BRB No. 07-0928 BLA

E.M.L. (o/b/o J.L., Deceased Miner) Claimant-Respondent v. SUPERIOR MINING & MINERALS Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/18/2008 DECISION and ORDER

Appeal of the Decision and Order on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (04-BLA-5846) of Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding

benefits on a subsequent claim[1] 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). This case is before the Board for the second time. In a Decision and Order dated October 11, 2005, the administrative law judge credited the miner with at least thirty-five years of coal mine employment,[2] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the medical opinion evidence developed since the prior denial of benefits established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), (c). Accordingly, the administrative law judge awarded benefits. In disposing of employer's first appeal, the Board affirmed the administrative law judge's findings that the new evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, thus, that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The Board also affirmed the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) on the merits. However, the Board vacated the administrative law judge's findings that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(i), (ii), (iv), and remanded the case for further consideration of all the relevant evidence thereunder. In addition, the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remanded the case for further consideration of all relevant evidence thereunder. [*J.L.*] *v. Superior Mining & Minerals*, BRB No. 06-0177 BLA (Nov. 29, 2006)(unpub).

[1] The miner filed his first claim on December 5, 1991. Director's Exhibit 1. It was finally denied by a claims examiner on September 9, 1993, because it was deemed abandoned. *Id*. The miner filed his second claim on March 24, 1994. Director's Exhibit 2. It was finally denied by the district director on September 6, 1994, because the evidence did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability by the disease. *Id*. The miner filed this claim on September 9, 2002. Director's Exhibit 3.

[2] The record indicates that the miner was last employed in the coal mining industry in Kentucky. Director's Exhibits 1, 2, 4, 6, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

On remand, the administrative law judge found that the evidence established total disability at 20 C.F.R. §718.204(b). The administrative law judge also found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).[3] Claimant[4] responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging the Board to reject employer's challenge to the validity of the amended regulation at 20 C.F.R. §725.309.[5]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

CHANGE IN AN APPLICABLE CONDITION OF ENTITLEMENT
Section 725.309

Initially, we will address employer's contention that the amended regulation at 20 C.F.R. §725.309 is invalid. Specifically, employer argues that the administrative law judge erred in failing to compare the old evidence with the new evidence in determining whether claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[6] In our prior Decision and Order, the Board rejected employer's

[3] Employer filed a brief in reply to the Director's response brief, reiterating it prior contentions at 20 C.F.R. §725.309.

[4] Claimant, the miner's widow, is pursuing this claim on behalf of the miner's estate. The miner died on July 5, 2004.

[5] Because the administrative law judge's findings that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The pertinent regulation provides that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable

assertion that "because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge's analysis pursuant to Section 725.309 must include consideration of the qualitative difference between the earlier evidence and the new evidence, consistent with *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)." [*J.L.*], BRB No. 06-0177 BLA, slip op. at 2-3. The Board explained that "[u]nder the revised version of Section 725.309, claimant no longer has the burden of proving a 'material change in condition;' rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based." [*J.L.*], BRB No. 06-0177 BLA, slip op. at 3. The Board then affirmed the administrative law judge's finding that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and her finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. [*J.L.*], BRB No. 06-0177 BLA, slip op. at 5.

The Board's previous disposition of this issue constitutes the law of the case. Employer does not argue that an exception to the law of the case doctrine applies in this case. Because we are not persuaded that the law of the case doctrine is inapplicable, or that an exception has been demonstrated, we need not revisit whether the amended regulation at Section 725.309 requires an administrative law judge to analyze the old evidence and new evidence. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also argues that the amended regulation at Section 725.309 is arbitrary and capricious, based on its margin of error regarding the progressivity of pneumoconiosis. Employer maintains that "[t]he best evidence produced by the [Department of Labor (DOL)] suggested that the presumed fact (progressive pneumoconiosis) is 92-94% likely to be incorrect and in cases of latency, absent progressive massive fibrosis, the presumed fact is 100% likely to be incorrect." Employer's Brief at 5 n.2. However, as the Director notes, the Board has rejected the assertion that there is no proof that legal pneumoconiosis is capable of progression or latent manifestation after a miner's exposure to coal mine dust has ceased. *See* Director's Letter Brief at 2; *Parson v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004)(Motion

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conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). In addition, the pertinent regulation provides that the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

for Recon.)(*en banc*); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-26-27 (2004)(*en banc*). Thus, we are not persuaded by employer's assertion that the amended regulation at Section 725.309 is arbitrary and capricious.

Employer additionally argues that the amended regulation at Section 725.309 cannot be applied retroactively without violating the prohibition against retroactive application of an agency's regulations. Specifically, employer asserts that if economic arrangements, and the expectations they reflect, are upset by a new rule, then that rule is illegally retroactive. Employer maintains that while the insurance arrangements for the miner were fully funded in 1989, the year the miner last worked as a coal miner, the application of the new expanded rules, adopted in 2001, affects that transaction, because they were overtly designed by the DOL to increase the likihood of an award of benefits. Contrary to employer's assertion, the United States Court of Appeals for the District of Columbia Circuit held that Section 725.309(d) was not retroactive, because it did not change the legal landscape. *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part* and *rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001). As the Director notes, the date of filing, rather than the date of last exposure to coal mine dust, is the operative date for the applicability of the black lung program. *See* 20 C.F.R. 725.4. Thus, we are not persuaded by employer's assertion that the amended regulation at Section 725.309 is impermissibly retroactive as applied to this claim. *See* 20 C.F.R. 725.2.

TOTAL DISABILITY
Section 718.204(b)(2)(iv)

Turning to the merits of this claim, employer contends that the administrative law judge erred in finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv).[7] The administrative law judge considered the reports of Drs. Johnson, Gottschall, Broudy, Amisetty, and Rosenberg. Dr. Johnson opined that the miner had a significant and severe pulmonary impairment, and that he did not have the respiratory functional capacity to do his past coal mine work or comparable exertional work activity, due to his hypoxemia at rest, which required supplemental oxygen continuously. Director's Exhibit 16. Dr. Gottschall opined that the miner had black lung disease and significant dyspnea on exertion, but she did not render an opinion with regard to the issue of total disability. Director's Exhibit 14. Dr. Broudy opined that the miner had a totally disabling pulmonary or respiratory impairment. Employer's Exhibit 5. Dr. Amisetty opined that the miner had a mild to moderate pulmonary impairment, and that

[7] We hold that the evidence was insufficient, as a matter of law, to establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence of cor pulmonale with right-sided congestive heart failure.

he did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 12. By contrast, Dr. Rosenberg opined that from a pulmonary perspective the miner could perform his previous coal mining job or other similarly arduous types of labor.[8] Employer's Exhibit 1.

The administrative law judge gave dispositive weight to Dr. Johnson's opinion, because it was consistent with the opinions of Drs. Gottschall and Broudy. Decision and Order on Remand at 5. The administrative law judge also found that Dr. Johnson's opinion was based on his treatment of the miner for chronic lung disease. *Id*. In addition, the administrative law judge found that Dr. Amisetty's disability opinion was well-reasoned, supported by objective evidence, and consistent with the disability opinions of Drs. Johnson, Gottschall, and Broudy. *Id*. Lastly, the administrative law judge discredited Dr. Rosenberg's disability opinion, because Dr. Rosenberg concluded that the miner was capable of returning to work in an underground coal mine, even though he was on continuous supplemental oxygen to address his hypoxia. *Id*.

Drs. Johnson, Gottschall, Broudy, and Amisetty

Employer argues that because the disability opinions of Drs. Johnson, Gottschall, Broudy, and Amisetty were based on objective evidence, the administrative law judge's reliance on those opinions was inconsistent with her finding that the objective tests did not establish total disability. As discussed, *supra*, the administrative law judge found that the pulmonary function study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), and she found that the arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 3-4. However, the pertinent regulation at 20 C.F.R. §718.204(b)(2)(iv) provides that "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contradicted, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment in paragraph (b)(1) of this section." 20 C.F.R. §718.204(b)(2)(iv).

In this case, the administrative law judge determined that Dr. Johnson's disability opinion was not based solely on the nonqualifying[9] pulmonary function and arterial blood

[8] Dr. Rosenberg also opined that "[the miner] clearly has multiple medical conditions, which together would be considered disabling." Employer's Exhibit 1.

[9] A "qualifying" pulmonary function study or blood gas study yields values that

gas study evidence, but was also based on other medically accepted clinical and laboratory diagnostic techniques.[10] The administrative law judge specifically stated:

> Again, I rely on the conclusion of Dr. Johnson, [the miner's] treating physician, that [the miner] was unable, from a respiratory standpoint, to return to his previous underground coal mining job. This is consistent with the conclusions, based on objective findings, by Dr. Gottschall and Dr. Broudy. I do not agree with the [e]mployer that Dr. Johnson's opinions are not based on his treatment of [the miner], but are based solely on the results of the July 2002 pulmonary function tests. Clearly, Dr. Johnson's opinions were based on the results of the July 2002 evaluation, but also on his physical examinations, objective testing, symptoms, and social, medical, and employment histories obtained during the fourteen years he treated [the miner] for chronic lung disease.

Decision and Order on Remand at 5.

Because the disability opinions of Drs. Johnson, Gottschall, Broudy, and Amisetty were not based solely on nonqualifying pulmonary function study and arterial blood gas study evidence, the administrative law judge acted within her discretion in weighing the opinions of Drs. Johnson, Gottschall, Broudy, and Amisetty at 20 C.F.R. §718.204(b)(2)(iv). *See generally Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Consequently, we reject employer's assertion that the administrative law judge's reliance on the disability opinions of Drs. Johnson, Gottschall, Broudy, and Amisetty was inconsistent with her finding that the objective tests did not establish total disability.

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are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

[10] While the administrative law judge concluded that the pulmonary function studies dated July 22, 2002 and November 5, 2002 by Drs. Gottschall and Amisetty yielded nonqualifying values, she concluded that the pulmonary function studies dated December 10, 2002 and April 19, 2004 by Dr. Rosenberg yielded qualifying values. Decision and Order on Remand at 3. Further, while the administrative law judge concluded that the arterial blood gas studies dated December 10, 2002 and April 19, 2004 by Dr. Rosenberg yielded nonqualifying values, she concluded that the arterial blood gas studies dated July 23, 2002 and November 5, 2002 by Drs. Gottschall and Amisetty yielded qualifying values. *Id*. at 4.

Drs. Gottschall and Broudy

Employer argues that the administrative law judge erred in relying on the disability opinions of Drs. Gottschall and Broudy, either standing alone or in support of Dr. Johnson's opinion, because they did not assess the miner's pulmonary functional ability or identify the physical demands of his usual coal mine employment. As discussed, *supra*, the administrative law judge concluded that the opinions of Drs. Gottschall and Broudy supported Dr. Johnson's disability opinion. In considering Dr. Gottschall's opinion, the administrative law judge stated:

> Dr. Gottschall did not directly address the question of whether [the miner] had the pulmonary capability to return to his previous coal mining work. But she noted his respiratory condition, including significant dyspnea on exertion, which had a profound effect on his quality of life, and his hypoxia, which required supplemental oxygen.

Decision and Order on Remand at 4. Contrary to the administrative law judge's finding, Dr. Gottschall did not render an opinion regarding the severity of the miner's respiratory impairment. Director's Exhibit 14. The mere recitation of symptoms does not constitute a diagnosis of impairment. *See Clay v. Director, OWCP*, 7 BLR 1-82 (1984); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365 (1983). Consequently, we hold that the administrative law judge erred in failing to explain why she found that Dr. Gottschall's opinion was supported Dr. Johnson's disability opinion. *Director, OWCP v. Rowe*, 710 F.2d 251, 254, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer additionally argues that the administrative law judge erred in relying on Dr. Broudy's opinion, because Dr. Broudy was not familiar with the exertional requirements of the miner's usual coal mine job. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), the Sixth Circuit court noted that while Drs. Baker and Vaezy considered the exertional requirements of the miner's usual coal mine employment in concluding that he was totally disabled, Drs. Broudy and Dahhan did not mention the physical requirements that were specific to his previous employment in concluding that he was not totally disabled. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. The court therefore held that the administrative law judge erred in failing to consider whether Drs. Broudy and Dahhan had any knowledge of the exertional requirements of the miner's usual coal mine work before crediting their opinions. *Id*. In this case, Dr. Broudy opined that the miner had a totally disabling respiratory or pulmonary impairment. Employer's Exhibit 5. However, unlike the doctors in *Cornett* who considered the exertional requirements of the miner's usual coal mine work in concluding that he was totally disabled, Dr. Broudy did not indicate that he had knowledge of the exertional requirements of the miner's usual coal mine job. Dr. Broudy

merely noted that "[the miner] had a history of coal mining anywhere from 31-43 years." *Id*. Because Dr. Broudy did not indicate that he was familiar with the exertional requirements of the miner's usual coal mine job, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124, we hold that the administrative law judge erred in finding that Dr. Broudy's opinion supported Dr. Johnson's disability opinion.

Employer further asserts that because Dr. Broudy's disability opinion was based on a combination of age, lung disease, and heart disease, it did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Contrary to employer's assertion, Dr. Broudy observed that "[the miner] had a long history of heavy smoking and it is clear from the evidence that cigarette smoking caused [his] respiratory impairment and pulmonary disability." Employer's Exhibit 5; *see Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Thus, we reject employer's assertion that Dr. Broudy's disability opinion was insufficient to establish total disability at 20 C.F.R. 718.204(b)(2)(iv), because it because was based on a combination of age, lung disease, and heart disease.

Dr. Amisetty

Employer argues that the administrative law judge erred in relying on Dr. Amisetty's disability opinion because Dr. Amisetty was not familiar with the functional demands of claimant's usual coal mine employment. Dr. Amisetty diagnosed a mild to moderate pulmonary impairment, and opined that the miner did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Director's Exhibit 12. As noted above, in *Cornett*, the Sixth Circuit court held that the administrative law judge should consider whether Drs. Broudy and Dahhan had any knowledge of the exertional requirements of the miner's usual coal mine work before crediting their disability opinions. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. In this case, Dr. Amisetty noted that the miner had forty-eight years of coal mine employment and that his usual coal mine job was as an electrician in underground mining. *Id*. However, Dr. Amisetty did not identify the exertional requirements of the miner's usual coal mine job as an electrician in underground mining. Thus, because Dr. Amisetty did not indicate that he was familiar with the exertional requirements of the miner's usual coal mine job, *Cornett*, 227 F.3d at 578, 22 BLR at 2-124, we hold that the administrative law judge erred in relying on Dr. Amisetty's opinion to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer also argues that Dr. Amisetty's inability to assess the extent to which any impairment was due to a primary pulmonary disease or claimant's heart disease precluded the administrative law judge from relying on Dr. Amisetty's opinion as a matter of law. Dr. Amisetty concluded that it was difficult to assess the extent to which the diagnoses of chronic bronchitis and coronary artery disease contributed to the miner's pulmonary impairment. Director's Exhibit 12. Nonetheless, Dr. Amisetty unequivocally

opined that the miner did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.*; *see Beatty*, 16 BLR at 1-15. Consequently, we reject employer's assertion that Dr. Amisetty's opinion was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) on that basis.

Dr. Johnson

Employer argues that because the administrative law judge did not explain how Dr. Johnson's treatment of the miner enhanced his opinion, she erred in giving greater weight to Dr. Johnson's disability opinion based on his status as the miner's treating physician. In our previous Decision and Order, the Board instructed the administrative law judge to apply the provisions of 20 C.F.R. §718.104(d),[11] when considering Dr. Johnson's disability opinion. Section 718.104(d) requires the officer adjudicating the claim to "give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the pertinent regulation provides that the adjudication officer shall take into consideration the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). Although the treatment relationship may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5). Moreover, the Sixth Circuit has held that in black lung litigation, the opinions of treating physicians are neither presumptively correct nor afforded automatic deference. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326 (6th Cir. 2002). In *Williams*, the court stated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647.

In her Decision and Order on Remand, the administrative law judge acknowledged that Dr. Johnson treated the miner's chronic lung disease for fourteen years. However, the administrative law judge did not specifically consider Dr. Johnson's disability opinion in light of the criteria provided at 20 C.F.R. §718.104(d) to determine whether Dr. Johnson's disability opinion was entitled to greater weight than Dr. Rosenberg's contrary disability opinion. Rather, the administrative law judge stated, "[c]learly Dr. Johnson's opinions were based on results of the July 2002 evaluation, but also on his physical examinations, objective testing, symptoms, and social, medical, and employment

[11] The criteria set forth at 20 C.F.R. §718.104(d)(1)-(4) for consideration of a treating physician's opinion are applicable to medical evidence developed after January 19, 2001, the effective date of the amended regulations.

histories obtained during the fourteen years he treated [the miner] for chronic lung disease." Decision and Order on Remand at 5. However, as employer argues, the administrative law judge did not explain why she gave greater weight to Dr. Johnson's disability opinion based on any of these factors. *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165. Consequently, we hold that the administrative law judge failed to provide a valid basis for according dispositive weight to Dr. Johnson's disability opinion.

Dr. Rosenberg

Employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's disability opinion, because she did not accept Dr. Rosenberg's suggestion that a miner who needed continuous supplemental oxygen would be capable of performing the work of an underground coal miner. Specifically, employer asserts that the administrative law judge mischaracterized Dr. Rosenberg's opinion by assuming that oxygen was needed to treat a primary respiratory or pulmonary disease, rather than some other condition. In a report dated April 27, 2004, Dr. Rosenberg noted that at the time of the evaluation "[the miner] had been on oxygen therapy chronically for the last five years and used a wheelchair when he was out, and barely could get around with a walker at home." Employer's Exhibit 1. Dr. Rosenberg also opined that the miner would be considered disabled from multiple medical conditions, such as a stroke, coronary artery disease, a cardiac arrhythmia, and hypertension. *Id*. Nonetheless, Dr. Rosenberg additionally opined that from a pulmonary perspective the miner could perform his previous coal mining job or other similar arduous types of labor. *Id*.

In considering Dr. Rosenberg's opinion, the administrative law judge stated that "[t]he [e]mployer takes issue with my earlier statement that I could not take seriously Dr. Rosenberg's suggestion that a man who needs continuous supplemental oxygen would be capable of working underground in a coal mine, arguing that I mischaracterized Dr. Rosenberg's opinion." Decision and Order on Remand at 5 n.9. The administrative law judge further stated, "[a]gain, I do not take Dr. Rosenberg's conclusion after his 2004 evaluation that [the miner], who was on continuous supplemental oxygen to address hypoxia, was capable of returning to work in an underground coal mine." *Id*. at 5.

An administrative law judge may not reject a physician's opinion because it does not comply with her own medical conclusion. *Hall v. Consolidation Coal Co*., 6 BLR 1-1306, 1-1309 (1984). In this case, the administrative law judge discredited Dr. Rosenberg's opinion, that from a pulmonary perspective the miner had the ability to perform his usual coal mine job, because she disagreed with Dr. Rosenberg's opinion, in light of the fact that the miner was on continuous supplemental oxygen. Because the administrative law judge substituted her opinion for that of the physician, *Hall*, 6 BLR at

1-1309, the administrative law judge erred in discrediting Dr. Rosenberg's disability opinion on this basis.

In view of the foregoing, we vacate the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration of the evidence thereunder.

On remand, the administrative law judge must consider Dr. Johnson's disability opinion in accordance with the criteria set forth at 20 C.F.R. §718.104(d).

Further, on remand, the administrative law judge must weigh together all of the contrary probative evidence of disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), like and unlike, to determine whether the evidence establishes total disability at 20 C.F.R. §718.204(b). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS
Section 718.204(c)

Employer next contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the reports of Drs. Johnson, Gottschall, Amisetty, Broudy, and Rosenberg. Dr. Johnson opined that coal dust exposure contributed to the miner's pulmonary impairment. Director's Exhibit 16. Dr. Gottschall diagnosed black lung disease related to coal dust exposure, but she did not render an opinion regarding the issue of total disability due to pneumoconiosis. Director's Exhibit 14. Dr. Amisetty opined that chronic smoking contributed to the miner's pulmonary impairment. Director's Exhibit 12. Dr. Broudy opined that neither pneumoconiosis nor coal dust exposure was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Employer's Exhibit 5. Dr. Broudy also opined that pneumoconiosis did not have a material adverse effect on the miner's respiratory or pulmonary condition. *Id*. Dr. Rosenberg opined that the miner's disability was not related to, or caused by, the inhalation coal mine dust exposure. Employer's Exhibit 1.

The administrative law judge determined that the disability causation opinions of Drs. Johnson and Gottschall were well-reasoned. Decision and Order on Remand at 8. In addition, the administrative law judge determined that Dr. Amisetty's disability causation opinion was internally inconsistent.[12] *Id*. at 6. Further, the administrative law

[12] The administrative law judge stated, "[a]gain I find Dr. Amisetty's opinions on this issue are inconsistent, as he stated that [the miner] had chronic bronchitis due to

judge discounted the disability causation opinions of Drs. Broudy and Rosenberg, because they were not reasoned. *Id*. at 6-7. The administrative law judge also discounted the disability causation opinions of Drs. Broudy and Rosenberg, because they were contrary to the regulations. *Id*. Based on the opinions of Drs. Johnson and Gottschall, the administrative law judge concluded that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Because we vacate the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv), we also vacate the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Nevertheless, for the sake of judicial economy, we address employer's specific assertions regarding the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.204(c).

Drs. Johnson and Gottschall

Employer asserts that the administrative law judge erred in relying on the opinions of Drs. Johnson and Gottschall. At Section 718.204(c), the administrative law judge considered her prior weighing of the opinions of Drs. Johnson and Gottschall with regard to the issue of legal pneumoconiosis. The administrative law judge specifically stated:

> In addressing my finding that the weight of the medical opinions established the existence of legal pneumoconiosis, the Board stated that I permissibly accorded significant weight to the opinions of Dr. Gottschall and Dr. Johnson, that while smoking was also a factor, coal dust exposure substantially contributed to [the miner's] chronic obstructive pulmonary disease, emphysema, and chronic bronchitis, as I found them to be well reasoned, persuasive, and supported by the objective evidence of record.
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> ***
>
> Weighing all of the evidence together, I have found that the [c]laimant has established that [the miner] suffered from a totally disabling respiratory impairment, in the form of chronic obstructive pulmonary disease, emphysema, and chronic bronchitis. My reasoning regarding the existence of legal pneumoconiosis applies as well to the question of

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chronic smoking and occupational dust exposure, and in response to a form questionnaire, that [the miner's] mild to moderate pulmonary impairment was due to his chronic smoking." Decision and Order on Remand at 6. No party contests the administrative law judge's weighing of Dr. Amisetty's opinion.

> whether [the miner's] disabling respiratory impairment was due, at least in significant part, to his long history of exposure to coal mine dust.

Decision and Order on Remand at 8.

In our prior Decision and Order, the Board stated that "the administrative law judge could properly find that the opinions of Drs. Gottschall and Johnson [regarding the existence of pneumoconiosis] were reasoned and documented, as they were based on the results of physical examination, objective testing, symptoms, and social, medical and employment histories, and the physicians explained how the miner's symptoms and objective findings supported their conclusions." [*J.L.*], BRB No. 06-0177 BLA, slip op. at 3 n.2. However, the Board did not address whether the opinions of Drs. Gottschall and Johnson were reasoned with regard to the issue of disability causation. Dr. Johnson opined that "[t]he cause of [the miner's] pulmonary impairment includes his coal mine dust exposure and a 28 year history for smoking a pack of cigarettes per day." Director's Exhibit 16. Dr. Johnson further opined that "[the miner] had 44 years of coal mine dust exposure obviously which significantly contributed to his confirmed pulmonary impairment." *Id*. In addition, Dr. Johnson found that considering the miner's significant smoking habit alone as a contributing factor of his chronic obstructive pulmonary disease did not fully explain the degree of his respiratory impairment. *Id*. Because the administrative law judge did not explain why she found that Dr. Johnson's disability causation opinion was well-reasoned, *Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165, we hold that the administrative law judge erred in failing to provide a valid basis for giving dispositive weight to Dr. Johnson's disability causation opinion at 20 C.F.R. §718.204(c).

Further, as noted above, Dr. Gottschall did not render an opinion with regard to the issue of total disability due to pneumoconiosis. Director's Exhibit 14. Thus, the administrative law judge mischaracterized Dr. Gottschall's opinion. *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Drs. Broudy and Rosenberg

Employer also asserts that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Rosenberg. Citing *Williams*, employer specifically asserts that the administrative law judge erred in discrediting Dr. Broudy's opinion because Dr. Broudy did not adequately address the role of the miner's coal dust exposure history. Dr. Broudy opined that "[the miner] had a long history of heavy smoking and it is clear from the evidence that cigarette smoking caused [his] respiratory impairment and pulmonary disability." Employer's Exhibit 5. Dr. Broudy also opined that "[t]here is no evidence that any impairment arose from the inhalation of coal mine dust." *Id*. The administrative

law judge found that Dr. Broudy's disability causation opinion was not reasoned. The administrative law judge specifically stated:

> I interpret Dr. Broudy's opinion to suggest that he relied heavily on the lack of evidence of clinical pneumoconiosis, *i.e.*, x-ray or CT scan evidence of fibrosis, or evidence of restriction. But he offered no explanation for his categorical exclusion of [the miner's] significant history of coal dust exposure as a factor, if not the only factor, in [the miner's] obstructive impairment. In short, he did not adequately or convincingly address the question of "legal" pneumoconiosis, or the role that [the miner's] significant history of coal dust exposure played in his disabling respiratory impairment.

Decision and Order on Remand at 7.

In *Williams*, the Sixth Circuit court noted that the administrative law judge seemed to criticize Dr. Dahhan for failing to adequately explain why a miner's coal mine employment history of thirty-seven years had nothing to do with his chronic obstructive pulmonary disease. *Williams*, 338 F.3d at 515, 22 BLR at 2-651. The court determined that "[i]t makes no sense, however, to assume that because [Dr.] Dahhan does not explain why Decedent's work as a miner has not caused his lung impairment, then his work as a miner must have caused his lung impairment." *Id*. The court explained that Dr. Dahhan stated that coal dust did not cause the miner's chronic obstructive pulmonary disease. *Williams*, 338 F.3d at 516, 22 BLR at 2-651.

In the instant case, Dr. Broudy opined that coal dust exposure did not contribute to the miner's pulmonary impairment. However, this case is distinguishable from *Williams*, because it involves a miner's claim regarding the issue of total disability due to pneumoconiosis, while the court's decision in *Williams* involved a survivor's claim regarding the issues of pneumoconiosis and death due to pneumoconiosis. As noted above, the court in *Williams* determined that Dr. Dahhan did not ignore chronic obstructive pulmonary disease, as claimed by the administrative law judge, but found that Dr. Dahhan stated that coal dust did not cause the chronic obstructive pulmonary disease. The court further determined that the most important point was that "[Dr.] Dahhan appropriately addressed the real issue when he explained that '[Decedent's] death would have been at the same time and the same manner regardless of his exposure to coal dust or the presence of occupational pneumoconiosis, since it was the result of an upper GI bleed, [a] condition of the general public at large.'" *Williams*, 338 F.3d at 516, 22 BLR at 2-651-2. Thus, the factual basis for the administrative law judge's weighing of Dr. Broudy's disability opinion in the instant case was not comparable to the factual basis for the court's holding in *Williams* with regard to the weighing of Dr. Dahhan's opinion. Consequently, we reject employer's assertion that the administrative law judge erred in

discrediting Dr. Broudy's opinion because Dr. Broudy did not adequately address the role of the miner's coal dust exposure history. *See also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000)(recognizing that an administrative law judge may discredit an opinion that lacks a thorough explanation, but is not legally compelled to do so).

Employer additionally argues that the administrative law judge erred in finding that Dr. Broudy's opinion was hostile to the regulations that recognize that pneumoconiosis, both clinical and legal, is a latent and progressive condition. The administrative law judge stated that "Dr. Broudy's opinion also suggests that he does not believe it is possible for a miner to develop disabling simple pneumoconiosis after leaving the mines, and that this can happen only if there is progressive massive fibrosis." Decision and Order on Remand at 7. Consequently, the administrative law judge gave less weight to Dr. Broudy's opinion.

In *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987), the Sixth Circuit court held that a physician's belief that simple pneumoconiosis is never disabling may constitute grounds for rejecting his opinion as inconsistent with the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. Nonetheless, the court observed that even a physician's belief that simple pneumoconiosis cannot be totally disabling does not automatically exclude from consideration, the physician's otherwise probative testimony regarding the existence or severity of a miner's disability. *Id*. Rather, the court held that the physician must foreclose the possibility that simple pneumoconiosis can be totally disabling before his opinion will be considered inconsistent with the spirit of the Act. *Id*.

As employer argues, Dr. Broudy did not foreclose the possibility that simple pneumoconiosis could develop after a miner leaves his usual coal mine work. Dr. Broudy did not exclude pneumoconiosis as a latent and progressive disease. Rather, Dr. Broudy observed that "[i]n general, one would expect pneumoconiosis to cause primarily a restrictive defect and that the impairment would not progress as rapidly as it did once exposure to coal ceases." Employer's Exhibit 5. Thus, because Dr. Broudy's opinion was not primarily based on a predisposed belief that foreclosed all possibility that pneumoconiosis is latent and progressive, *see generally Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003)(recognizing that pneumoconiosis is a progressive and latent disease that can arise and progress in the absence of continued exposure to coal dust), we hold that the administrative law judge erred in giving little weight to Dr. Broudy's opinion on the ground that it was in conflict with the regulations. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72.

Employer further asserts that the administrative law judge erred in discrediting Dr. Rosenberg's disability causation opinion, because Dr. Rosenberg diagnosed chronic

obstructive pulmonary disease related to smoking. In a report dated June 21, 2005, Dr. Rosenberg opined that a pattern of obstruction that was noted with marked air trapping, a markedly reduced FEV1%, and a bronchodilator response was not characteristic of the obstructive pattern of coal mine dust exposure, but was the pattern that was classic for chronic obstructive pulmonary disease related to smoking. The administrative law judge gave less weight to Dr. Rosenberg's opinion, because "Dr. Rosenberg did not further describe the 'characteristics' of the obstructive pattern seen with coal dust exposure, or address the question of whether [the miner's] extensive exposure to coal dust, along with his history of smoking, contributed to his obstructive impairment, which was only partially reversible." Decision and Order on Remand at 6. Because the administrative law judge acted within her discretion in finding that Dr. Rosenberg did not adequately explain the basis for his conclusion, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*), we reject employer's assertion that the administrative law judge erred in discrediting Dr. Rosenberg's disability causation opinion because Dr. Rosenberg diagnosed chronic obstructive pulmonary disease related to smoking.

In addition, employer argues that the administrative law judge erred in finding that Dr. Rosenberg's opinion was hostile to the regulations that recognize that pneumoconiosis, both clinical and legal, is a latent and progressive condition. In a report dated May 23, 2005, Dr. Rosenberg stated that "there is no question [that] under certain circumstances CWP can be progressive and latent." Employer's Exhibit 2. Specifically, Dr. Rosenberg concluded that "the above articles clearly lay a foundation that while medical CWP with respect to progressive massive fibrosis (PMF) can be latent and progressive, this simply does *not* apply to simple CWP." *Id*. (emphasis added). In addition, Dr. Rosenberg concluded that "with respect to the issue of progressive and latent chronic obstructive pulmonary disease in relationship to coal mine dust exposure, there is no scientific foundation based on evidence the D.O.L. reviewed that this occurs." *Id*. Dr. Rosenberg then opined that the miner did not develop any progressive or latent clinical coal workers' pneumoconiosis after he left the coal mines. *Id*. The administrative law judge determined that "Dr. Rosenberg made it crystal clear that he does not accept the concept that pneumoconiosis can be a latent and progressive disease, which can manifest itself even after a miner leaves the mines." Decision and Order on Remand at 6. As noted above, in *Adams*, the Sixth Circuit court held that a physician must foreclose the possibility that simple pneumoconiosis can be totally disabling before his opinion will be considered inconsistent with the spirit of the Act. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72. In this case, Dr. Rosenberg's opinion was primarily based on a predisposed belief that foreclosed all possibility that simple pneumoconiosis, clinical or legal, is latent and progressive. Employer's Exhibit 2. Consequently, we reject employer's assertion that the administrative law judge erred in finding that Dr. Rosenberg's opinion was hostile to the regulations that recognize that pneumoconiosis, both clinical and legal, is a latent and progressive condition. *Adams*, 816 F.2d at 1119, 10 BLR at 2-72.

If reached on remand, the administrative law judge must consider the evidence in accordance with the disability causation standard set forth at 20 C.F.R. §718.204(c).[13]

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

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

20 C.F.R. §718.204(c)(1)(i), (ii).

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge