



BRB No. 17-0411 BLA

BARBARA A. COPLEY )  
(Widow of HOWARD H. COPLEY) )

Claimant-Respondent )

v. )

BUFFALO MINING COMPANY, c/o )  
WELLS FARGO DISABILITY )  
MANAGEMENT )

DATE ISSUED: 10/24/2018

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 Awarding Benefits on Second Remand of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2010-BLA-05463) of Administrative Law Judge Adele H. Odegard, rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time.

Initially, upon review of employer's appeal, the Board affirmed the administrative law judge's findings that the miner worked for twenty-eight years in underground coal mine employment<sup>1</sup> and was totally disabled by a respiratory or pulmonary impairment. The Board therefore affirmed the administrative law judge's determination that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act,<sup>2</sup> 30 U.S.C. §921(c)(4) (2012). *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-86 (2012). The Board also affirmed the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis because it failed to establish that the miner did not have clinical pneumoconiosis.<sup>3</sup> *Id.* at 1-87-88. However, the Board vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption of death due to pneumoconiosis. *Id.* at 1-90. The Board held that, in addressing the second method of rebuttal, the administrative law judge erroneously focused on the cause of the miner's total disability rather than the cause of the miner's death. *Id.* Therefore, the Board vacated the award of benefits and remanded the case for the administrative law judge to reconsider

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<sup>1</sup> The record reflects that the miner was last employed in the coal mining industry in West Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>2</sup> Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner worked fifteen or more years in underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine, and had a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

<sup>3</sup> "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

whether employer rebutted the Section 411(c)(4) presumption of death due to pneumoconiosis.<sup>4</sup> *Id.*

In a Decision and Order on Remand issued on December 31, 2013, the administrative law judge initially noted that the Department of Labor had recently promulgated the final regulation implementing the rebuttal standards derived from the 2010 amendments to Section 411(c)(4). Decision and Order on Remand 2-3, *citing* 20 C.F.R. §718.305. She noted that employer's failure to disprove clinical pneumoconiosis precluded a rebuttal finding under 20 C.F.R. §718.305(d)(2)(i) that the miner did not have pneumoconiosis. *Id.* at 9. The administrative law judge also noted that under 20 C.F.R. §718.305(d)(2)(ii), employer had to establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *Id.* at 2-3. Before addressing that issue, however, the administrative law judge first addressed whether employer could establish that the miner did not have legal pneumoconiosis, as such a finding was relevant to the cause of the miner's death. *Id.* at 9.

The administrative law judge considered the pathology reports of Drs. Oesterling and Bush and the medical opinions of Drs. Rosenberg and Spagnolo on the issue of legal pneumoconiosis. Decision and Order on Remand at 9-13. The administrative law judge noted that all four physicians diagnosed emphysema, which they attributed to the miner's history of cigarette smoking. *Id.* at 5-8. She found that the pathology reports of Drs. Oesterling and Bush were insufficient to rebut the presumed fact of legal pneumoconiosis because the physicians did not rule out coal mine dust exposure as a cause of the miner's emphysema. *Id.* at 9-10. She further found that the opinions of Drs. Rosenberg and Spagnolo were not credible because they did not persuasively explain why coal mine dust exposure did not cause the miner's emphysema, and because they were based on "relatively old" pulmonary function testing. *Id.* at 10-11. The administrative law judge also found that the autopsy prosector, Dr. Racadag, diagnosed the miner with legal pneumoconiosis, as he attributed the miner's emphysema to coal mine dust exposure, and she found that his opinion was credible. *Id.* at 9-10. Therefore, the administrative law judge found that employer was unable to rebut the presumed fact of legal pneumoconiosis. *Id.*

With respect to the issue of death causation, the administrative law judge found that the same reasons for which she discredited the conclusions of Drs. Oesterling, Bush,

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<sup>4</sup> Based on the standard that was set forth by the Department of Labor (DOL) when it proposed 20 C.F.R. §718.305, implementing the 2010 amendments to Section 411(c)(4), the Board instructed the administrative law judge to address whether employer established that the miner's death did not arise in whole, or in part, out of dust exposure in the miner's coal mine employment. *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89-90 (2012), *quoting* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012).

Rosenberg, and Spagnolo on the issue of legal pneumoconiosis also undercut their opinions that no part of the miner's death was caused by legal pneumoconiosis. Decision and Order on Remand at 11-12. Additionally, the administrative law judge rejected Dr. Rosenberg's opinion that no part of the miner's death was caused by clinical pneumoconiosis because she found that Dr. Rosenberg mischaracterized the autopsy findings of Dr. Racadag. *Id.* The administrative law judge additionally found that Dr. Spagnolo focused on whether pneumoconiosis was a substantially contributing cause of the miner's death and, therefore, failed to address whether no part of the miner's death was caused by pneumoconiosis. *Id.* Finally, the administrative law judge found that Dr. Racadag's opinion that both clinical and legal pneumoconiosis contributed to the miner's death was well-reasoned and documented. *Id.* at 12-13. Therefore, the administrative law judge found that employer failed to rebut the presumption under 20 C.F.R. §718.305(d)(2)(ii) by establishing that no part of the miner's death was caused by pneumoconiosis, and she awarded benefits accordingly. *Id.*

Upon review of employer's second appeal, the Board affirmed the administrative law judge's finding that Dr. Spagnolo's opinion was unpersuasive and insufficient to rebut the presumed fact of legal pneumoconiosis. *Copley v. Buffalo Mining Co.*, BRB No. 14-0139 BLA, slip op. at 8 (Feb. 9, 2015) (unpub.). However, the Board agreed with employer that the administrative law judge erroneously applied the "no part" standard from 20 C.F.R. §718.305(d)(2)(ii) to her consideration of whether the pathology opinions of Drs. Oesterling and Bush established that the miner did not have legal pneumoconiosis. *Id.* at 5-6. Further, the Board held that the administrative law judge mischaracterized and selectively analyzed the rationales set forth by Drs. Oesterling, Bush, and Rosenberg when she found that their opinions were not persuasive on the issue of legal pneumoconiosis. *Id.* The Board also held that, because the administrative law judge failed to adequately explain her basis for crediting Dr. Racadag's diagnosis of legal pneumoconiosis, her decision did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).<sup>5</sup> *Id.* at 7-8. Therefore, the Board vacated the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis. *Id.*

The Board also agreed with employer that the administrative law judge erred in weighing the pathology and medical opinion evidence when addressing whether employer disproved a causal connection between clinical pneumoconiosis and the miner's death. *Copley*, BRB No. 14-0139 BLA, slip op. at 9. Specifically, the Board held that the

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<sup>5</sup> The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

administrative law judge did not explain her basis for resolving the conflict in the evidence between Drs. Oesterling, Bush, Rosenberg, and Racadag as to the extent of the miner's clinical pneumoconiosis. *Id.* Based on these foregoing errors, the Board vacated the administrative law judge's findings that employer was unable to establish that no part of the miner's death was caused by clinical or legal pneumoconiosis. *Id.* at 7-9. The Board remanded the case for the administrative law judge to reconsider the opinions of Drs. Oesterling, Bush, Rosenberg, and Racadag on the issues of legal pneumoconiosis and death causation. *Id.*

In her Decision and Order Awarding Benefits on Second Remand (Decision and Order on Second Remand), which is the subject of this appeal, the administrative law judge again found that employer failed to establish that the miner did not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(2)(i). Decision and Order on Second Remand at 9-11. The administrative law judge also found that employer was unable to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by clinical or legal pneumoconiosis under 20 C.F.R. §718.305(d)(2)(ii). *Id.* at 11-17. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in weighing the pathology and medical opinion evidence on the issues of legal pneumoconiosis and death causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensations Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis, or that "no part of [his] death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii).

Employer argues that the administrative law judge failed to follow the Board's instructions on remand when reweighing the pathology reports of Drs. Oesterling and Bush and the medical opinion of Dr. Rosenberg regarding whether the miner had legal pneumoconiosis. Employer's Brief at 10-17. We disagree.

The Board instructed the administrative law judge to reconsider the conclusions of Drs. Oesterling, Bush, and Rosenberg on the issue of legal pneumoconiosis and set forth her findings in detail, including the underlying rationale. *Copley*, BRB No. 14-0139 BLA, slip op. at 6-7. Prior to weighing the relevant evidence on remand, the administrative law judge reiterated her findings that the miner had an underground coal mine employment

history of at least twenty-eight years and a cigarette smoking history of forty pack-years. Decision and Order on Second Remand at 2. The administrative law judge noted that the miner's medical treatment records included numerous diagnoses of emphysema, and that all the physicians who rendered opinions agreed that the autopsy results verified that the miner had emphysema at the time of his death. *Id.* at 9-11. The administrative law judge recognized that Drs. Oesterling and Bush attributed the miner's emphysema to cigarette smoking, and that both physicians excluded the miner's coal mine dust exposure as causing the emphysema. *Id.*

The administrative law judge noted, however, that Dr. Oesterling did not specify how many years the miner worked in coal mine employment or how many years he smoked cigarettes. Decision and Order on Second Remand at 10; Director's Exhibit 16. The administrative law judge also noted that Dr. Bush identified a coal mine employment history of thirty years, but did not indicate how many years the miner smoked cigarettes. Decision and Order on Second Remand at 10; Director's Exhibit 17. In weighing their opinions with respect to the etiology of the miner's emphysema, the administrative law judge discredited Dr. Oesterling's opinion because he did not indicate his understanding of the miner's coal mine dust exposure and cigarette smoking histories, and discredited Dr. Bush's opinion because he did not indicate his understanding of the miner's smoking history. Decision and Order on Second Remand at 9-10. Employer does not challenge these credibility determinations with respect to the opinions of Drs. Oesterling and Bush on the etiology of the miner's emphysema. Therefore, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).<sup>6</sup>

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<sup>6</sup> Regardless of employer's failure to raise the issue, our dissenting colleague maintains that the administrative law judge did not discredit Dr. Oesterling's opinion based on his failure to specify his understanding of the miner's coal mine dust exposure and cigarette smoking histories. But even if the issue were before us, a plain review of the administrative law judge's credibility findings does not support that position. The administrative law judge began her discussion of the physician opinions by stating that it is "well settled" that a doctor may be discredited for an inaccurate view of length of coal mine employment or smoking history. Decision and Order on Second Remand at 9. She then found that Dr. Oesterling identified two possible factors for the miner's emphysema: coal mine dust exposure and smoking. *Id.* at 10. Based on Dr. Oesterling's failure to specify an understanding of either exposure histories, she concluded that it was impossible to assess "any presumption he may have had regarding these factors." *Id.* On its face, it would have been impossible for her to make those findings and thereafter consistently credit any conclusion drawn from exposure to either. *See Creech v. Benefits Review Board*, 841 F.2d 706, 709 (6th Cir. 1988); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993).

We next address employer's argument with respect to Dr. Rosenberg's opinion. The administrative law judge again noted that Dr. Rosenberg relied on pulmonary function studies, the most recent of which was conducted in 2000, nine years before the miner's death. Decision and Order on Second Remand at 11. The administrative law judge acknowledged the Board's instruction to consider "the portions of Dr. Rosenberg's opinion in which he identified other factors in support of his determination" that the miner's chronic obstructive pulmonary disease (COPD)/emphysema "was not legal pneumoconiosis, and [that] appeared to minimize the extent to which he relied on the pulmonary function study evidence." *Copley*, BRB No. 14-0139 BLA, slip op. at 6-7; Decision and Order on Second Remand at 11. The administrative law judge accurately noted, however, that although Dr. Rosenberg acknowledged that the prior pulmonary function studies may be invalid, he nonetheless relied on pulmonary function studies taken at least nine years before the miner's death to exclude legal pneumoconiosis.<sup>7</sup> Decision and Order on Second Remand at 11.

In his initial report, Dr. Rosenberg stated that although "the pulmonary function tests in the file cannot be validated," they "likely demonstrated a severe degree of airflow obstruction associated with a bronchodilator response." Employer's Exhibit 1 at 7. He excluded coal mine dust exposure as causing the miner's emphysema based partly on the fact that the miner "had a significant bronchodilator response" on pulmonary function testing, and "[s]uch a response is not characteristic of legal" coal workers' pneumoconiosis. *Id.* at 8. When deposed, Dr. Rosenberg testified that although the validity of the pulmonary function studies could not be assured, "looking at the data, and the curves, and everything that was there," the miner "probably had a significant degree of obstructive impairment." Employer's Exhibit 4 at 12. Dr. Rosenberg further stated that the "basic objective findings in this file outline that this is a smoking related form of obstructive lung disease." *Id.*

After acknowledging the entirety of Dr. Rosenberg's opinion, the administrative law judge permissibly found it unpersuasive because it was based on pulmonary function

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Moreover, shortly thereafter the administrative law judge found Dr. Bush's opinion not well-reasoned because she determined that "it is *also unclear* whether Dr. Bush considered an accurate smoking history" in his report. *Id.* (emphasis added). The administrative law judge's use of the words "also" and "unclear" further establish that she is discrediting their opinions for the same reason: she found it unclear if they considered accurate exposure histories. Decision and Order on Second Remand at 10; see *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316 (4th Cir. 2012).

<sup>7</sup> Specifically, Dr. Rosenberg relied upon pulmonary function studies conducted on April 20, 1995, December 13, 1996, August 19, 1998, and February 16, 2000. Employer's Exhibit 1 at 2-7. The miner died on April 28, 2009. Director's Exhibit 8.

studies taken nine years before the miner's death.<sup>8</sup> See *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-10 (3d Cir. 2002); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

In addition, the administrative law judge accurately noted that Dr. Rosenberg excluded a diagnosis of legal pneumoconiosis because he indicated that the autopsy findings of Dr. Racadag did not support coal mine dust exposure as causing the miner's emphysema. Decision and Order on Second Remand at 11. Specifically, Dr. Rosenberg acknowledged that coal mine dust exposure can cause centrilobular emphysema, but explained that "in order for coal dust to do that, it has to be right where the emphysema is occurring . . . ." Employer's Exhibit 4 at 12-13. Because "this was not described pathologically with respect to [the miner]," Dr. Rosenberg excluded a diagnosis of legal pneumoconiosis.<sup>9</sup> *Id.*

The administrative law judge noted, however, that in his microscopic description of the miner's lung tissue, Dr. Racadag stated that "scattered coal nodules are present in the upper lobes composed of black pigmented histiocytes in aggregates associated with fibrocollagenous fibrosis and emphysematous changes." Decision and Order on Second Remand at 4-5; Director's Exhibit 9. Therefore, the administrative law judge found that "Dr. Racadag's report suggests an association between [the miner's] coal dust deposition and emphysema . . . ." Decision and Order on Second Remand at 11. Based on that finding,

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<sup>8</sup> To support her position that the administrative law judge's credibility finding should be vacated, our dissenting colleague highlights a list of topics from Dr. Rosenberg's report that she asserts the administrative law judge did not address and that may demonstrate that Dr. Rosenberg did not rely on the old pulmonary function testing. As discussed, however, the administrative law judge rationally explained why Dr. Rosenberg's medical report and the other portions of his deposition testimony contradict the conclusion that he was minimizing his reliance on older pulmonary function testing. The administrative law judge thus followed our single prior instruction on the matter. To the extent that our dissenting colleague now identifies other portions of Dr. Rosenberg's testimony not specifically identified by the Board in its prior remand instruction, or by the employer on appeal, the APA does not require an administrative law judge to explicitly accept or reject each and every piece of evidence. 5 U.S.C. § 557. "If a reviewing court can discern what the administrative law did and why [s]he did it, the duty of explanation is satisfied." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir.). For the reasons outlined above, we can here.

<sup>9</sup> Dr. Rosenberg also stated that Dr. Racadag's autopsy findings revealed the presence of bullous emphysema, and opined that bullous emphysema is not caused by coal mine dust exposure. Employer's Exhibit 4 at 12-13.



the administrative law judge concluded that “Dr. Rosenberg’s citation to [Dr. Racadag’s] report as evidence of no relationship between emphysema and coal [mine] dust exposure may not be well-founded.” *Id.* The administrative law judge therefore found that Dr. Rosenberg’s opinion did not accurately reflect Dr. Racadag’s report, providing an additional reason why it was not well-reasoned or documented.<sup>10</sup> *Id.*

Employer argues that the administrative law judge erroneously found that Dr. Racadag’s report “suggests” an association between the coal nodules he observed on the miner’s autopsy, and the miner’s emphysema. Employer’s Brief at 17-18. But Dr. Racadag identified “[s]cattered coal nodules” in the upper lobes and, within the same sentence, stated that they were “associated with” both “fibrocollagenous fibrosis and emphysematous changes.” Director’s Exhibit 9. The administrative law judge thus permissibly drew the inference that Dr. Racadag “suggests” an association between the coal nodules and the emphysema he observed on autopsy in the upper lobes. Decision and Order on Second Remand at 11. Contrary to employer’s argument, the administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999).

The administrative law judge then evaluated Dr. Rosenberg’s rationale for concluding that the miner’s emphysema was not caused by coal mine dust exposure. Dr. Rosenberg’s principal reason for excluding coal mine dust exposure as causing the miner’s centrilobular emphysema, which he conceded was within the miner’s upper lung lobes,<sup>11</sup> was that coal mine dust was not “right where the emphysema [was] occurring” pathologically. Employer’s Exhibit 4 at 12-13. In light of Dr. Racadag’s contrary pathology observations of those same upper lung lobes, the administrative law judge permissibly found that Dr. Rosenberg’s basis for excluding legal pneumoconiosis in the form of centrilobular emphysema was not well-founded and, therefore, his opinion was not well-reasoned or documented. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-15 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997);

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<sup>10</sup> Notably, either of the two reasons provided by the administrative law judge for discrediting Dr. Rosenberg’s opinion is sufficient to affirm her finding that his opinion is insufficient to rebut the presumption of legal pneumoconiosis. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

<sup>11</sup> Dr. Rosenberg testified that the CT scans he reviewed revealed centrilobular emphysema within the upper lung lobes. Employer’s Exhibit 4 at 16-17. He testified that this was consistent with the pathology evidence. *Id.*

Decision and Order on Second Remand at 11. Because her credibility finding is supported by substantial evidence, it is affirmed.<sup>12</sup> See *Looney*, 678 F.3d at 314-15; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174 (4th Cir 1997).

As the trier-of-fact, the administrative law judge is charged with assessing the credibility of the medical evidence, and assigning it appropriate weight. See *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting); *Looney*,

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<sup>12</sup> Our dissenting colleague raises a number of additional arguments relating to alleged differences between bullous and centrilobular emphysema to support her position that the administrative law judge erred in finding that Dr. Rosenberg's citation to Dr. Racadag's autopsy findings is not well-founded. None of these arguments was specifically raised by employer, and they do not affect the administrative law judge's other grounds for discrediting Dr. Rosenberg. The Board must limit its review to contentions of error that are specifically raised by the parties. See 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987).

Regardless, to the extent our colleague raises arguments not briefed by the parties or considered by the administrative law judge, we note that the DOL has determined that coal mine dust exposure can cause emphysema, and it has not distinguished between types. See, e.g., 65 Fed. Reg. 79,920, 79,941-43 (Dec. 20, 2000) (describing relationship between coal dust and "emphysema" without qualification). While we agree with our dissenting colleague that an administrative law judge is not bound by the preamble, an administrative law judge can look to it for guidance as part of the deliberative process. See, e.g., *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013). And while it is also true that not all emphysema is legal pneumoconiosis, by operation of presumption, employer had the burden to prove that the emphysema in this case was not pneumoconiosis. 30 U.S.C. §921(c)(4). Thus, had the issue been properly raised, and had she not already discredited Dr. Rosenberg for relying on outdated testing, the administrative law judge could have further rejected Dr. Rosenberg's categorical opinion that coal dust cannot cause or aggravate bullous emphysema as contrary to the science the DOL relied on in revising the definition of legal pneumoconiosis. See, e.g., 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) ("The considerable body of literature documenting coal mine dust exposure's causal effect on the development of chronic bronchitis, emphysema and associated airways obstruction constitutes a clear and substantial basis" to revise the definition of pneumoconiosis; "The term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma"). Finally, to the extent that Dr. Rosenberg cited to the pathology findings of Dr. Bush, Employer's Exhibit 1, the administrative law judge already discredited Dr. Bush's autopsy opinion.

678 F.3d at 314-15. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i).<sup>13</sup>

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). Reiterating her determination that employer failed to establish that the miner's COPD/emphysema was not legal pneumoconiosis, the administrative law judge accurately noted that the miner's medical records reflected that the miner experienced an exacerbation of his COPD at the time of his final illness. The administrative law judge further noted that "none of the physicians . . . denied that the [m]iner's COPD/emphysema was a factor in his death." Decision and Order on Second Remand at 17. Because Drs. Oesterling, Bush, Rosenberg, and Spagnolo did not diagnose the miner with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease, the administrative law judge permissibly discredited their opinions on the issue of whether legal pneumoconiosis played any part in the miner's death. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 17. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's death was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii).<sup>14</sup>

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<sup>13</sup> As Dr. Racadag's opinion cannot assist employer in establishing rebuttal of the Section 411(c)(4) presumption, we need not address employer's arguments that the administrative law judge erred in crediting Dr. Racadag's diagnosis of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 17-19.

<sup>14</sup> Because we have affirmed her determination that employer failed to establish that no part of the miner's death was caused by legal pneumoconiosis, error, if any, in the administrative law judge's determination that employer failed to establish that clinical pneumoconiosis played no part in the miner's death would be harmless. *See* 20 C.F.R. §718.305(d)(2)(ii); *Larioni*, 6 BLR at 1-1278. We note, however, that the burden remains with the employer to rebut the presumption that pneumoconiosis played a part in the miner's death. 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-90 (2012). Thus Dr. Racadag's opinion that pneumoconiosis played a part in the miner's death cannot assist employer in establishing rebuttal, notwithstanding any error committed by the administrative law judge in weighing his opinion.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Second Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

I concur:

JONATHAN ROLFE  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's unchallenged credibility finding with respect to Dr. Bush's opinion on the issue of legal pneumoconiosis. I respectfully dissent, however, from the majority's affirmance of the administrative law judge's findings with respect to the opinions of Drs. Oesterling and Rosenberg.

I disagree with the majority that the administrative law judge explicitly discredited Dr. Oesterling's opinion on the issue of legal pneumoconiosis because Dr. Oesterling did not indicate an understanding of the miner's coal mine dust exposure and cigarette smoking histories. Although the administrative law judge referenced this lack of understanding on the part of Dr. Oesterling, and indicated that she was "unable to assess the accuracy of any

presumption he may have had regarding these factors,” she did not discredit Dr. Oesterling on this basis. Decision and Order on Second Remand at 10.<sup>15</sup>

Rather, the administrative law judge found that Dr. Oesterling’s opinion was not credible because he “did not explain why in the [m]iner’s case he believed the [m]iner’s bullous emphysema was more likely due to smoking than coal mine dust exposure.” Decision and Order on Second Remand at 10. Thus she found his opinion was not well-reasoned or documented. *Id.* Contrary to the administrative law judge’s finding, however, Dr. Oesterling described various “structures”<sup>16</sup> of the bullous emphysema seen on the autopsy slides, and indicated that these “structures are commonly seen in patients who have emphysema related to cigarette smoke inhalation.” Director’s Exhibit 16. Dr. Oesterling then stated, “this is a far more logical explanation for [the miner’s] severe bullous emphysema than the relatively modest coal dust changes that are present.” *Id.* Thus, the administrative law judge’s credibility finding is not supported by substantial evidence. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013) (explaining that substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

Further, I disagree with the majority that the administrative law judge did not err in discrediting Dr. Rosenberg’s opinion. In previously remanding this case, the Board correctly held that “the administrative law judge did not explicitly consider the portions of Dr. Rosenberg’s opinion in which he identified other factors in support of his determination that the miner’s COPD/emphysema was not legal pneumoconiosis, and appeared to

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<sup>15</sup> The majority constructs an elaborate rationale for reading into the administrative law judge’s opinion a determination that simply does not appear in the opinion itself and that is not a necessary inference from what does appear there. The administrative law judge set forth one rationale for discrediting Dr. Oesterling, and it is not the one cited by the majority.

<sup>16</sup> Specifically, Dr. Oesterling states as follows:

Please also note within the large air space the small islands which at 600x in photo 26 are vascular islands. These structures are commonly seen in patients who have emphysema related to cigarette smoke inhalation. This is a far more logical explanation for his severe bullous emphysema than the relatively modest coal dust changes that are present.

Director’s Exhibit 16.

minimize the extent to which he relied on the pulmonary function study evidence.”<sup>17</sup> *Copley*, BRB No. 14-0139 BLA, slip op. at 6-7. On remand, the administrative law judge did not follow the Board’s instructions, and only found as follows:

Regarding Dr. Rosenberg’s reliance on bronchodilator response, I again note that the most recent pulmonary function test result that Dr. Rosenberg reviewed dated back to 2000, nine years before the [miner’s] death, and was of uncertain validity. Though Dr. Rosenberg acknowledged that the tests might be invalid, he nonetheless cited them as evidence for his conclusion. So, to the extent that Dr. Rosenberg’s conclusion is based on such data, I find it should not be relied upon.

Decision and Order on Second Remand at 11. Notwithstanding her statement that “to the extent that Dr. Rosenberg’s conclusion is based on such data,” the administrative law judge has not adequately explained why Dr. Rosenberg’s opinion “should not be relied upon” when, as the Board previously held, he appeared to minimize his reliance on the suspect objective testing. *Id.* Therefore, I would hold that the administrative law judge’s finding does not comply with the Administrative Procedure Act (APA).<sup>18</sup> *Wojtowicz v. Duquesne*

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<sup>17</sup> As previously noted, Dr. Rosenberg testified at his deposition that, “[f]or whatever it’s worth, although the pulmonary function tests were not valid, [the miner] did demonstrate significant bronchodilator responses[,] based on the various data that was recorded with respect to all the pulmonary function tests.” Employer’s Exhibit 4 at 21. Further, as pointed out in the Board’s February 2015 decision in this case, Dr. Rosenberg “identified other factors in support of his determination that the miner’s COPD/emphysema was not legal pneumoconiosis.” *Copley*, BRB No. 14-0139 BLA, slip op. at 6-7. Among the factors noted by Dr. Rosenberg were the location of the miner’s coal workers’ pneumoconiosis (primarily pleural-based which would have very little effect on lung function), the type of emphysema which predominated in his lungs (bullous emphysema which is unrelated to coal mine dust exposure), the miner’s smoking history (long and continued for years after he left the mines), the medication he was on (bronchodilators which are not a solution for treating the effects of coal mine dust on the lungs), the fact that he had metastatic cancer (that was spread out beyond the kidney), and the fact that he had a positive TB test and was reported as having granulomatous disease (which would account for the nodes in his lungs). Employer’s Exhibits 1 at 8-9, 4 at 9-17. None of these other factors is related to the pulmonary function tests.

<sup>18</sup> The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . .” 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

*Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. In affirming the administrative law judge’s credibility finding on this basis, the Board itself has approved the same error for which this case was previously remanded.

The administrative law judge’s second reason for discrediting Dr. Rosenberg’s opinion also was erroneous. The administrative law judge stated that Dr. Rosenberg diagnosed the miner with “bullous emphysema, a ‘diffuse’ type of emphysema.” Decision and Order on Second Remand at 11. The administrative law judge further stated that “[i]n support of [his] position” that the miner did not have legal pneumoconiosis, Dr. Rosenberg recounted that “Dr. Racadag did not find coal mine dust associated with emphysema in his autopsy.” *Id.* However, the administrative law judge found that “Dr. Racadag’s report suggests an association between the [m]iner’s coal dust deposition and emphysema” and thus discredited Dr. Rosenberg’s opinion because he “did not accurately recount Dr. Racadag’s” autopsy findings. *Id.*

In making this credibility finding, the administrative law judge failed to consider the reports of Drs. Rosenberg and Racadag in their entirety, and impermissibly substituted her opinion for that of a medical expert.<sup>19</sup> *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Specifically, Dr. Rosenberg cited the report of Dr. Bush, not Dr. Racadag, with regard to whether coal mine dust was found pathologically in association with emphysema. Employer’s Exhibit 1 at 6, 8.<sup>20</sup> Further, Dr. Rosenberg differentiated between bullous and centrilobular emphysema when excluding legal pneumoconiosis. Employer’s Exhibit 4 at 12-13. He testified that coal mine dust exposure does not cause bullous emphysema. *Id.* He further explained that coal mine dust can cause centrilobular emphysema, but when it does, there should be “coal dust deposited with this emphysema.”<sup>21</sup> *Id.* As the pathology evidence of Dr. Bush did not indicate coal mine dust

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<sup>19</sup> *See* Employer’s Brief at 17- 19 (raising the arguments that the administrative law judge’s rejection of Dr. Rosenberg’s opinion must be vacated because her determination that Dr. Racadag linked the miner’s bullous emphysema with pneumoconiosis is not supported by substantial evidence, there is no evidence that Dr. Racadag meant bullous emphysema when he described emphysematous changes, the administrative law judge substituted her judgment for that of the medical experts, and Dr. Rosenberg’s conclusions are properly supported by the findings of Dr. Bush).

<sup>20</sup> Dr. Rosenberg also accurately recounted Dr. Racadag’s report in summarizing the evidence he reviewed. Employer’s Exhibit 1 at 5.

<sup>21</sup> Dr. Rosenberg testified:

associated with centrilobular emphysema, he opined that the miner did not have legal pneumoconiosis. *Id.*

In his autopsy report, Dr. Racadag provided the following relevant pathological microscopic description:

Scattered coal nodules are present in the upper lobes composed of black pigmented histiocytes in aggregates associated with fibrocollagenous fibrosis and emphysematous changes. The rest of the lungs show scattered coal macules composed of similar black pigmented histiocytes in aggregates associated with minimal fibrosis.

Director's Exhibit 9. In discrediting Dr. Rosenberg's opinion, the administrative law judge impermissibly equated the "emphysematous changes" which Dr. Racadag determined were associated with coal nodules with emphysema of the type Dr. Rosenberg testified could be caused by coal dust (centrilobular emphysema rather than bullous emphysema). *See Kertesz*, 788 F.2d at 163; Director's Exhibit 9. Dr. Racadag made no such medical finding. Director's Exhibit 9. Further, he did not indicate that the emphysematous changes he observed constituted bullous emphysema. *Id.* Notably, Dr. Racadag identified the "emphysematous changes" separate from his specific identifications of bullous emphysema. Director's Exhibit 9. Consequently, I agree with employer that, in making this determination, the administrative law judge substituted her opinion for that of a medical expert. *Kertesz*, 788 F.2d at 163.

The administrative law judge also failed to consider the pathology observations that support Dr. Rosenberg's opinion. Dr. Rosenberg did not limit his review of the autopsy

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From autopsy, he had extensive bullous emphysema throughout the lungs. Bullous emphysema is a diffuse form of emphysema that really is unrelated to past coal mine dust exposure. This type of emphysema—obviously emphysema, centrilobular emphysema, can obviously occur in relationship to coal dust exposure, but when centrilobular emphysema occurs in relationship to coal dust exposure, you're going to get coal dust deposited with this emphysema. In other words, to understand the pathogenesis of emphysema . . . coal can cause this destructive process, but in order for coal dust to do that, it has to be right where the emphysema is occurring, and this was not described pathologically with respect to Mr. Copley. And in addition, bullous emphysema is not a specific type of emphysema that's related to coal dust exposure.

Employer's Exhibit 4 at 12-13.



evidence to Dr. Racadag's findings, as he also reviewed Dr. Bush's findings.<sup>22</sup> Employer's Exhibit 1. Dr. Bush in turn opined that the miner's autopsy slides revealed sections of centrilobular emphysema "not associated with dust pigment." Director's Exhibit 17 at 2. Dr. Bush's pathology observations have not been impeached by the administrative law judge's unchallenged credibility finding regarding Dr. Bush's knowledge of the miner's smoking history. The administrative law judge failed to resolve the conflict between the pathology observations of Drs. Bush and Racadag (to the extent she properly interpreted Dr. Racadag's findings) when discrediting Dr. Rosenberg's opinion. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441.<sup>23</sup>

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<sup>22</sup> He also reviewed the findings of Dr. Oesterling. Employer's Exhibit 1 at 1, 5-6.

<sup>23</sup> The majority would brush away the inconvenient specific evidence in this case by treating general language in the preamble to the 2001 regulatory revisions as controlling. This mistakes the role of the preamble. The preamble to a rule-making is explanatory. It responds to comments submitted in the rule-making process, and sets forth the decisions made by the DOL and the basis on which the DOL made them. What is said in the preamble does not have binding effect as a regulation. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16 (4th Cir. 2012). Neither, contrary to the majority, does it act as fiat which must be accepted. *See* 1 Admin. L. & Prac. 3d. §4:43 (preamble will not be considered part of the rule unless it is necessary for interpretation); Kevin M. Stack, *Preambles as Guidance*, 84 Geo. Wash. L. Rev. 1252, 1253-59 (2016). In this case, the DOL discussed emphysema, and studies related to emphysema, in explaining its decision to include obstructive respiratory impairments in the regulation's definition of pneumoconiosis. 20 C.F.R §718.201; 65 Fed. Reg. 79,920, 79,939-41 (Dec. 20, 2000). The majority is correct that it spoke in general terms. However, by doing so, it did not (as the majority suggests) find that all types of emphysema are related to coal mine dust exposure, or even that it had drawn that conclusion. Rather, it made general statements in a context where specific evidence would have to be introduced in individual cases to establish causation. Whether a particular miner's obstructive impairment arose out of dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record. *See* 65 Fed. Reg. at 79,938; *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861 (D.C. Cir. 2002). Further, to the extent that the preamble discusses specific types of emphysema that may be caused by coal mine dust exposure, the preamble identifies centrilobular emphysema, centriacinar emphysema, and focal emphysema, but not panlobular and bullous emphysema. *See* 65 Fed. Reg. 79,941-42 (Dec. 20, 2000). The studies cited by the preamble do not say that emphysema is always legal pneumoconiosis. Nor do they say that all types of emphysema may be related to coal dust.

Based on these errors, I would vacate the administrative law judge's findings that employer failed to establish that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(i), and that employer failed to establish that no part of the miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). I also would vacate the administrative law judge's finding that employer failed to establish that clinical pneumoconiosis played no part in the miner's death at 20 C.F.R. §718.305(d)(2)(ii). I moreover agree with employer that the administrative law judge has not adequately explained the basis on which she found that Dr. Racadag's description, of the clinical pneumoconiosis he observed, provided a picture of the extent of pneumoconiosis present which justified his opinion. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441; *Wojtowicz*, 12 BLR at 1-165. Consequently, I would remand for her to provide further explanation for the weight she accorded to Dr. Racadag's opinion.

JUDITH S. BOGGS  
Administrative Appeals Judge