19, 2003) (Order) (unpublished).

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

[6] The administrative law judge found that the opinions of Drs. Daniel, Kress and Morgan were not probative with respect to the existence of "legal" pneumoconiosis because they only discussed whether there was sufficient evidence to support a diagnosis of "clinical" pneumoconiosis. Decision and Order on Remand at 25.

Dr. Zaldivar's opinion. The administrative law judge discredited Dr. Zaldivar's opinion because he found that the doctor did not provide credible reasons to support his opinion that claimant did not suffer from "legal" pneumoconiosis. Decision and Order on Remand at 26. In his May 14, 1997 report, Dr. Zaldivar opined that that the miner's chest x-rays revealed the presence of bullae caused by smoking and congenital abnormalities. Employer's Exhibit 1. At the March 25, 1998 hearing, Dr. Zaldivar explained that claimant's first lung collapse occurred in 1959 when claimant was approximately thirty-one years old and had worked in the coal mines for five to six years. Transcript at 65. Dr. Zaldivar explained that some individuals are born with blebs, small cystic spaces in the lungs. *Id.* at 66. Dr. Zaldivar explained that if an individual smokes, the blebs will enlarge faster and will blend into bullae, larger cystic spaces of the lungs caused by the destruction of lung tissue. *Id.* at 67. Dr. Zaldivar found it "unthinkable" to blame claimant's lung collapse on his coal mine employment because it occurred when claimant had only worked for five or six years in the coal mines and was only thirty-one years of age. *Id.*

At the hearing, Dr. Zaldivar provided the following responses to questions regarding the cause of claimant's pulmonary abnormalities:

> Q. Doctor, you were here today when [claimant] described his smoking history. Is that a sufficient smoking history to have contributed to the problems that caused his pneumothorax or pneumothoracies?
>
> A. These individuals are, more or less, susceptible to the effects of tobacco smoke. So any smoking in somebody who is susceptible to it, it would be significant. So, the history was significant, whether he's smoking anything, whether it's corn silk, tobacco, newspaper, anything at all, marijuana, or whatever it may by, would introduce toxic fumes into the lungs and will cause breakdown of the lungs. It does not have to be tobacco.
>
> Q. What about coal dust?
>
> A. Now, coal dust can be deposited within the lung. It can cause damage to the airways, and that is what coal workers' pneumoconiosis does when it does anything; and when it does that, it causes airway obstruction.
>
> Q. Is there any reason in this case to think that the coal dust that [claimant] inhaled contributed to his pneumothoracies?
>
> A. No, there is absolutely no relationship between the pneumothoracies

and his employment at all.

Q. Do you think that he would have the same pneumothoracies if he had never set foot in the coal mines?

A. Oh, absolutely, yes, without question.

***

Q. In this case where the court has already determined that [claimant] has coal workers' pneumoconiosis, isn't it at all likely that the emphysema is a product of coal dust exposure, as well as smoking?

A. No. As I have said, what he has in this bullae is panlobular emphysema, total destruction of the lung units, which has caused a large cystic area in the lungs, which has caused the recurring pneumothoracies, in addition to the blobs [sic] that he had. Coal workers' pneumoconiosis doesn't do that.

Q. Does it make any difference that he had 26 years – at least, 26 years of coal mine employment?

A. When he first collapsed his lungs, he only had five years of coal mine employment, and he was 31 years of age, and what we're seeing now is the same process years later.

***

Q. Assuming an individual had inhaled coal dust and that inhalation had resulted in the development of coal workers' pneumoconiosis, would that accelerate or enhance the growth of the blobs [sic]?

A. No.

Q. Why not?

A. Well, in the first place, coal dust will not enter the blobs [sic] and bullaes as easily as fumes, and smoke is a fume. These carry with it very tiny particles of tar and many other carcinogens.

Coal dust is a particle. The particle has to be very small to reach the lungs in the first place, and these areas of the lungs are communicating

very poorly with the remainder of the bronchial tree. This is why pressure builds up on them and they burst.

So it is not conceivable – it's difficult to conceive the small particles reaching these areas, but it's easy to conceive fumes, in the form of smoke, reaching these areas.

So these areas are exposed to the chemicals in the smoke, and it's the chemical breakdown that causes enlargement of the bullae.

Q. So what you're saying is the congenital blobs [sic] are accessible by fumes and cigarette smoking, but it is highly unlikely, if not impossible, that they would be reached by coal dust particles?

A. Yes.

Transcript at 104-105, 138-139, 150-151.

Dr. Zaldivar opined that claimant's coal dust exposure did not contribute to his blebs, bullae, recurring pneumothoracies, emphysema or asthma. Transcript at 117. Dr. Zaldivar also opined that claimant's coal dust exposure did not make him more susceptible to his pulmonary problems. *Id.* at 118. Dr. Zaldivar also specifically opined that claimant did not suffer from "legal" pneumoconiosis. Transcript at 154-155. Thus, contrary to the administrative law judge's characterization, Dr. Zaldivar provided detailed reasons for finding that claimant did not suffer from "legal" pneumoconiosis.

The administrative law judge, however, provided a second basis for discrediting Dr. Zaldivar's opinion. The administrative law judge discredited Dr. Zaldivar's opinion because the doctor disagreed with the NIOSH studies indicating that cigarette smoking and occupational dust exposure have an additive effect on the development of occupational respiratory disease such as chronic bronchitis, emphysema and lung cancer. Decision and Order on Remand at 27. The administrative law judge also found that Dr. Zaldivar's testimony reflected that he did not agree with the Act's broad definition of pneumoconiosis and that he was unwilling to consider whether a miner's chronic pulmonary disease or respiratory or pulmonary impairment was significantly related to, or substantially aggravated by, dust exposure in coal mine employment in the absence of radiographic or pathological evidence of clinical pneumoconiosis. *Id.*

At the hearing, Dr. Zaldivar noted that what claimant's counsel referred to as a NIOSH study was, in fact, a compilation of studies. Transcript at 139-140. In reference to the additive effects of smoking and dust exposure on the development of occupational respiratory disease, Dr. Zaldivar stated:

> Well, I disagree because there is data back and forth on that. Some authors claim that if an individual has emphysema, then they are more prone to develop a retention of dust in the lungs, but they have never – nothing has shown that by retaining dust in the lungs, one is going to worsen the emphysema.
>
> ***
>
> There are articles that have said there is a link between coal dust and emphysema, as there are articles that says [sic] there is not, and the textbooks – and that's Park's textbooks, Morgan's textbooks, which compile all this information together.

Transcript at 140-141, 142.

Dr. Zaldivar's disagreement with some of the studies cited by NIOSH does not evidence a disagreement with the "Act's broad definition of pneumoconiosis" or that he is "unwilling to consider whether a miner's chronic pulmonary disease or respiratory or pulmonary impairment is significantly related to, or substantially aggravated by, dust exposure in coal mine employment in the absence of radiographic or pathological evidence of clinical pneumoconiosis." Consequently the administrative law judge's bases for discrediting Dr. Zaldivar's opinion that claimant does not suffer from "legal" pneumoconiosis cannot stand.

Employer next contends that the administrative law judge erred in discrediting Dr. Fino's opinion. In his July 11, 1997 report, Dr. Fino opined that:

> I do not think that there is any doubt that this man has some bullous emphysema. However, I disagree with the physicians who have stated that the bullous emphysema is due to coal mine dust inhalation. In fact, there is no medical literature to support that claim. Bullous emphysema is not seen in simple pneumoconiosis. Bullous emphysema is a disease of the general medical population that is associated with cigarette smoking and can also be associated with a hereditary or congenital condition. In this particular case, there is no causal association between the bullous emphysema that is present and coal mine dust inhalation.

Employer's Exhibit 3.

Dr. Fino also opined that claimant's pneumothoraces were unrelated to the inhalation of coal mine dust. Employer's Exhibit 3. Dr. Fino opined that he found no

evidence of pneumoconiosis or impairment due to coal mine dust inhalation. *Id.* In his April 13, 1998 report, Dr. Fino noted that bullous changes in the lungs can cause a pneumothorax. Employer's Exhibit 17. Dr. Fino also noted that there is no increased incidence of pneumothorax in simple pneumoconiosis or in coal miners. *Id.* Dr. Fino opined that claimant's significant lung problems were not caused in whole or in part by his coal mine dust exposure. *Id.*

In regard to Dr. Fino's opinion, the administrative law judge stated:

> Dr. Fino stated that the Claimant has a "purely obstructive" impairment which is inconsistent with a condition related to coal dust exposure; DX 41; and he stated that there is no evidence that the Claimant has any pulmonary condition or impairment related to the inhalation of coal dust. EX 3. I accord Dr. Fino's opinion little weight since his position that coal dust inhalation does not produce a purely obstructive impairment has been rejected by the Department of Labor as "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed. Reg. 79,920, 79939 (December 20, 2000). *See also Freeman v. United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001) (finding it rational for the [administrative law judge] to discredit Dr. Fino's opinions as not supported by adequate data or sound analysis and to credit Dr. Cohen's views "particularly in light of his remarkable clinical experience and sound knowledge of cutting-edge research").

Decision and Order on Remand at 25-26.

The revised regulations recognize that "legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. *Id.* In the comments to this revised regulation, the Department of Labor (DOL) noted, *inter alia*, that Dr. Fino's opinion that coal miners do not have an increased risk of developing chronic obstructive pulmonary disease was "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed. Reg. 79,939 (2000). The DOL's comments, however, do not foreclose an administrative law judge from making his own assessment of the credibility of Dr. Fino's opinion in any given case. In this case, the administrative law judge did not make such an independent assessment.

The administrative law judge also relied upon *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001) to discredit Dr. Fino's opinion. In

Summers, the Seventh Circuit held that it was "rational to discount Dr. Fino's opinions, based on a finding that they were not supported by adequate data or sound analysis." 272 F.3d at 483, 22 BLR at 2-281. The Seventh Circuit further noted that:

> Dr. Fino stated in his written report of August 30, 1998 that "there is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease." (Br. Supp. Pet. Modif'n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions "are not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature." 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

Summers, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

The administrative law judge, in this case, failed to explain what particular statements made by Dr. Fino were "not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature."[7] Consequently, the administrative law judge's analysis of the evidence does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record.[8] 5 U.S.C.

[7] The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. In an unpublished case arising in the Fourth Circuit, a claimant argued that the administrative law judge should have discredited an opinion provided by Dr. Fino because the Fourth Circuit had found that Dr. Fino rendered an opinion hostile to the Act in another, unpublished, case two years earlier. The Fourth Circuit held that, contrary to the claimant's assertion, Dr. Fino's opinions in another case did not bear on the adequacy of his testing, reasoning and conclusions in the claimant's case. *Terry v. Bethenergy Mines, Inc.*, 151 F.3d 1030 (table), 1998 WL 2372612 (4th Cir. 1998) (unpublished).

[8] Even if the administrative law judge had properly found that Dr. Fino expressed opinions hostile to the Act, the Seventh Circuit has held that a physician's expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration. Rather, the administrative law judge must determine whether, and to what extent, the hostile opinion affected the physician's medical diagnoses. *See Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *see also Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

§557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Accordingly, the administrative law judge, on remand, is instructed to provide a basis for his finding that any particular physician's views are not in accord with the medical and scientific literature.

Employer also contends that the administrative law judge erred in discrediting Dr. Hippensteel's opinion. The administrative law judge discredited Dr. Hippensteel's opinion in a single sentence, stating:

> Dr. Hippensteel attributed the Claimant's emphysema to congenital causes and his mild obstructive impairment to cigarette smoking, but he provided no explanation as to why these conditions are not also significantly related to or substantially aggravated by his exposure to coal mine dust. DX 43.

Decision and Order on Remand at 25.

Although Dr. Hippensteel did not explicitly explain why claimant's bullous emphysema was not aggravated by coal dust exposure, he opined that claimant did not suffer from a coal dust related lung disease.[9] Employer's Exhibit 7. Moreover, Dr. Hippensteel opined that claimant's bullous emphysema was congenital in nature, thus, providing an etiology for the disease.[10] Director's Exhibit 43; Employer's Exhibit 10. We, therefore, hold that the administrative law judge's basis for discrediting Dr. Hippensteel's opinion cannot stand.

Employer next contends that the administrative law judge erred in finding that the opinions of Drs. Daniel, Kress and Morgan were not probative with respect to the

---

[9] In his February 24, 1988 report, Dr. Hippensteel opined that the evidence was "insufficient to make a diagnosis of pneumoconiosis or coal dust related disease of [claimant's] lungs." Employer's Exhibit 7.

[10] In his March 8, 1995 report, Dr. Hippensteel opined that claimant suffered from bullous emphysema causing recurrent pneumothoraces. Director's Exhibit 43. Dr. Hippensteel opined that claimant's bullous emphysema likely had some congenital component. *Id.*

In his March 20, 1998 report, Dr. Hippensteel opined that claimant suffered from bullous emphysema with blebs, a congenital problem unrelated to coal workers' pneumoconiosis. Employer's Exhibit 10.

existence of legal pneumoconiosis because they only discussed whether there is sufficient evidence to support a diagnosis of "clinical" pneumoconiosis. Decision and Order on Remand at 25. We agree. Although Dr. Daniel diagnosed chronic obstructive pulmonary disease, he indicated that the disease did not arise out of coal dust exposure.[11] Director's Exhibit 35. Dr. Kress opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 35. Although Dr. Kress opined that coal dust exposure may have been a contributing factor to claimant's chronic bronchitis, he opined that claimant's pulmonary emphysema was due to smoking and was not related to coal dust exposure. *Id.* In a supplemental report dated January 12, 1988, Dr. Kress opined that claimant's mild obstructive ventilatory impairment was not related to coal mine employment, but was caused by smoking. *Id.* Dr. Morgan opined that claimant did not suffer from coal workers' pneumoconiosis. Director's Exhibit 35. Dr. Morgan attributed the irregular opacities on claimant's x-rays to cigarette smoking. *Id.* Dr. Morgan further opined that the abnormalities were not related to coal dust. *Id.* Dr. Morgan found no evidence to suggest that coal mine dust exposure made any contribution to claimant's impairment. *Id.* Thus, contrary to the administrative law judge's characterization, the opinions of Drs. Daniel, Kress and Morgan are relevant to the issue of "legal" pneumoconiosis because they indicated that claimant's lung disease did not arise out of his coal dust exposure.

Employer next argues that the administrative law judge committed numerous errors in relying upon the opinions of Drs. Rasmussen, Doyle, Cohen, Koenig and Figueroa to support a finding of "legal" pneumoconiosis. Employer initially argues that the administrative law judge failed to address the equivocal nature of Dr. Rasmussen's opinion. We agree. In his June 15, 1994 report, Dr. Rasmussen diagnosed "questionable occupational pneumoconiosis" and "COPD with emphysema." Director's Exhibit 30. Dr. Rasmussen attributed claimant's COPD with emphysema to "[p]ossible coal dust exposure." *Id.* Dr. Rasmussen also opined that it was "possible" that claimant's coal mine dust exposure was a significant contributing factor to his totally disabling respiratory insufficiency. *Id.* The administrative law judge erred in crediting Dr. Rasmussen's opinion without addressing its speculative nature.[12] *See U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Justice v.*

[11] Dr. Villanueva also participated in Dr. Daniel's examination and signed Dr. Daniel's report. Director's Exhibit 35.

[12] In a subsequent report dated July 21, 1997, Dr. Rasmussen opined that claimant suffered from coal workers' pneumoconiosis arising out of his coal mine employment, a finding of clinical pneumoconiosis. Claimant's Exhibit 16. The administrative law judge failed to explain how this diagnosis supported a finding of "legal" pneumoconiosis.

Island Creek Coal Co., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge also failed to explain how Dr. Doyle's reference to COPD in his office notes supported a finding of "legal" pneumoconiosis. Decision and Order on Remand at 24; Director's Exhibit 42. Dr. Doyle also prepared a report dated March 9, 1998, wherein he diagnosed pneumoconiosis "[b]ased upon radiographic findings, evidence of impairment, and clinical history." Claimant's Exhibit 26. Although the administrative law judge noted that Dr. Doyle opined that both cigarette smoke and coal dust contributed to claimant's respiratory impairment, the administrative law judge failed to address whether Dr. Doyle's diagnosis of pneumoconiosis constituted a finding of "clinical" pneumoconiosis or "legal" pneumoconiosis. Decision and Order on Remand at 24.

We also agree with employer that the administrative law judge failed to address the speculative nature of Dr. Koenig's opinion.[13] *See Justice*, 11 BLR at 1-94; *Campbell*, 11 BLR at 1-19.

Employer also contends that the administrative law judge erred in finding that Dr. Figueroa's opinion supported a finding of "legal" pneumoconiosis. In a letter dated September 19, 1995, Dr. Figueroa opined that claimant had evidence of coal workers' pneumoconiosis documented by classical changes in his chest x-ray. Director's Exhibit 54. Dr. Figueroa opined that claimant's "spontaneous pneumothorax [was] probably

---

[13] In his July 15, 1997 report, Dr. Koenig stated:

> [T]here is no question that cigarette smoking and asthma can, in and of themselves, explain [claimant's] pulmonary function test abnormalities, bullous emphysema, and recurrent pneumothoraces. In fact, you don't even need to invoke asthma. COPD alone could explain all the findings. However, based on the medical literature, coal dust exposure alone, independent of smoking, and without the presence of simple coal workers' pneumoconiosis, could also account for his respiratory findings and impairment. To claim that [claimant's] respiratory disability has nothing to do with coal mine dust exposure and could only be due to smoking and asthma would be disregarding numerous methodologically valid studies in the medical literature. Moreover in his statement, Dr. Zaldivar gave no evidence of logical reasoning to support his claims that [claimant's] smoking and asthma, and not his coal mining work, caused his respiratory impairment. He simply said it was so.

Claimant's Exhibit 4.

multifactorial in origin" and that coal workers' pneumoconiosis was a significant risk factor for it. *Id.* In a second letter dated February 7, 1997, Dr. Figueroa stated that:

> [Claimant] has had extensive chest x-ray changes compatible with Coal Miners pneumoconiosis. [Claimant] does fulfilled [sic] the legal definition of CMP. It is well known that any occupational lung disease can produce recurrent pneumothoraces and in this case it is perfectly justifiable to assume to [sic] that the pneumothoraces were related to his underlying Coal Miners Pneumoconiosis. Based on the extensive Chest X ray changes, the patient's working capacity should be significantly deteriorated to not allow [claimant] to performed [sic] effectively a job as a coal loader operator at a mine strip.

Claimant's Exhibit 3.

The administrative law judge found that "Dr. Figueroa's diagnosis of recurrent, spontaneous pneumothorax and his medical opinion that occupational lung disease can cause pneumothorax and that the Claimant's conditions falls [sic] within the legal definition of pneumoconiosis" supported a finding of "legal" pneumoconiosis. Decision and Order on Remand at 25. Although Dr. Figueroa referenced the "legal" definition of pneumoconiosis, his finding of "coal miners pneumoconiosis" constitutes a diagnosis of "clinical" pneumoconiosis, not "legal" pneumoconiosis.

We also agree with employer's contention that the administrative law judge erred in crediting the opinions of Drs. Rasmussen, Doyle, Cohen, Koenig and Figueroa without addressing whether their respective opinions are sufficiently reasoned. Employer also correctly contends that the administrative law judge erred in not addressing other factors affecting the credibility of the medical opinions of record, including the underlying documentation and the qualifications of the physicians. On remand, when reconsidering whether the medical opinion evidence is sufficient to establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge should address the comparative credentials of the respective physicians, the explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

In the light of the above-referenced errors, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of

pneumoconiosis pursuant to 20 C.F.R §718.202(a) and remand the case for further consideration.[14]

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because the administrative law judge must reevaluate whether the medical evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Finally, employer contends that the administrative law judge erred in retroactively applying the revised regulations set out at 20 C.F.R. §718.201 and 718.204 in the instant case. We disagree. The United States Court of Appeals for the District of Columbia held that the provisions of revised Section 718.201 are not impermissibly retroactive as applied to pending claims. *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 864, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001). In regard to revised Section 718.204, the United States Court of Appeals for the District of Columbia held that only the revised part of the regulation set out at 20 C.F.R. §718.204(a) is impermissibly retroactive as applied to pending cases. The Court did not hold that 20 C.F.R. §718.204(b) and (c) were impermissibly retroactive as applied to pending claims. Consequently, we reject employer's contention.

[14] In weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), the administrative law judge properly noted that evidence that is insufficient to establish "clinical" pneumoconiosis should not necessarily be treated as evidence weighing against a finding of "legal" pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order on Remand at 28.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
PETER A. GABAUER, JR.
Administrative Appeals Judge