BRB Nos. 08-0838 BLA
and 09-0453 BLA

D.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 09/23/2009
	)	
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 and Attorney Fee Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Sealing, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand[1] (99-BLA-0445) of Administrative Law Judge Donald W. Mosser awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

[1] Unless otherwise noted, "Decision and Order on Remand" refers to the administrative law judge's Decision and Order on Remand dated August 28, 2008.

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] Employer also appeals the administrative law judge's Attorney Fee Order (99-BLA-0445).[3] This case involves a claim filed on March 24, 1998. In a Decision and Order dated February 9, 2001, Administrative Law Judge Rudolf L. Jansen credited claimant with thirty years of coal mine employment,[4] and found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), Judge Jansen found that the evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000).[5] Judge Jansen also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Jansen awarded benefits. Pursuant to employer's appeal, the Board vacated Judge Jansen's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c)(4), and 718.204(b) (2000), and remanded the case for further consideration. [*D.D.S.*] *v. Peabody Coal Co.*, BRB No. 01-0506 BLA (Mar. 8, 2002) (Hall, J., dissenting) (unpub.).

On remand, Judge Jansen found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Jansen also found that the evidence established that claimant was totally disabled due to

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[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[3] By Order dated July 16, 2009, the Board advised the parties that it would address employer's appeal of the administrative law judge's Attorney Fee Award in its decision addressing employer's appeal of the administrative law judge's Decision and Order on Remand awarding benefits.

[4] The record reflects that the miner's coal mine employment was in Indiana. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Judge Jansen, therefore, awarded benefits. *Id.* Pursuant to employer's appeal, the Board vacated Judge Jansen's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv), (c), and remanded the case for further consideration. [*D.D.S.*] *v. Peabody Coal Co.*, BRB No. 03-0304 BLA (Jan. 30, 2004) (unpub.).

On remand for the second time, Judge Jansen found that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Judge Jansen also found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Jansen denied benefits. Pursuant to claimant's appeal, the Board affirmed Judge Jansen's finding that the medical opinion evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Noting that the Board had previously affirmed Judge Jansen's findings that the other types of evidence submitted did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the Board affirmed Judge Jansen's denial of benefits.[6] [*D.D.S.*] *v. Peabody Coal Co.*, BRB No. 05-0482 BLA (Dec. 23, 2005) (unpub.).

Pursuant to claimant's appeal, the United States Court of Appeals for the Seventh Circuit held that Judge Jansen erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b). *Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 24 BLR 2-33 (7th Cir. 2007). The Seventh Circuit, therefore, vacated the Board's December 23, 2005 Decision and Order, and remanded the case for further consideration. *Id.* By Order dated May 31, 2007, the Board remanded the case to the Office of Administrative Law Judges for further consideration. [*D.S.*] *v. Peabody Coal Co.*, BRB No. 05-0482 BLA (May 31, 2007) (Order) (unpub.).

On remand, due to Judge Jansen's unavailability, the case was reassigned, without objection, to Administrative Law Judge Donald W. Mosser (the administrative law judge). In a Decision and Order on Remand dated August 28, 2008, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis, in the form of an obstructive pulmonary impairment due to coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4).[7] 20 C.F.R. §718.201(a)(2). The

[6] In light of its affirmance of Administrative Law Judge Rudolf L. Jansen's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1)-(4), the Board declined to address claimant's contentions of error regarding Judge Jansen's finding pursuant to 20 C.F.R. §718.204(b). [*D.D.S.*] *v. Peabody Coal Co.*, BRB No. 05-0482 BLA (Dec. 23, 2005) (unpub.).

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

administrative law judge also found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Weighing all the evidence of total disability together, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b) and (c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions of error.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge noted that the Seventh Circuit agreed with the previous administrative law judge that there are only five reliable opinions regarding the existence of pneumoconiosis, namely those of Drs. Cohen, Koenig, Tuteur, Castle, and Dahhan.[8] Decision and Order on Remand at 3; *see*

[8] No party challenges the administrative law judge's determination that the opinions of Drs. Cohen, Koenig, Castle, Tuteur, and Dahhan are the "only reliable opinions" in regard to the issue of pneumoconiosis out of the several opinions contained in the record. *See* Claimant's Brief at 10; Employer's Brief at 14.

Stalcup, 477 F.3d at 484, 24 BLR at 2-36. While all of the physicians agree that claimant suffers from some form of obstructive pulmonary defect, they differ as to whether the disease was caused by coal dust exposure. Drs. Cohen and Koenig opined that claimant's chronic obstructive pulmonary disease (COPD) is due to coal mine employment. Claimant's Exhibits 1, 2. Dr. Castle opined that claimant suffers from bronchial asthma, a condition unrelated to his coal dust exposure. Employer's Exhibits 10, 33, 52. Dr. Dahhan also diagnosed bronchial asthma. Employer's Exhibit 32. Although Dr. Tuteur also diagnosed a mild obstructive ventilatory defect, he attributed it to a chronic hiatus hernia and intermittent gastroesophageal reflux disease. Employer's Exhibit 50 at 49.

In this case, the administrative law judge initially focused upon the reasoning underlying the conflicting medical opinions of Drs. Cohen, Koenig, Dahhan, and Castle. Dr. Cohen based his opinion, that claimant's obstructive lung disease was due to coal mine dust exposure, in part upon the fact that claimant's obstructive pulmonary impairment was not completely reversible, *i.e.*, although claimant's pulmonary function improved after bronchodilator therapy, it did not return to normal.[9] Claimant's Exhibits 1, 8. Dr. Koenig also relied upon this factor in excluding asthma as a cause of claimant's

[9] Dr. Cohen explained that:

> [Claimant's] obstruction is responsive to bronchodilators but does not normalize. The hallmark of asthma is a reversible obstructive airways disease. If the airways obstruction does not reverse fully, it may be asthma which is chronic and has resulted in a component of chronic obstructive lung disease, or it may be chronic obstructive lung disease with a reversible component. In order to distinguish between these two possibilities we must look at the exposures the patient has and their history. As I have shown above, coal mine dust has been clearly associated with the development of chronic obstructive lung disease. [Claimant] clearly has chronic obstructive lung disease in that he never has normal pulmonary function. [Claimant] does not have a childhood history of asthma and did not carry that diagnosis throughout his adult life. One would have to conclude, to a reasonable degree of medical certainty, that [claimant's] exposure to a substance, coal mine dust, which can cause chronic obstructive lung disease was a significant contributory factor. Coal mine dust has also been associated with airway hyper-reactivity. [Claimant] had this type of airway hyper-activity.

Claimant's Exhibit 8.

obstructive lung disease.[10] Claimant's Exhibit 2.

By contrast, Dr. Dahhan opined that the reversibility of claimant's obstructive pulmonary impairment, coupled with a normal diffusion capacity and elevated residual volumes, are "hallmarks of the condition known as bronchial asthma." Employer's Exhibit 32. Dr. Castle also attributed claimant's obstructive pulmonary impairment to asthma, relying upon the significant reversibility of claimant's impairment, along with no evidence of restriction or diffusion abnormality. Employer's Exhibit 33.

The administrative law judge noted that "[w]hen a conflict between well-qualified physicians exists, it is important to turn to the objective evidence and the peer-reviewed support provided in each opinion." Decision and Order on Remand at 10. After considering the objective evidence and peer-reviewed support, the administrative law judge resolved the conflict in favor of Drs. Koenig and Cohen, explaining that:

> The only article cited by either Dr. Dahhan or Dr. Castle to support their diagnosis of asthma is the text by Dr. Jack L. Clausen which is attached to Dr. Dahhan's report. (EX 32). This article makes it clear that reversibility to normal is required for a diagnosis of asthma ("restoration of abnormally low flows to normal after therapy is indicative of asthma," p. 408). Both Drs. Koenig and Cohen point out this fact and cite to literature to support their position. Dr. Koenig goes on to further note that incomplete reversibility is actually a sign of COPD and not asthma, as COPD is an

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[10] Dr. Koenig explained that:

> [T]o distinguish COPD from asthma, one must look at objective findings other than improvement in lung function after bronchodilator. One such finding is incomplete reversibility of pulmonary function tests with bronchodilator. By incomplete reversibility, I mean that although spirometric values improve after bronchodilator, they do not return completely to normal (*i.e.* FEV1 $\geq$ 80% of predicted; FEV1/FVC $\geq$ 70%). COPD, is by definition, an irreversible obstructive lung disease. In contrast, asthma is typically completely reversible. That [claimant's] FEV1 and FEV1/FVC did not return to normal after bronchodilator favors an irreversible obstructive lung disease. Therefore, based on the available information, COPD and not asthma is the most likely cause of [claimant's] obstructive lung disease.

Claimant's Exhibit 2 at 4 (footnotes omitted). Because claimant did not smoke, Dr. Koenig opined that coal dust exposure remained as the "only tenable cause" of claimant's chronic obstructive pulmonary disease (COPD). *Id.*

> irreversible disease while asthma is generally completely reversible. I find the opinions of Drs. Koenig and Cohen to be better reasoned and supported on this issue. Therefore, I do not find that incomplete reversibility on bronchodilator is a strong enough indication of bronchial asthma to support the diagnosis of Drs. Castle and Dahhan.

Decision and Order on Remand at 10-11.

The administrative law judge, therefore, found that the relevant medical literature better supported the opinions of Drs. Cohen and Koenig that partial reversibility after bronchodilator does not preclude a finding of a coal-dust induced lung disease. Thus, contrary to employer's contention, the administrative law judge complied with the Seventh's Circuit's remand instructions by providing "a medical reason" for preferring one physician's conclusion over another's. *Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *see also Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001).

Further, contrary to employer's argument, the administrative law judge permissibly questioned the opinions of Drs. Dahhan and Castle because neither physician adequately explained how claimant's coal dust exposure could be eliminated as a source of claimant's obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Because the pulmonary function tests disclose that claimant has an obstructive impairment that is not completely responsive to bronchodilator, the administrative law judge permissibly found that Drs. Dahhan and Castle, in attributing claimant's respiratory condition entirely to asthma, failed to adequately address why claimant's residual impairment (*i.e.*, the impairment that remained after bronchodilator) could not have been attributable to coal dust exposure. *Id.* The administrative law judge also noted that Dr. Tuteur, one of employer's own experts, agreed with Drs. Koenig and Cohen that claimant does not suffer from bronchial asthma.[11]

Additionally, the administrative law judge acted within his discretion as the fact-finder in explaining why he was not convinced by Dr. Castle's explanation for why claimant's asthma did not reverse completely after bronchodilator therapy:

> In order to explain claimant's incomplete reversibility after bronchodilator, Dr. Castle stated that asthmatics, over time, develop some degree of fixed

[11] During a May 9, 2000 deposition, Dr. Tuteur opined that there was no proof that claimant has "bronchial reactivity." Employer's Exhibit 50 at 64. (Because Dr. Tuteur was not aware of the questioner's definition of asthma, he explained that he converted the term "asthma" to "bronchial reactivity.")

> airway obstruction that is not reversed by bronchodilators. This argument, again, is not well taken. Claimant does not have a history of asthma. He has never been diagnosed as asthmatic, whether in childhood or at any other time. (Tr. 46). Nothing in [claimant's] records indicates any diagnosis of asthma previous to this litigation. If claimant indeed has asthma, it would likely have had an adult-aged onset. However, the medical records do not disclose an age of onset and how long claimant may have suffered from the disease. Therefore, Dr. Castle's argument that claimant's asthma may have developed some degree of fixed airway obstruction "over time" is completely unsupported by the record.

Decision and Order on Remand at 11. This assessment of the credibility of Dr. Castle's opinion was reasonable and is supported by substantial evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer, however, contends that the administrative law judge erred in not addressing the significance of relevant evidence, namely treatment notes from Dr. Combs for the years 1994 to 1998 that include an undated diagnosis of "asthmatic bronchitis." Director's Exhibit 11 at 6. We disagree. In assessing the reasoning underlying a medical opinion, an administrative law judge is not required to compare the opinion with each piece of medical data in the record, but rather, must determine if the report's underlying documentation adequately supports the doctor's conclusions. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993). In this case, Drs. Cohen and Koenig reviewed the evidence of record and explained their reasons for concluding that claimant does not have asthma but suffers from COPD due to coal dust exposure. The administrative law judge, within his discretion, determined that the opinions of Drs. Cohen and Koenig were well documented and reasoned. Decision and Order on Remand at 12; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Substantial evidence supports this finding. Consequently, we reject employer's argument that the administrative law judge ignored relevant evidence in crediting the opinions of Drs. Cohen and Koenig.[12]

Employer also argues that the administrative law judge erred in his consideration of Dr. Tuteur's opinion. Dr. Tuteur attributed claimant's obstructive defect to

[12] The record reflects that Dr. Koenig explained that "asthmatic bronchitis" is not necessarily asthma, but is a "term sometimes used to describe patients with COPD who have significant improvement in airflow obstruction with bronchodilator." Claimant's Exhibit 2 at 4.

gastroesophageal reflux disease.[13] The administrative law judge permissibly accorded less weight to Dr. Tuteur's opinion in light of the doctor's acknowledgement that there is no clinical evidence to support a diagnosis of gastroesophageal reflux disease.[14] *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order on Remand at 11.

The function of the administrative law judge, as fact-finder, is to weigh the conflicting medical evidence. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990). In this case, the administrative law judge reviewed the opinions of Drs. Dahhan, Castle, and Tuteur and found that they were not well-reasoned and were, therefore, entitled to less weight than the better reasoned opinions of Drs. Koenig and Cohen.[15] Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis in the form of chronic obstructive pulmonary disease

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[13] In regard to the cause of claimant's obstructive pulmonary defect, Dr. Tuteur stated:

> [T]he chronic hiatus hernia with intermittent gastroesophageal reflux associated with intermittent small volume acid aspiration . . . has caused airway inflammation, some of which is chronic, and caused (a) the episodes of acute bronchitis and (b) the persistent, mild air flow obstruction.

Employer's Exhibit 50 at 51.

[14] Dr. Tuteur agreed that there is no objective evidence as to the extent or frequency of reflux aspiration. Employer's Exhibit 50 at 52. Dr. Tuteur noted that claimant's symptoms of burning indicate reflux or esophagitis. Because claimant's burning episodes tended to be temporally related to episodes of acute bronchitis, Dr. Tuteur noted that that this "strongly suggests aspiration." *Id.* at 66. However, Dr. Tuteur acknowledged that it did not "prove it." *Id.*

Dr. Castle, one of employer's physicians, opined that he did not see any clinical evidence of gastroesophageal reflux disease. Director's Exhibit 52 at 62.

[15] Contrary to employer's contention, the administrative law judge did not improperly shift the burden from claimant to employer in regard to establishing the existence of legal pneumoconiosis. The administrative law judge found that the opinions of Drs. Koenig and Cohen were the most reliable medical opinions and satisfied claimant's burden to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

arising out of coal mine employment.[16] 20 C.F.R. §718.202(a)(4); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Total Disability

Employer next argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). In considering whether the medical opinion evidence established total disability, the administrative law judge considered the opinions of Drs. Cohen, Koenig, Cook, Dahhan, Repsher, Tuteur, and Castle.[17] Drs. Cohen and Koenig opined that claimant is totally disabled from a respiratory standpoint.[18] Claimant's Exhibits 1, 2. By contrast, Drs. Cook, Dahhan,

[16] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the etiology thereof at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

[17] The administrative law judge noted that Dr. Carandang opined that claimant suffers from a "moderate impairment." Director's Exhibit 10. However, because Dr. Carandang did not offer an opinion as to whether claimant could perform his usual coal mine work, the administrative law judge afforded Dr. Carandang's opinion little weight on the issue of total disability. Decision and Order at 13 n.6.

[18] In regard to the issue of total disability, Dr. Cohen stated:

> [Claimant] demonstrates mild obstructive lung disease with a[n] FEV1 of 76% of predicted. This by itself would not be disabling, however, on cardiopulmonary testing he demonstrated a clear ventilatory limit to exercise with high dead space and a positive alveolar to end tidal CO2 gradient. He also had a high ventilatory equivalent for CO2 at anaerobic threshold. These findings are significant and indicate a ventilatory limit to exercise. This occurred at a low work capacity which would not be consistent with the work requirements of his last coal mining job as a mechanic.

Claimant's Exhibit 1.

Dr. Koenig similarly opined that:

Repsher, Tuteur, and Castle opined that claimant retains the pulmonary capacity to perform his last coal mine work.[19] Employer's Exhibits 1, 7, 48, 50, 52. In addressing this conflicting evidence, the administrative law judge initially addressed the exertional requirements of claimant's usual coal mine work. The administrative law judge found that Dr. Cohen provided the most extensive and accurate account of the tasks required of claimant in his previous coal mine work as a mechanic.[20] Decision and Order on Remand

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> [Claimant] has moderately impaired exercise capacity secondary to ventilatory limitation. He has mild obstructive lung disease and no evidence of restrictive lung disease. [Claimant's] pulmonary disease renders him totally and permanently disabled from performing his last job in the coal mines.

Claimant's Exhibit 2.

[19] Dr. Cook opined that claimant has "a normal capacity for sustained exercise with a normal (cardiovascular) type of limitation." Dr. Cook opined that claimant was capable of all the exertional requirements of his job as a mechanic. Employer's Exhibit 1. Dr. Dahhan opined that claimant's respiratory impairment is "mild at best," and not sufficient to render him totally and permanently disabled from returning to his previous coal mining work. Employer's Exhibit 7. Dr. Repsher opined that claimant was capable, from a pulmonary standpoint, of performing his last coal mine job. Employer's Exhibit 48 at 28. Dr. Tuteur opined that claimant suffers from a mild pulmonary impairment, but is not totally disabled from a respiratory standpoint. Employer's Exhibit 50 at 47-48. Dr. Castle opined that claimant suffers from a mild to moderate airway obstruction, albeit one that is "significantly reversible." Employer's Exhibit 52 at 42. Dr. Castle opined that claimant "could do non-sustained heavy labor for periods of time." *Id.* at 68.

[20] The administrative law judge noted that:

> [Dr. Cohen] set forth an employment history of the claimant dating back to 1967. The physician noted that from 1988 to 1997, claimant was employed as a mechanic and he spent an average of four hours per day in the pit. He was required to climb up and down a ladder approximately seven to eight feet high at least twenty-five times daily, carrying water hoses, tools, and other parts weighing approximately forty pounds. At least once a week, he had to lift a 50 pound axle alone and 100 pound hydraulic pumps with another co-worker. He also had to lift 40 to 45 pound brake shoes at least once a week and he had to crawl on his hands and knees to check transmission oil every day for eight different trucks. Once a month he had to walk into the hopper and climb 200 stairs to get out. While in the hopper, claimant had to shovel coal from the bottom onto the belt for

at 13. The administrative law judge found that Dr. Cohen's description established that claimant "worked in a very strenuous and labor-intensive position."[21] *Id.*

The administrative law judge found that the opinions of Drs. Cohen and Koenig, that claimant was totally disabled, were entitled to the greatest weight because they possessed a more accurate understanding of the exertional requirements of claimant's usual coal mine work. Decision and Order on Remand at 13-14. The administrative law judge accorded less weight to the opinions of Drs. Cook, Dahhan, Repsher, Tuteur, and Castle because they "either misstated the claimant's job tasks or did not discuss them at all." Decision and Order on Remand at 15. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Tuteur, Dahhan, and Castle.[22] In regard to Dr. Tuteur's opinion, the administrative law judge stated:

> Dr. Tuteur notes that claimant is totally disabled, due predominately to hypertension. He also noted that claimant suffers from minimal to mild impairment of pulmonary function. He fails to provide an opinion as to the extent to which the claimant's minimal to mild pulmonary impairment relates to his total disability. As such, I find his opinion is vague and not well-reasoned on the issue of total disability.

Decision and Order on Remand at 14. Because Dr. Tuteur did not adequately address whether claimant's mild to minimal pulmonary impairment was totally disabling, the administrative law judge permissibly found that Dr. Tuteur's opinion was not sufficiently reasoned. *See Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

> approximately four to five hours, and each shovel weighed approximately 45 pounds. Dr. Cohen's summary of claimant's work history coincides with the testimony claimant provided at the hearing. (Tr. 31-43).

Decision and Order on Remand at 13.

[21] Because no party challenges the administrative law judge's finding that claimant's usual coal mine work as a mechanic was "very strenuous and labor-intensive," this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[22] Because employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Cook and Repsher, these findings are affirmed. *Skrack*, 6 BLR at 1-711.

The administrative law judge accorded less weight to Dr. Dahhan's opinion because he provided no description of the exertional requirements of claimant's usual coal mine employment. Decision and Order on Remand at 14. Substantial evidence supports this finding. Employer's Exhibit 7. Although the administrative law judge noted that Dr. Castle, during his deposition, was asked whether claimant could perform various tasks, the administrative law judge found that "Dr. Cohen described and claimant testified to a much more rigorous job description than that understood by Dr. Castle." Decision and Order on Remand at 14. The administrative law judge explained:

> Claimant regularly had to shovel coal for four or five hours at a time, and he had to lift and carry heavy equipment on a regular basis. He had to climb on top and under this equipment on a regular basis. I find that Dr. Castle did not adequately address all the elements of claimant's job in forming his opinion regarding total disability.

Decision and Order on Remand at 14. Since Dr. Castle did not address all of the tasks claimant had to perform as a mechanic, the administrative law judge reasonably accorded his opinion less weight. *See Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-259 (7th Cir. 2005). Further, the administrative law judge reasonably found that the failure of employer's physicians to integrate a full, accurate description of the exertional requirements of claimant's usual coal mine work into their opinions regarding total disability was not remedied by their review of Dr. Cohen's report. *See* Killman, 415 F.3d at 722, 23 BLR at 2-259; Decision and Order on Remand at 14-15.

Thus, in addressing the issue of total disability, the administrative law judge credited the "detailed and well-supported" opinions of Drs. Castle and Koenig that claimant's respiratory impairment precludes him from performing his last coal mine employment. The administrative law judge found that Dr. Tuteur's opinion regarding the extent of claimant's pulmonary impairment was not sufficiently reasoned. Because the administrative law judge found that Drs. Dahhan and Castle did not have an accurate understanding of the specific job requirements of claimant's usual coal mine work, he permissibly accorded less weight to their opinions that claimant is not totally disabled. *Killman*, 415 F.3d at 722, 23 BLR at 2-259. Because it is based on substantial evidence, the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) is affirmed.

Employer next contends that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b). Employer specifically contends that the administrative law judge failed to account for the non-qualifying[23] nature of claimant's pulmonary function and arterial blood gas studies. We

[23] A "qualifying" pulmonary function study or arterial blood gas study yields

disagree. After acknowledging that the pulmonary function and arterial blood gas studies are non-qualifying, the administrative law judge found that the medical opinion evidence was the most probative evidence, noting that "Drs. Cohen and Koenig provide detailed and well-supported opinions as to why claimant's respiratory condition precludes him from handling the rigors of his last coal mine employment." Decision and Order on Remand at 15; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). We, therefore, affirm the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b).

Total Disability Due to Pneumoconiosis

Employer next contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's contention lacks merit. The administrative law judge permissibly found that the opinions of employer's physicians were entitled to less weight on the issue of disability causation because they did not diagnose any type of coal dust-related disease. Decision and Order on Remand at 15; *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge properly relied on the well-reasoned opinions of Drs. Cohen and Koenig that claimant is totally disabled due to legal pneumoconiosis, in the form of coal dust-induced COPD. Decision and Order on Remand at 15. Consequently, the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c) is affirmed.

Attorney Fee Order

The administrative law judge awarded claimant's counsel a total fee of $38,166.45 for legal services and expenses. Employer and claimant's counsel agree that, due to a miscalculation committed by the administrative law judge, the proper fee due claimant's counsel is $34,278.95. We, therefore, modify the administrative law judge's Attorney

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values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Fee Order to reflect a total fee of $34,278.95 for legal services and expenses.[24]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. The administrative law judge's Attorney Fee Order is modified to reflect a total fee award of $34,278.95.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[24] An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).