BRB No. 09-0860 BLA

ARTHUR O. WILSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/30/2010
	)	
SHANNOPIN MINING COMPANY	)	
	)	
and	)	
	)	
INTERNATIONAL BUSINESS & MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (2007-BLA-5825) of Administrative Law Judge Daniel L. Leland rendered on a subsequent claim filed on June 14, 2006, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for a second time. In a Decision and Order issued on March 26, 2008, the administrative law judge credited claimant with thirty-eight and one-half years of coal mine employment and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thus, concluded that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

Claimant appealed, and the Board vacated the administrative law judge's findings that the medical opinion evidence failed to establish the existence of pneumoconiosis. *A.W.* [*Wilson*] *v. Shannopin Mining Co.*, BRB No. 08-0507 BLA, slip op. at 8-9 (Apr. 20, 2009) (unpub.). The Board specifically held that the administrative law judge erred in failing to render a specific finding as to the length and extent of claimant's smoking history, prior to discrediting the opinions of Drs. Jaworski and Rasmussen on the grounds that they relied upon a minimal smoking history that was unsupported by the record.[2] *Id*. at 8. The Board, therefore, vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309, and remanded the case with instructions that he render a specific finding as to the length and extent of claimant's smoking history and then reconsider his credibility determinations in light of that finding.[3] *Id*. at 9.

[1] Claimant first filed a claim on July 14, 1997, which was denied by Administrative Law Judge Michael P. Lesniak on November 29, 1999, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Judge Lesniak made no findings regarding the other conditions of entitlement. *Id*. Claimant took no further action with regard to the denial until he filed his current subsequent claim on June 14, 2006. Director's Exhibit 3.

[2] The Board affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3). *A.W.* [*Wilson*] *v. Shannopin Mining Co.*, BRB No. 08-0507 BLA, slip op. at 3-5 (Apr. 20, 2009) (unpub.).

[3] The Board noted that the administrative law judge did not consider that Dr. Renn also based his opinion on his assumption that it was likely claimant's smoking history was more extensive than reported in the medical records. *Wilson*, slip op. at 9.

Additionally, the Board instructed the administrative law judge to weigh, in his consideration of the newly submitted medical opinions, the May 14, 2007 examination report of Dr. Fino, and consider whether Drs. Renn and Rasmussen relied on inadmissible evidence in rendering their conclusions. *Id*. at 10. The Board also instructed the administrative law judge to consider whether Dr. Jaworski's opinion is reasoned and documented and entitled to controlling weight, based on his status as claimant's treating physician. *Id*. If the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, he was then to consider whether the record, as a whole, supports claimant's entitlement to benefits. *Id*.

In his Decision and Order on Remand, issued on September 17, 2009, the administrative law judge determined that claimant had a two-year smoking history and found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits of the claim, the administrative law judge further found that the weight of the evidence was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Specifically, employer asserts that the administrative law judge erred in failing to address, pursuant to 20 C.F.R. §725.309, whether there has been a material change in claimant's condition since the denial of his prior claim. Employer generally asserts that claimant's subsequent claim must be barred under the principles of res judicata. Employer argues that the administrative law judge erred in failing to explain the bases for his decision to credit the opinions of Drs. Rasmussen and Jaworski, that claimant has a disabling respiratory condition due, in part, to coal dust exposure, while assigning little weight to Dr. Fino's contrary opinion pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the administrative law judge performed the proper analysis pursuant to 20 C.F.R. §725.309 and that, contrary to employer's assertion, the subsequent claim is not barred by the principle of res judicata. Employer has filed a reply brief reiterating its arguments with respect to the administrative law judge's analysis pursuant 20 C.F.R. §725.309.[4]

[4] By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Wilson v. Shannopin Mining Co.*, BRB No. 09-0860 BLA (June 18, 2010)

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

When 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 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); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing this element of entitlement in order to have his subsequent claim reviewed on the merits. *See White*, 23 BLR at 1-3.

Employer challenges the administrative law judge's finding, based on his review of the newly submitted evidence on remand, that claimant established a change in an applicable condition of entitlement. Employer argues that the administrative law judge failed to engage in a meaningful analysis under 20 C.F.R. §725.309 as to whether claimant's condition worsened in any material way. Employer's Brief in Support of

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(unpub. Order). Employer and the Director, Office of Workers' Compensation Programs (the Director), have responded and assert that, while Section 1556 is applicable to this claim because it was filed after January 1, 2005, it is not necessary that the case be remanded to the administrative law judge for further consideration, unless the Board vacates the award of benefits.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 4.

Petition for Review at 11-12. Employer also asserts that, because claimant was determined to be totally disabled by asthma in the prior claim, and did not return to work since that finding, there is no evidence to support a finding of "a material change in conditions." *Id*. at 12-13. Employer maintains that "the fact that two doctors now say that coal mining is also the source of [claimant's] disease and disability provides no valid reason to find entitlement." *Id*. at 13. Employer further contends that, because claimant did not establish legal pneumoconiosis or disability causation in the prior claim, common law principles of res judicata preclude reconsideration of whether claimant's disabling respiratory impairment is due to coal dust exposure in this subsequent claim, as the etiology of claimant's respiratory condition is not subject to change. *Id*. at 12-13. Employer states that the "[administrative law judge's] decision, coupled with [20 C.F.R.] §725.309, as interpreted by [the Department of Labor,] erects an irrebuttable presumption that a person who can prove entitlement after his claim has been denied has experienced a material change in condition and should be able to relitigate. The fact irrebuttably presumed is that his condition changed due to black lung whether or not that is a medical possibility in a given case." *Id*. at 16. Employer asserts that it "is manifestly unfair to impose a perpetual litigation regime on mine operators where, as here, there is no valid justification for doing so," and urges the Board to vacate the administrative law judge's findings pursuant to 20 C.F.R. §725.309. *Id*.

Employer's allegation, that claimant is unable to establish a "material change" in his condition, is without merit. *Id*. at 13. Contrary to employer's contention, it was not resolved in the prior claim that claimant is totally disabled due to asthma, as the prior claim was denied on the ground that the evidence was insufficient to establish the existence of pneumoconiosis. There was no finding with regard to the issue of total disability or whether claimant has a disabling asthmatic condition. *See* Director's Exhibit 1. Thus, pursuant to 20 C.F.R. §725.309, claimant is entitled to submit new evidence, developed in connection with the current claim, establishing that he has pneumoconiosis, in order demonstrate a change in an applicable condition of entitlement. *See White*, 23 BLR at 1-3; s*ee also* 65 Fed. Reg. 79968 (Dec. 20, 2000). Moreover, the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held, in interpreting the prior version of 20 C.F.R. §725.309 (2000),[6] that when a miner establishes an element previously adjudicated against him, "he has demonstrated, as a matter of law, a material change," requiring consideration by the administrative law judge

[6] The Department of Labor revised the regulations implementing the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). These regulations apply to all claims filed after January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the revised regulations.

of all the record evidence and a determination regarding entitlement to benefits. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76, 2-94 (3d Cir. 1995).

We also reject employer's assertion that the regulation at 20 C.F.R. §725.309, as interpreted, is invalid because it permits a claimant to relitigate the denial of an earlier claim in contravention of the principles of res judicata. In determining whether a claimant has satisfied his burden of proof under 20 C.F.R. §725.309, the adjudicator is bound by the final denial of the prior claim, but compares the new medical evidence with the legal conclusions reached in the prior claim, to determine whether claimant has established a change in one of the applicable conditions of entitlement. By requiring a miner to prove a change in an applicable condition of entitlement with new evidence, the regulation ensures that the miner is not simply seeking reconsideration of his prior, finally denied claim. *Swarrow*, 72 F.3d at 314, 20 BLR at 2-87; *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

Additionally, contrary to employer's assertion, because claimant is required to establish a change in an applicable condition of entitlement by a preponderance of the relevant evidence, and employer also has the right to submit evidence to defeat claimant's proffer, there is no irrebuttable presumption implicated by 20 C.F.R. §725.309. We therefore reject employer's arguments regarding the validity of 20 C.F.R. §725.309. *See Swarrow*, 72 F.3d at 314, 20 BLR at 2-87; *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235; *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 450, 21 BLR 2-50, 2-60 (8th Cir. 1997); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79 (1993).

Turning to the administrative law judge's weighing of the newly submitted evidence, employer argues that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis. We disagree.

On remand, in accordance with the Board's instructions, the administrative law judge found that claimant smoked cigarettes "for two years in the early 1950s," based on claimant's testimony and the smoking history recorded by Drs. Celko, Jaworski and Rasmussen. Decision and Order at 6. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge then considered the newly submitted medical opinions of Drs. Jaworski, Fino, Rasmussen and Renn, relevant to the issue of legal pneumoconiosis.[7]

[7] The record also contained the newly submitted medical opinion of Dr. Celko, based on his July 24, 2006 examination of claimant. Director's Exhibit 13. Dr. Celko diagnosed chronic obstructive pulmonary disease and asthma, and identified the etiology of the diagnosed conditions as "sustained dust exposure [and] intrinsic asthma." *Id*. In his March 26, 2008 Decision and Order, the administrative law judge found that Dr.

In a letter dated September 21, 2007, Dr. Jaworski indicated that he had been treating claimant since March 21, 2006.[8] Claimant's Exhibit 5. He noted that a chest x-ray, CT scan and biopsy confirmed the presence of a "right upper lobe lung mass," which was "most likely related to complicated coal workers' pneumoconiosis/progressive massive fibrosis," although he stated that he "cannot exclude the possibility of fungal etiology." *Id*. Dr. Jaworski opined that claimant's pulmonary function testing revealed "severe emphysema . . . consistent with severe obstruction." *Id*. He diagnosed that claimant has severe obstruction due to emphysema, as documented by pulmonary function testing on March 20, 2006. *Id*. He also reported that CT scans showed evidence of emphysema and that claimant has a severely reduced diffusion capacity consistent with emphysema. *Id*. Regarding the etiology of the claimant's condition, Dr. Jaworski opined that it was "predominantly due to coal dust exposure . . . based on a [forty]-year history of underground mining and [an] insignificant history of cigarette smoking." *Id*.

Dr. Fino examined claimant on May 14, 2007, and also reviewed claimant's medical records. Employer's Exhibit 1. He opined that claimant does not suffer from a coal mine dust-related pulmonary condition, but does suffer from asthma. *Id*. He explained that "[o]ver the last [twenty-one] years, [claimant] has experienced worsening lung function and has developed airway remodeling and a significant complement to the airways [sic] obstruction. This is not atypical in asthmatics." *Id*. Dr. Fino stated that "[p]resently, there appears to be a reduction in the diffusing capacity. The diffusing capacity was normal in 1986, and certainly if this man had a reduction in diffusion due to coal mine dust, it would have presented itself in 1986[,]" when claimant left the mines. *Id*.

Dr. Rasmussen reviewed claimant's medical records, including the reports of Drs. Celko, Jaworski and Fino, submitted a report dated October 6, 2007, and was deposed on January 9, 2008. Claimant's Exhibits 4, 7. He noted that the physicians all agreed that claimant suffers from severe chronic lung disease, which has rendered him incapable of returning to coal mine employment. Claimant's Exhibit 4. Dr. Rasmussen opined that claimant suffers from legal pneumoconiosis, in that he has chronic obstructive lung disease "independent of his likely asthma" and pulmonary emphysema due to coal dust

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Celko's opinion could not support a finding of legal pneumoconiosis, and the Board affirmed this finding on appeal. *Wilson*, slip op. at 7. Accordingly, the administrative law judge did not reconsider Dr. Celko's opinion on remand.

[8] Dr. Jaworski reiterated his conclusions in a deposition conducted on December 4, 2007. Employer's Exhibit 10.

exposure. *Id*. Specifically, Dr. Rasmussen provided the following explanation for his opinion:

> While I agree that evidence supports a diagnosis of both chronic obstructive lung disease and asthma, I do not agree with Dr. Fino's assertion that [claimant's] emphysema and reduced diffusing capacity were the consequences of his asthma. It is very unusual for very severe asthma to result in those abnormalities and [claimant's] asthma by no means is severe enough to result in these findings. The history does contain two factors, which can cause both chronic obstructive lung disease[,] including emphysema and reduction in single breath diffusing capacity[,] as well as abnormal exercise arterial blood gases. These factors include [claimant's] smoking history, which appears to be very limited and likely not sufficient to be a significant contributing factor . . . [and]his very significant history of coal mine dust exposure.

Id.

Dr. Renn prepared a consultative report dated October 12, 2007 and was deposed on January 22, 2009. Employer's Exhibits 2, 12. He opined that claimant suffers from "asthma and/or chronic bronchitis with an asthmatic component, pulmonary emphysema and an apparent granulomatous cicatrization in the right upper lobe." Employer's Exhibit 2. He concluded that none of these conditions was caused or contributed to by coal dust exposure, but resulted from his years of cigarette smoking. *Id*.

In resolving the conflict in the medical opinions, the administrative law judge found that "Drs. Jaworski[']s and Rasmussen's statements regarding their inability to distinguish whether the miner's chronic obstructive pulmonary disease (COPD) was due to cigarette smoking or coal dust exposure does not detract from the credibility of their opinions." Decision and Order on Remand at 6. He found that their conclusions were influenced by claimant's "very limited smoking history and his lengthy coal mine employment history[,] which makes their conclusion that claimant's pulmonary impairment as significantly related to his coal mine employment well reasoned." *Id*. at 6-7. The administrative law judge also gave more weight to Dr. Jaworski's opinion because he was claimant's treating physician. *Id*. at 7. In contrast, the administrative law judge found that Dr. Renn's "reliance on an incorrect smoking history significantly detracts from the credibility of his opinion," that claimant does not legal pneumoconiosis. *Id*. The administrative law judge also gave little weight to Dr. Fino's opinion because he found that it "is inconsistent and poorly reasoned." *Id*. at 6-7. The administrative law judge explained:

> Dr. Fino determined that the spirometry he performed on May 14, 2007 showed reversibility but later stated that the miner had developed airway remodeling and progressive irreversibility. Dr. Fino does not explain this inconsistency. Dr. Fino also stated that if the miner had a reduced diffusion capacity due to coal mine dust[,] it would have presented itself in 1986, the year he retired from coal mining. Dr. Fino's conclusion contradicts the provision in [20 C.F.R] §718.201(c) that "pneumoconiosis is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Moreover, Dr. Fino does not cite any basis for his diagnosis of asthma and his conclusion that claimant does not have a coal mine-dust related pulmonary condition. He does not refer to any previous diagnosis of asthma or to a family history of asthma. I therefore give little weight to the opinion of Dr. Fino.

Id. Accordingly, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the subsequent claim on the merits, the administrative law judge found that the pulmonary function tests and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b), and gave controlling weight to the opinions of Drs. Jaworski and Rasmussen, that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer contends that the administrative law judge erred in rejecting Dr. Fino's opinion. We conclude, however, that the administrative law judge reasonably found Dr. Fino's opinion, "that if the miner had a reduced diffusion capacity due to coal mine dust[,] it would have presented itself in 1986, the year [claimant] retired from coal mining," to be inconsistent with 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis is a latent and progressive disease, which may first become detectable only after the cessation of coal mine dust exposure. *See* 20 C.F.R. §718.201; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 209-210, 22 BLR 2-467, 2-478-79 (3d Cir. 2002). The administrative law judge also reasonably found Dr. Fino's opinion, that claimant does not have a respiratory condition due in part to coal dust exposure, to be unpersuasive, since Dr. Fino failed to explain how claimant's pattern of "progressive irreversibility" in pulmonary function testing supported his opinion, when he specifically reported that claimant's May 14, 2007 pulmonary function study showed *reversibility*.[9] Decision and Order on Remand at 7.

[9] Because we affirm the administrative law judge's rejection of Dr. Fino's opinion on other grounds, it is not necessary that we address employer's assertions that Dr. Fino's opinion should have been credited, based on his reliance on an accurate smoking history

We also reject employer's assertion that the administrative law judge erred in finding that the opinions of Drs. Jaworski and Rasmussen are sufficient to satisfy claimant's burden of proving that he has legal pneumoconiosis. Employer asserts that the administrative law judge failed to properly consider relevant aspects of their opinions when considering whether they were reasoned and documented. We disagree.

Specifically, employer asserts that the administrative law judge's decision "overlooks Dr. Jaworski's reliance on a diagnosis of progressive massive fibrosis that was not supported in the record" and "surely is a relevant factor to consider in assessing the credibility of the doctor's report." Brief in Support of Petition for Review at 17. Despite employer's suggestion to the contrary, because legal pneumoconiosis encompasses a broader category of respiratory diseases, the administrative law judge is not required to reject a physician's opinion as to the existence of legal pneumoconiosis, simply because the administrative law judge did not accept his diagnosis of clinical pneumoconiosis, either simple or complicated. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-601 (4th Cir. 1999). We hold that the administrative law judge acted within his discretion in concluding that Dr. Jaworski's diagnosis of emphysema, based on claimant's pulmonary function study results, which he attributed to coal dust exposure, was sufficient to support a finding of legal pneumoconiosis, notwithstanding Dr. Jaworski's diagnosis of massive fibrosis. Decision and Order on Remand at 7; *see Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark*, 12 BLR at 1-153. Furthermore, the administrative law judge properly considered the factors cited at 20 C.F.R. §718.104(d)(1)-(4), and permissibly exercised his discretion in determining that Dr. Jaworski's fully reasoned and documented opinion was entitled to greater weight, based on his status as claimant's treating physician.[10] *See* 20 C.F.R. §718.104(d)(5); *Lango v.*

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or that the administrative law judge erred in finding that Dr. Fino did not cite any basis for his diagnosis of asthma. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[10] The administrative law judge noted that "Dr. Jaworski has treated claimant for his pulmonary condition since March 2006 and has subjected him to a PET scan, a biopsy, two bronchoscopies, and numerous CT scans. He also prescribes numerous medications for the treatment of [claimant's] pulmonary impairment." Decision and Order at 7. The administrative law judge found that Dr. Jaworski had an accurate understanding of the lengths of claimant's smoking and coal mine employment histories and that he explained why "[t]he appearance of emphysema on [claimant's] CT scan and

Director, OWCP, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

We also reject employer's argument that the administrative law judge erred in relying on Dr. Rasmussen's opinion, that claimant has COPD due in part to coal dust exposure, because Dr. Rasmussen stated that "[c]oal mine dust exposure is known to cause [COPD] identical to that caused by cigarette smoking." Claimant's Exhibit 4. The Department of Labor and several of the United States Courts of Appeals have recognized that a physician's statement that he cannot distinguish between the effects of smoking and coal dust exposure does not, by itself, render unreasoned a physician's identification of coal dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 65 Fed. Reg. 79946 (Dec. 20, 2000); *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 22 BLR 2-265, 2-280 (7th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000).

Employer also asserts that the administrative law judge erred in failing to consider that Dr. Rasmussen acknowledged that the probability of coal dust exposure causing COPD was low, and that he was unable to cite any medical literature to support his view that asthma does not cause reductions in diffusion capacity results. Brief in Support of Petition for Review at 19. However, we consider employer's reference to specific aspects of Dr. Rasmussen's deposition testimony to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm, as supported by substantial evidence, the administrative law judge's credibility determinations, and his finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[11] *Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Clark*, 12 BLR at 1-153.

Lastly, we reject employer's assertion that the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis at 20 C.F.R.

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his diffusion impairment are consistent with emphysema but not airway remodeling from asthma." *Id*. at 4.

[11] Employer does not allege with any specificity how the administrative law judge erred in his treatment of Dr. Renn's opinion. Therefore, we affirm the administrative law judge's decision to accord Dr. Renn's opinion less weight. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6.

§718.204(c). The administrative law judge properly weighed the medical opinion evidence, as discussed *supra*, and found that Drs. Jaworski and Rasmussen provided well reasoned and documented opinions that claimant's legal pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. *Balsavage*, 295 F.3d at 396-397, 22 BLR at 2-396; *Clark*, 12 BLR at 1-153; Decision and Order on Remand at 8. Furthermore, the administrative law judge properly found that although "Drs. Fino and Renn did not find that [claimant] is totally disabled due to pneumoconiosis, they did not diagnose either clinical or legal pneumoconiosis and therefore their opinions on etiology are not entitled to any weight." Decision and Order on Remand at 8; s*ee Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). Therefore, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), that claimant is totally disabled due to legal pneumoconiosis.[12]

[12] Based on our affirmance of the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge