BRB No. 05-1000 BLA

CHARLES M. AMICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 09/22/2006
	)	
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-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

HALL, Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits (01-BLA-0443) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered 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). On November 26, 2002 the administrative law judge issued a Decision and Order awarding benefits. The Board affirmed

the award of benefits. *Amick v. Westmoreland Coal Co.*, BRB No. 03-0256 BLA (2-1 decision with Smith, J. concurring and dissenting)(Jan. 21, 2004)(unpub.). Employer appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises.

In an unpublished decision issued on December 6, 2004, the Fourth Circuit court initially affirmed the Board's holding that the instant claim was timely filed,[1] *Westmoreland Coal Company v. Amick*, 123 Fed. Appx. 525 (4th Cir. 2004), and that the administrative law judge properly applied the newly amended Part 718 regulations. *Amick*, 123 Fed. Appx. 529-530.[2] Further, the court found that the administrative law judge applied the correct standard in determining that claimant established a material change in conditions. *Amick*, 123 Fed. Appx. 529-530; *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*). The court did not disturb the administrative law judge's determination that the opinions of claimant's physicians, Drs. Cohen and Koenig, were well-reasoned and well-documented since they considered the progressive nature of both medical and legal pneumoconiosis and because the opinions were well-supported by medical literature. In addition, the court did not disturb the administrative law judge's conclusion that these physicians' opinions were the most complete in considering the impact of both the miner's lengthy smoking history and lengthy coal mine employment history on claimant's deteriorating pulmonary condition.

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[1] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, specifically stated that neither the time limitations statute at 30 U.S.C.A. §932(f), nor the regulation at 20 C.F.R. §725.308, makes any distinction between initial and duplicate claims. *Westmoreland Coal Co. v. Amick*, 123 Fed. Appx. 525, 528 (4th Cir. 2004). The court also stated that it need not resolve the issue as to whether a communication of disability to a miner must be written because the only inference that can be drawn from the relevant evidence of record was that the claim was timely filed. *Amick*, 123 Fed. Appx. at 528-529.

[2] Contrary to employer's argument, the amended regulation has not drastically changed the definition of pneumoconiosis because it was already defined by the statute as a chronic dust disease of the lung and its sequalae, including respiratory and pulmonary impairments arising out of coal mine employment. 30 U.S.C. §902(b); *see Gulf & Western Industries v. Ling*, 176 F.3d 226, 231-232, 21 BLR 2-571, 2-580 (4th Cir. 1999); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2, 21 BLR 2-373, 2-377 n.2 (4th Cir. 1996); *see also Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 862, 23 BLR 2-124 (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 (D.D.C. 2001).

The court, however, vacated the administrative law judge's award of benefits and remanded the case for further consideration because the administrative law judge erred in his consideration of the opinions by employer's physicians. *Amick*, 123 Fed. Appx. 525. On remand, the administrative law judge found that while all the physicians agreed that claimant suffered from a totally disabling, chronic obstructive pulmonary disease, they disagreed as to the existence of legal pneumoconiosis, *i.e.*, whether claimant's chronic obstructive pulmonary disease was due to both coal mine employment and smoking or just to smoking. Decision and Order on Remand at 3. Addressing the court's concerns, the administrative law judge found the presence of legal pneumoconiosis established based on the opinions of Drs. Cohen and Koenig, which he found to be more persuasive because they were complete and were supported by the medical literature.

Although employer contends on appeal that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis and that pneumoconiosis was totally disabling (disability causation), employer does not allege the administrative law judge repeated the errors previously identified by the court. Employer seeks not only vacation of the administrative law judge's decision, but also reassignment of the case to a different administrative law judge. Employer's Brief at 31. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, (the Director) takes no position on the ultimate issue of entitlement, but challenges employer's assertions that the administrative law judge's application of the revised regulation at 20 C.F.R. §718.201 is impermissibly retroactive and that the administrative law judge erred in discounting certain opinions because the physicians failed to recognize that pneumoconiosis may be a latent and progressive condition.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

At the outset, we observe that the administrative law judge complied with the court's directive to consider the relative qualifications of the physicians. Decision and Order on Remand at 8-9; *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). The administrative law judge found the opinions of Drs. Zaldivar, Stewart, Castle, Spagnolo, Cohen and Koenig entitled to the greatest weight because these physicians were board-certified in pulmonary disease and, within a proper exercise of his discretion, he found the opinions of Drs. Cohen and Koenig to be more persuasive than those of the other, highly-qualified physicians. Decision and Order on Remand at 9.

On appeal, employer makes various allegations error with respect to the administrative law judge's consideration of the medical opinions from employer's doctors: Drs. Zaldivar, Daniel, Castle, Spagnolo, Morgan and Stewart. Thereafter, employer alleges error in the administrative law judge's determination to credit opinions proffered by claimant from Drs. Cohen and Koenig. Employer's arguments will be addressed seriatim.

The administrative law judge properly discounted Dr. Zaldivar's opinion that coal mine employment did not contribute to the miner's disabling obstructive respiratory impairment based upon the doctor's contradictory statements regarding the relevance of x-ray evidence. The administrative law judge stated:

> On considering Dr. Zaldivar's opinion on remand, I note that he did state that legal pneumoconiosis can be present without radiographic evidence of coal worker's pneumoconiosis. He also stated that there is no evidence of any dust disease of the miner's lungs, leading to his conclusion that legal pneumoconiosis is not present in this case. However, in his deposition testimony and in his reports, Dr. Zaldivar consistently cited the absence of coal worker's pneumoconiosis, specifically as seen on chest x-ray, as one important basis for his finding that the chronic obstructive pulmonary disease present was not due to coal mine employment. Dr. Zaldivar's statement that he understood a positive chest x-ray is not required to establish legal pneumoconiosis is at odds with his other testimony and statements, which consistently note the fact that the Claimant's chest x-ray films did not show worsening coal worker's pneumoconiosis and, thus, the physiological worsening was not due to coal mine dust exposure….
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> In addition, Dr. Zaldivar's general statements - that even if radiographic evidence of simple coal worker's pneumoconiosis was present, his opinions on the etiology of Claimant's pulmonary disability would not change-are somewhat contradictory with his statement that without worsening on chest x-ray film, he could not attribute the miner's physiological deterioration to coal mine dust exposure.

Decision and Order on Remand at 4.

The administrative law judge concluded from a careful analysis of Dr. Zaldivar's reports and testimony that the doctor was disingenuous when he indicated that he did not require a positive x-ray to find that coal dust exposure contributed to a miner's respiratory impairment. There is abundant support in the record for this conclusion. When asked whether it would be reasonable to conclude that some of claimant's impairment ought to be attributed to "thirty-some" years of coal mine employment, the doctor responded:

> If it is accepted that it is the dust that is causing the airway damage and that it is the reaction to the dust that is causing the airway damage by distorting and destroying the airway, then one expects to see a radiographic finding as well. One expects to see greater inflammation in the lungs.
>
> At least this is the way that all diseases of the lung behave if they are manifested radiographically at all. As the physiological impairment worsens, the radiographic appearance also worsens.
>
> In this instance, there has [sic] been no changes of pneumoconiosis radiographically back in 1991, which meant that there is no reaction of the lungs to anything, anything physical, anything, well, physical in the way of dust. He had a physical reaction to the fumes that he was smoking which are microscopic.
>
> Therefore, the progression of the destruction is not due to a dust that is causing a reaction in the lungs. If the coal workers' pneumoconiosis were responsible for this progression, then one expects to find radiographic changes that have worsened alongside the physiological manifestation of destruction, and this hasn't occurred. So this is not the behavior of coal workers' pneumoconiosis when it progresses.

Dep. Tr. 23-24. The doctor made plain that he required a positive x-ray to find coal dust exposure contributed to a miner's respiratory impairment: "[t]he x-ray is absolutely necessary to determine that the exposure has been high enough for this individual to inhale and to retain the dust." Dep. Tr. 36. The doctor insisted that an x-ray is always essential in determining whether coal dust exposure contributed to a miner's impairment, stating that as a responsible medical doctor, he could never offer an opinion without obtaining that evidence. Dep. Tr. 49-51. When the doctor was asked whether in the absence of a positive x-ray he had ever diagnosed a miner with legal pneumoconiosis in the form of an obstructive impairment, he admitted that he had not. Dep. Tr. 53-54. Accordingly, the record supports the administrative law judge's determination that the doctor provided contradictory testimony on the role of x-ray evidence in diagnosing legal pneumoconiosis. This was a valid reason for finding Dr. Zaldivar's opinion less persuasive. *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 492, 23 BLR 2-18, 2-29 (7th Cir. 2004)(court upheld administrative law judge's discounting of doctor's opinion of legal pneumoconiosis where doctor had stressed the absence of x-ray evidence, even though the doctor's opinion could have been construed differently).

The administrative law judge also considered Dr. Zaldivar's opinion less persuasive because he did not explain his bases for finding that claimant's worsening airway obstructive disease was not due to coal dust exposure, except for the absence of x-ray evidence of

worsening condition. Decision and Order on Remand at 4. Employer responds that the administrative law judge is wrong because the doctor testified that administration of the bronchodilator improved claimant's condition indicating that asthma caused claimant's respiratory impairment as opposed to coal dust exposure, which causes a fixed impairment. Employer's Brief at 8. While employer is correct in asserting that Dr. Zaldivar cited this evidence to show that claimant's impairment was unrelated to coal dust exposure, the physician testified that claimant's "main problem is emphysema" which is not responsive to bronchodilator treatment. Dep. Tr. 20, 18. Hence, the cited evidence does not demonstrate that claimant's coal dust exposure did not contribute to his main problem, his emphysema.

Employer asserts that, in addition to the bronchodilator evidence, Dr. Zaldivar relied upon scientific journal articles to justify his opinion that claimant's significant obstructive impairment could not be caused by coal dust exposure. Employer's Brief at 8. In his testimony, Dr. Zaldivar cited an article by Dr. Morgan, which was also cited in his report, for the proposition that smoking is a "far more potent stimulus of airway obstruction" than coal dust exposure and that the "airway obstruction that has been statistically shown to be present in nonsmoking coal miners is of far less significance as a group than that of smoking coal miners or smokers in general." Employer's Exhibit 23 at 23, *citing Morgan and Seaton, Occupational Lung Diseases* (3d ed.). In the comments to the revised regulations, the Department explained why Dr. Morgan's findings are "somewhat suspect" 65 Fed. Reg. 79942 (Dec. 20, 2000). The Department also discussed a similar reference to medical literature made by Drs. Fino and Bahl to oppose the inclusion of obstructive lung disease in the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2). The Department observed:

> Just as not all smokers develop COPD [chronic obstructive pulmonary disease] and pulmonary dysfunction, pulmonary impairment is not universal in coal miners. As the majority of miners may have small or, perhaps in some cases, no decline in pulmonary function, the average decline of the population studies can appear to be relatively small. Despite this, the individual miners affected can have quite severe disease, and statistical averaging hides this effect. The amended definition clarifies that these miners have a right to prove their case with evidence of a disabling obstructive lung disease that arose out of coal mine employment.

65 Fed. Reg. 79941 (Dec. 20, 2000). The studies cited by Dr. Zaldivar to de-link obstructive lung disease from coal dust exposure, are like the studies cited by Drs. Fino and Bahl which the Department criticized as "not in accord with…the substantial weight of the medical and scientific literature." *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

We, therefore, hold that the administrative law judge reasonably discounted Dr.

Zaldivar's opinion excluding thirty-five years of coal dust exposure as a contributor to claimant's obstructive lung disease, based upon the doctor's varied statements regarding negative x-ray evidence in the formulation of his opinion. Moreover, as discussed *supra*, the bronchodilator evidence is irrelevant to the issue of whether claimant's coal dust exposure contributed to his emphysema; and the scientific literature cited was rejected by the Department in the comments to the revised regulations.[3]

Employer also faults the administrative law judge's consideration of Dr. Daniel's opinion:

> The Court appeared to agree with my earlier analysis that Dr. Daniel failed to discuss whether or nor Claimant's COPD was due to coal mine dust exposure as well as cigarette smoking. (EX 8). Dr. Daniel did conclude that the moderately severe chronic obstructive lung disease present is due to smoking but not to pneumoconiosis. Dr. Daniel earlier stated that there was no evidence of pneumoconiosis based on the negative chest x-ray readings he credited. Dr. Daniel did not discuss whether the obstructive pulmonary disease was due to coal mine dust exposure as "legal pneumoconiosis," nor did he include a basis for his finding that the Claimant's obstructive impairment was due only to Claimant's exposure to tobacco smoke.

Decision and Order on Remand at 4. The administrative law judge correctly observed that in its decision the court had noted employer's argument that the administrative law judge had erred in finding that Drs. Zaldivar, Stewart, Castle and Daniel failed to address whether coal dust exposure had contributed to claimant's chronic obstructive pulmonary disease and the

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[3] Employer points out that the administrative law judge stated that Dr. Zaldivar did not discuss whether the progession of claimant's chronic obstructive pulmonary disease could be due to coal dust exposure as well as smoking. Decision and Order at 4. It is not clear what the administrative law judge meant by that statement because in the next sentence the administrative law judge acknowledged Dr. Zaldivar's testimony that he could not attribute the miner's physiological changes to coal dust exposure unless he saw the condition worsening on x-ray film. *Id*. Dr. Zaldivar had testified:

> If the coal workers' pneumoconiosis were responsible for this progression, then one expects to find radiographic changes that have worsened alongside the physiological manifestation of destruction, and this hasn't occurred.

Tr. 24.

court held that the administrative law judge had erred in discrediting the opinion of Drs. Zaldivar, Stewart and Castle. From the court's omission of discussion of Dr. Daniel's opinion, the administrative law judge reasonably inferred that the court found no error. Moreover, the record supports the administrative law judge's determination that Dr. Daniel did not discuss the existence of legal pneumoconiosis, the issue presented in this case. In his report, Dr. Daniel stated the first question which employer's counsel asked him to address: "Is there sufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis with respect to this man." Employer Exhibit 8 at 1. To answer the question Dr. Daniel discussed and analyzed only the x-ray evidence, concluding, "My opinion is that there is no evidence of pneumoconiosis by present evidence." Employer's Exhibit 8 at 1. A fair reading of his opinion is that he considered only coal workers' pneumoconiosis, evidenced by x-ray.

Employer contends that the administrative law judge erred in finding that Dr. Daniel had not stated a basis for attributing claimant's obstructive disease solely to smoking, citing Dr. Daniel's statement that claimant's improvement following bronchodilator treatment showed an asthmatic component to his COPD. Dr. Daniel's explanation fails because, as discussed *supra*, the presence of an asthmatic component is irrelevant to the issue of whether coal dust exposure contributed to the underlying chronic obstructive pulmonary disease which is unresponsive to bronchodilators. Hence, the administrative law judge was correct in finding that Dr. Daniel failed to explain the basis for his determination that claimant's chronic obstructive pulmonary disease was due only to smoking.[4]

Employer also contends that the administrative law judge improperly discredited Dr. Castle's opinion because the administrative law judge stated that the physician failed to explain why no part of claimant's disabling respiratory impairment was due to his thirty-five year history of coal dust exposure. Decision and Order on Remand at 5-6. Contrary to employer's assertion, the administrative law judge's determination does not shift the burden of proof; rather, it highlights the lack of foundation for the doctor's opinion that claimant's impairment is entirely due to smoking. In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), the court approved the administrative law judge's finding that the credibility of a doctor's testimony was undermined by his failure to explain how claimant's more than thirty year history of coal dust exposure could not have aggravated his impairment which had been caused by smoking. *Compton*, 211 F.3d at 213, 22 BLR at 2-177.

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[4] After properly faulting Dr. Daniel for failing to consider the existence of legal pneumoconiosis and, specifically, for failing to explain why the doctor attributed claimant's chronic obstructive pulmonary disease to smoking alone, the administrative law judge added to the list of the doctor's omissions his failure to discuss the possibility that pneumoconiosis may be latent and progressive. This reflects merely an extension of the administrative law judge's fundamental criticism.

The administrative law judge in the case at bar similarly discounted Dr. Castle's opinion for providing no explanation for his determination that claimant's lengthy coal dust exposure had not aggravated or contributed to his impairment.

Employer's second allegation of error in the administrative law judge's consideration of Dr. Castle's opinion is also without merit. Employer asserts that the administrative law judge faulted Dr. Castle for failing "to 'discuss the progressive nature of pneumoconiosis.'[5] *See* 20 C.F.R. §718.201 2005." Employer's Brief at 14. In fact, the administrative law judge faulted Dr. Castle for failing "to consider the progressive nature of pneumoconiosis" because he had testified that his opinion, that coal dust exposure had not contributed to claimant's impairment, was based upon the absence of evidence of coal workers' pneumoconiosis currently *i.e.*, negative x-ray evidence and evidence that "at the time he left the mining industry, he did not have this significant degree of impairment." Employer's Exhibit 26 at 34. To the extent the doctor's opinion of no legal pneumoconiosis is based on negative x-ray evidence, it contravenes the Act: "no claim for benefits…shall be denied solely on the basis of the results of a chest roentgenogram." 30 U.S.C. §923; *see Shores*, 358 F.3d 486, 23 BLR 2-18.[6] To the extent the doctor's opinion is that a miner who is asymptomatic at retirement cannot develop a significant impairment after a latent period as a result of coal dust exposure, the opinion is contrary to the Act as explained by the courts and the Department of Labor: "Pneumoconiosis is recognized as the latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *accord*, *Consolidation Coal Co. v. Williams*, 453 F.3d 609, BLR (4th Cir. 2006); *see* 20 C.F.R. §718.201(c). It was proper for the administrative law judge to discount Dr. Castle's opinion because its premise, that pneumoconiosis is not latent and progressive, is invalid. *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999, 23 BLR 2-301, 2-318 (7th Cir. 2005) (appropriate to discount a medical opinion which conflicts with Section 718.201(c)'s recognition that pneumoconiosis can be latent and progressive); *accord*, *Shores*, 358 F.3d at 492; 23 BLR at 2-29; *Kramer*, 305 F.3d at 209, 22 BLR at 2-479. Accordingly, the administrative law judge's determination that Dr. Castle's opinion was less persuasive than the other opinions of record is supported by substantial evidence and complies with the remand instructions of the court.

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[5] The source of this quotation is unclear.

[6] We note that when the case at bar was before the Fourth Circuit, the court acknowledged that a conclusion that a miner does not suffer from legal pneumoconiosis based on negative x-ray evidence might be construed as hostile or contradictory to the Act. *Amick*, 123 Fed. Appx. at 533 n.6.

Employer's contentions regarding the administrative law judge's discrediting of Dr. Spagnolo's opinion are likewise invalid. The administrative law judge stated that although the doctor had explained his reasons for attributing claimant's pulmonary changes to smoking, he had not explained "why these findings then eliminate coal mine dust exposure as another possible additive and causative agent." Decision and Order at 6-7. Although employer professes to be baffled by the administrative law judge's statement, it is abundantly clear that thirty years of coal dust exposure could be a contributing or "additive" cause of claimant's respiratory impairment. In the cited language, the administrative law judge properly faulted Dr. Spagnolo, as he had Dr. Castle, for failing to "explain why coal dust exposure could not have …aggravated [the impairment]." *Compton*, 211 F.3d at 213, 22 BLR at 2-177.

Likewise unsound is employer's contention, raised in the context of its challenge to the administrative law judge's consideration of Dr. Spagnolo's opinion, that the case law prior to 2001 did not recognize pneumoconiosis as a latent disease. Employer's Brief at 18-19. Contrary to employer's assertion, the Supreme Court's decision in *Mullins*, quoted *supra*, as well as several cases cited in the Director's response letter, *e.g., LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-88 (3d Cir. 1995), specifically recognize pneumoconiosis as a latent disease. Further, as the Director also points out, both the United States Court of Appeals for the Seventh Circuit and the United States Court of Appeals for District of Columbia Circuit have rejected the argument that the revised definition of pneumoconiosis in Section 718.201(c) is impermissibly retroactive. *Shores*, 358 F.3d at 490, 23 BLR at 2-29; *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 864-4 (D.C. Cir. 2002).

Similarly mistaken is employer's argument that the administrative law judge erred in discounting Dr. Morgan's opinion. The administrative law judge provided two reasons for finding Dr. Morgan's opinion less persuasive. First, he found that Dr. Morgan excluded coal dust exposure as an aggravating factor in claimant's pulmonary impairment because he failed to recognize that pneumoconiosis may be a latent and progressive disease:

> Dr. Morgan stated that the Claimant's relatively severe chronic obstructive pulmonary disease now present was only a mild respiratory impairment at the time Claimant stopped mining. It is not realistic, according to Dr. Morgan, to suggest that the progression of the chronic obstructive pulmonary disease is due to coal mine dust exposure that occurred before 1983. Dr. Morgan noted that the miner continued smoking after 1983 and that his long history of cigarette smoking is certainly sufficient to cause a severe airway obstruction in a susceptible individual. Dr. Morgan stated that the severe respiratory impairment, which occurred only in the last ten years after Claimant quit mining, can only be attributed to Mr. Amick's continued smoking habit…. Dr. Morgan did not consider the progressive nature of pneumoconiosis but rather stated that progression after the miner quit mining

> could only be due to smoking. Dr. Morgan's conclusion that the deterioration after 1991 was all due to cigarette smoking without any discussion of the possibility that pneumoconiosis, either medical or legal, also progressed in this particular case makes his opinion less persuasive than other medical opinion reports of record.

Decision and Order on Remand at 8. Employer asserts that this was error because Dr. Morgan had declared:

> Although there are instances where progression of the effects of coal mine dust can continue, it is not realistic to suggest that the progression of Mr. Amick's chronic obstructive pulmonary disease was caused by coal dust to which he was exposed prior to 1983. There are certainly occasions when the effects of coal mine dust progress but this is not the case in Mr. Amick.

Employer's Exhibit 22 at 20. That statement, however, is nothing more than a conclusory assertion which does not explain why claimant's impairment could not reflect, even in part, the effects of his coal dust exposure. The administrative law judge was not required to accept the unexplained assertion. *Compton*, 211 F.3d at 213, 22 BLR at 2-176. Moreover, Dr. Morgan implicitly stated that pneumoconiosis is not latent and progressive, when he wrote: "Common sense indicates that the deterioration in ventilatory capacity was a consequence of his smoking since he was not exposed to coal dust [after 1983]." Employer's Exhibit 22 at 1. Hence, there is substantial support in the record for the administrative law judge's inference that the doctor's opinion was premised on the assumption that pneumoconiosis is not latent and progressive, and for that reason, worthy of less weight. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318; *Shores*, 358 F.3d at 492, 23 BLR at 2-29; *Kramer*, 305 F.3d at 209, 22 BLR at 2-479.

The administrative law judge's second reason for discounting Dr. Morgan's opinion is that he relied on the absence of positive x-ray evidence of pneumoconiosis to exclude coal dust exposure as a contributing factor in claimant's disabling respiratory impairment. Employer asserts the administrative law judge's criticism is unfounded, citing two statements by Dr. Morgan:

> Dr. Cohen then states that he disagrees with Drs. Castle, Stewart, Spagnolo, and Zaldivar that coal dust does not cause obstructive lung disease manifested by emphysema and bronchitis. I know that Drs. Castle, Stewart, Spagnolo, and Zaldivar are aware of the fact coal miner's [sic] develop airways obstruction and bronchitis. They also develop focal dust emphysema…. [I]t must be admitted that a miner may show pathological evidence of simple coal workers' pneumoconiosis that does not show up radiographically.

Employer's Exhibit 22 at 17, 20. Employer's Brief at 22. The doctor does not state that his colleagues would diagnose a disabling respiratory impairment due to coal dust exposure absent x-ray evidence of coal workers' pneumoconiosis. The acknowledgement that coal dust may be seen in a miner's lungs on autopsy or biopsy, yet not on x-ray, is not an acknowledgement that coal dust exposure may contribute to a disabling respiratory impairment without causing the x-ray changes of coal workers' pneumoconiosis. Indeed, employer's citation of Dr. Morgan's statements demonstrates that the administrative law judge's criticism is well-founded. Because there is evidence to support the administrative law judge's interpretation of Dr. Morgan's opinion as requiring x-ray evidence of pneumoconiosis, his determination to discount Dr. Morgan's opinion is upheld. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318; *Shores*, 358 F.3d at 492, 23 BLR at, 2-29; *Kramer*, 305 F.3d at 209, 22 BLR at 2-479.

Further, employer objects to the administrative law judge's finding "less persuasive" Dr. Stewart's opinion that claimant's extensive coal dust exposure could not have caused part of his respiratory impairment. Decision and Order on Remand at 5. The administrative law judge identified those reasons which the doctor had provided for his opinion which were not persuasive: the impairment was more severe than generally expected from coal dust exposure; the miner ceased coal mine employment in 1983 and his pulmonary condition did not begin to deteriorate until 1991. Decision and Order on Remand at 5-6. Employer takes exception only to the administrative law judge's statement: "Dr. Stewart did not discuss…the progressive and latent nature of coal dust exposure." Decision and Order on Remand at 5. Employer asserts that a physician is not required to discuss the progressive nature of pneumoconiosis. However, in this instance, it is apparent that the credibility of Dr. Stewart's opinion is significantly undermined because he provided no indication that he recognizes pneumoconiosis may be a latent and progressive disease when he eliminated coal dust exposure as a cause of the miner's impairment based upon the development of his respiratory impairment eight years after leaving the miners and the impairment's worsening thereafter. The administrative law judge properly discounted Dr. Stewart's opinion of no pneumoconiosis because it was premised in large part on his assumption that pneumoconiosis is not latent and progressive. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318; *Shores*, 358 F.3d at 492, 23 BLR at 2-29; *Kramer*, 305 F.3d at 209, 22 BLR at 2-479.

Employer argues that the reasons the administrative law judge provided for crediting the opinions of Drs. Cohen and Koenig were invalid: they, unlike employer's experts, recognized the progressive nature of pneumoconiosis; their opinions are well supported by the medical literature; and their opinions are more complete than those of employer's experts. Employer's contention is without merit.

As discussed *supra*, the record provides abundant support for the administrative law judge's determination that, unlike employer's experts, Drs. Cohen and Koenig recognized the progressive nature of pneumoconiosis and the administrative law judge properly discounted

those opinions premised on the assumption that pneumoconiosis cannot be latent and disabling. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318; *Shores*, 358 F.3d at 492, 23 BLR at 2-29; *Kramer*, 305 F.3d at 209, 22 BLR at 2-479.

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Cohen and Koenig as well-supported by the medical literature without discussing the contrary medical literature cited by Drs. Zaldivar and Morgan. The administrative law judge credited Dr. Cohen for his citation of medical literature identifying a link between coal mine dust exposure and obstructive lung disease. Decision and Order at 7. The administrative law judge credited Dr. Koenig's citation of medical literature, discussing an obstructive impairment as legal pneumoconiosis and discussing pneumoconiosis as latent and progressive. Decision and Order at 9. Because the Department of Labor reviewed all of the medical and scientific literature before promulgating the revised regulations, it was not necessary for the administrative law judge to review the "contrary" literature cited by Drs. Zaldivar and Morgan. The administrative law judge reasonably determined to credit those opinions which were based on medical literature most consistent with the regulatory finding that pneumoconiosis is latent and progressive and that an obstructive impairment may be "legal pneumoconiosis." Decision and Order at 9. *See Summers*, 272 F.3d 473, 22 BLR 2-265.

Employer also takes exception to the administrative law judge's crediting the opinions of Drs. Cohen and Koenig as "more complete", professing not to know what he meant by "more complete." Decision and Order on Remand at 9. Employer's Brief at 26-27. The administrative law judge made plain that the opinions of Drs. Cohen and Koenig reflected their consideration of both of claimant's long-term hazardous exposures, coal dust and smoking, as well as the doctors' understanding that pneumoconiosis may be latent and progressive, in addition to their knowledge of the medical literature credited by the Deparment of Labor in promulgating the regulations. Decision and Order on Remand at 9.

Employer's last attack on the administrative law judge's decision is that the "opinions [of Drs. Cohen and Koenig] regarding disability causation should not be credited because they relied upon positive x-ray interpretations to diagnose coal workers' pneumoconiosis." Employer's Brief at 29. The factual premise of employer's argument is wrong: both physicians did not diagnose coal workers' pneumoconiosis, only Dr. Cohen did; more importantly, Dr. Cohen, like Dr. Koenig attributed claimant's total disability to both legal pneumoconiosis and smoking, as the administrative law judge correctly determined. Claimant's Exhibit 9; Decision and Order on Remand at 9-10. Thus, employer's allegation of error in the administrative law judge's crediting of these doctors on disability causation is unfounded.

Fundamentally, this case turns on whether substantial evidence supports the

administrative law judge's findings regarding the credibility of the expert witnesses. As the court noted in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), "to overturn the ALJ, we would have to rule as a matter of law that 'no reasonable mind' could have interpreted and credited the doctor's opinion as the ALJ did. That we cannot do." *Mays*, 176 F.3d at 763, 21 BLR at 2-606; *see also Summers*, 272 F.3d at 483, 22 BLR at 2-281. In the case at bar, we cannot hold that no reasonable mind could have interpreted and credited the physicians' opinions as the administrative law judge did. Because we hold that the administrative law judge's decision is supported by substantial evidence, and therefore affirm the award of benefits, employer's request for reassignment of the case is moot.

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

SO ORDERED.

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BETTY JEAN HALL
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues' decision affirming the administrative law judge's Decision and Order on Remand Awarding Benefits. While I agree with my colleagues that the administrative law judge considered the directive of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, regarding the relative qualifications of the physicians. *See* Decision and Order on Remand at 8-9; *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). I, nonetheless, conclude that the administrative law judge has erred in his analysis of the medical opinion evidence and, in so doing, has failed to comply with the remand instructions of the court. Accordingly, I would vacate the administrative law judge's award of benefits and remand the claim for further consideration.

Contrary to the administrative law judge's determination, in addition to considering negative x-ray evidence Dr. Zaldivar explained that a reason for his conclusion that claimant's chronic obstructive pulmonary disease (COPD) did not arise from coal mine exposure was the improvement demonstrated by claimant on objective studies which was not consistent with an impairment related to coal mine employment. Further, I agree with employer's assertion that the administrative law judge impermissibly rejected Dr. Zaldivar's opinion because the physician failed to address the progressive and latent nature of pneumoconiosis inasmuch as the physician clearly stated that claimant had no impairment related to the inhalation of coal mine dust. Although the regulations define pneumoconiosis as a "latent and progressive disease which may become detectable only after the cessation of coal mine dust exposure," 20 C.F.R. §718.201, the regulatory language does not require a physician to address specifically the progressive nature of the disease in rendering an opinion as to its existence. In this case, Dr. Zaldivar clearly stated that claimant had no impairment related to the inhalation of coal mine dust. Thus, because the administrative law judge mischaracterized the medical conclusions of Dr. Zaldivar, I would vacate the administrative law judge's decision to accord little weight to the doctor's opinion and I would remand the case to the administrative law judge for further consideration of the opinion. *See Westmoreland Coal Co. v. Amick*, 123 Fed. Appx. 525 (4th Cir. 2004); *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *see also Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985).

Further, in considering the opinion of Dr. Daniel, while the administrative law judge stated that the court "appeared to agree with my earlier analysis that Dr. Daniel failed to discuss whether or not Claimant's COPD was due to coal mine dust exposure as well as cigarette smoking," Decision and Order on Remand at 4; Employer's Exhibit 8, the administrative law judge went on to assign little weight to Dr. Daniel's opinion because he found that the doctor concluded that claimant's COPD, was due to smoking, not pneumoconiosis, and the doctor failed to discuss the progressive nature of pneumoconiosis in

reaching his conclusion.

Review of the court's decision, as employer contends, however, shows that it did not affirm the administrative law judge's previous analysis of the opinion of Dr. Daniel. *Amick*, 123 Fed. Appx. 525. Contrary to the administrative law judge's finding, Dr. Daniel specifically indicated that the reversibility demonstrated on objective studies showed that claimant's COPD was due to asthma and was not coal mine dust related. Further, the failure of the physician to specifically use the term "legal pneumoconiosis" did not invalidate the opinion inasmuch as the physician specifically addressed whether claimant suffered from an impairment relating to coal mine dust exposure, an inquiry sufficient to satisfy the legal definition of pneumoconiosis pursuant to 20 C.F.R. §718.201. Moreover, Dr. Daniel's failure to address specifically the progressive nature of pneumoconiosis does not constitute an affirmable basis for discrediting the physician's opinion, as Dr. Daniel specifically opined that claimant did not suffer from the existence of coal workers' pneumoconiosis. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004). Accordingly, as the administrative law judge mischaracterized the medical conclusions of Dr. Daniel and mischaracterized the opinion of the court, I would vacate the administrative law judge's finding according little weight to Dr. Daniel's opinion and I would remand the case to the administrative law judge for further consideration of the opinion. *See Amick*, 123 Fed. Appx. 525; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Tackett*, 7 BLR 1-703; *Arnold*, 7 BLR 1-648.

Regarding Dr. Castle's opinion, I agree with employer that the administrative law judge erred in according little weight to the opinion of Dr. Castle, a reviewing physician, who opined that claimant's totally disabling respiratory impairment was due to smoking induced emphysema and asthma, and that claimant suffered from no coal mine dust related disease, Employer's Exhibits 9, 20, 24. As employer contends, the administrative law judge impermissibly shifted the burden to employer to rule out coal mine dust exposure as the source of claimant's condition. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). As employer contends, Dr. Castle fully explained his basis for concluding that claimant's condition was unrelated to coal mine dust exposure inasmuch as the physician noted the absence of any interstitial pulmonary process and explained that the reduction in claimant's diffusing capacity was consistent with emphysema and asthma and that the reversibility demonstrated by claimant was consistent with asthma. The burden to establish the presence of pneumoconiosis rests with claimant. Thus, insofar as Dr. Castle specifically concluded that claimant did not suffer from a coal mine related impairment, I agree with employer that the administrative law judge impermissibly shifted the burden to employer rule out the presence of pneumoconiosis. *See Ondecko*, 512 U.S. 267, 18 BLR 2A-1. Moreover, the failure of the physician to specifically address the progressive nature of pneumoconiosis did not render his opinion invalid. 20 C.F.R. §718.201; *see Parsons*, 23

BLR 1-29; *Workman*, 23 BLR 1-22. Accordingly, I would vacate the administrative law judge's accordance of less weight to Dr. Castle's opinion and direct the administrative law judge to reconsider Dr. Castle's opinion on remand.

Likewise, as employer contends and contrary to the administrative law judge's determination, Dr. Spagnolo fully explained the basis for concluding that claimant's condition was unrelated to coal mine dust exposure as the physician opined that claimant suffered from no coal mine dust disease and that claimant suffered from no obstructive or restrictive lung disease. I would hold, therefore, that the administrative law judge impermissibly shifted the burden to employer rule out the presence of pneumoconiosis, *see Ondecko*, 512 U.S. 267, 18 BLR 2A-1, and that the failure of the physician to specifically address the progressive nature of pneumoconiosis did not render that physician's opinion invalid. *See Parsons*, 23 BLR 1-29; *Workman*, 23 BLR 1-22. Thus, I would vacate the administrative law judge's accordance of little weight to the opinion of Dr. Spagnolo and remand the case for the administrative law judge to again address Dr. Spagnolo's opinion.

I also agree with employer that the administrative law judge mischaracterized the opinion of Dr. Morgan inasmuch as the physician specifically addressed the existence of legal pneumoconiosis when he opined that a miner can demonstrate simple pneumoconiosis without the presence of an x-ray and can develop bronchitis and focal dust emphysema as a result of coal mine dust exposure. The administrative law judge's mischaracterization of Dr. Morgan's opinion, therefore, requires remand, *see Amick*, 123 Fed. Appx. 525; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *see also Tackett*, 7 BLR 1-703; *Arnold*, 7 BLR 1-648. Accordingly, I would vacate the administrative law judge's accordance of little weight to Dr. Morgan's opinion and I would remand the case to the administrative law judge to again address the opinion of Dr. Morgan.

Further, as employer contends, Dr. Stewart specifically opined that claimant's impairment did not arise from coal mine dust exposure and was due to smoking. The failure of a physician to specifically address the progressive nature of pneumoconiosis does not render the opinion of that physician invalid. *Parsons*, 23 BLR 1-29; *Workman*, 23 BLR 1-22. Accordingly, I would vacate the administrative law judge's accordance of little weight to the opinion of Dr. Stewart and I would remand the case for the administrative law judge to reconsider Dr. Stewarts's opinions.

I would also vacate the administrative law judge's finding according greater weight to the opinions of Drs. Cohen and Koenig, who diagnosed the presence of legal pneumoconiosis. Although claimant correctly notes that the opinions of these physicians were not before the court for consideration, the administrative law judge's decision, on remand, to accord greater weight to their opinions is adversely affected by his flawed analysis of the opinions of employer's physicians. As employer argues, the administrative law judge's failure to disclose the basis for his conclusion that the opinions of these

physicians are "more complete," than the opinions of the physicians rendering contrary opinions, Decision and Order on Remand at 9, is a violation of the Administrative Procedure Act, 5 U.S.C. §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), which requires that every adjudicatory decision 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. Further, although the administrative law judge found that the medical conclusions of Drs. Cohen and Koenig were "well supported by medical literature," Decision and Order on Remand at 9, the administrative law judge failed, as employer contends, to address the conflicts in the medical literature which were noted by Dr. Morgan, Employer's Exhibit 22, and Dr. Zaldivar, Employer's Exhibit 23.

In conclusion, therefore, I would hold that substantial evidence does not support the administrative law judge's determination that claimant established the presence of legal pneumoconiosis and I would, therefore, vacate the administrative law judge's Decision and Order on Remand Awarding Benefits and I would remand this case for a *de novo* review of all of the medical opinion evidence.

Moreover, the administrative law judge's failure to correctly discuss the medical opinion evidence as to the existence of legal pneumoconiosis and his failure to follow the court's remand instructions necessarily affects his consideration of disability causation. Accordingly, if reached, I would hold that the administrative law judge must reconsider disability causation. *See* 20 C.F.R. §§718.201, 718.202(a)(4); 718.204(c); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director,* OWCP, 9 BLR 1-36 (1986); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

I would, however, decline employer's request for reassignment of the case to a different administrative law judge at this time, as employer has pointed to no evidence of bias or recalcitrance by the administrative law judge. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992).

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ROY P. SMITH
Administrative Appeals Judge