BRB No. 10-0690 BLA

CLAUDE E. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FREEMAN UNITED COAL MINING COMPANY	)	
	)	
	)	DATE ISSUED: 09/28/2011
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Julie A. Webb (Craig & Craig), Mt. Vernon, Illinois, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2008-BLA-05887) of Administrative Law Judge Jeffrey Tureck rendered on a subsequent claim filed pursuant to the provisions of 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*)).[1] On April 7, 2010, the administrative law judge issued an Order

[1] Claimant's initial claim, filed on May 10, 2004, was denied by the Office of Workers' Compensation Programs (OWCP) on May 19, 2005 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant submitted a

requiring the parties to submit position statements addressing the applicability of the 15-year presumption of total disability due to pneumoconiosis set forth in amended Section 921(c)(4).[2] The administrative law judge determined that the parties' agreed that the 15-year presumption has been invoked, that claimant worked as an underground coal miner for twenty-six years, that claimant is totally disabled, and that he established a change in conditions since the previous claim was denied pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found, however, that employer rebutted the presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer established rebuttal of the 15-year presumption, arguing that the administrative law judge did not properly weigh the relevant medical opinions pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant also asserts that he is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[3] The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a substantive response to claimant's appeal, unless specifically requested to do so by the Board.[4]

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withdrawal request that was denied by the OWCP as untimely. *Id.* Claimant took no further action with regard to that denial until he filed the current subsequent claim on September 24, 2007. Director's Exhibit 3.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if he had fifteen or more years of qualifying coal mine employment and is totally disabled pursuant to 20 C.F.R. §718.204(b).

[3] Employer also argues that the Patient Protection and Affordable Care Act is unconstitutional and that the rebuttable presumption set forth in amended Section 921(c)(4) does not apply in this case. We decline to address employer's contentions, as it merely asserts them, without identifying any rationale underlying its arguments. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

[4] We affirm, as unchallenged on appeal, the administrative law judge's crediting of the parties' stipulation that claimant had twenty-six years of underground coal mine employment, that claimant is totally disabled pursuant to 20 C.F.R §718.204(b), that claimant established a change in conditions pursuant to 20 C.F.R § 725.309(d), that

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

In determining that claimant did not have pneumoconiosis, the administrative law judge initially found that the x-ray and CT scan evidence was negative for pneumoconiosis. Decision and Order at 5. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Tuteur, Fino, Cohen, Renn and Mayer.

Dr. Tuteur examined claimant on March 9, 2005, and diagnosed a severe obstructive impairment caused by cigarette smoking. Director's Exhibit 1 (contains record of prior claim). In support of his opinion, Dr. Tuteur noted that only a small percentage of non-smoking coal miners develop chronic obstructive pulmonary disease (COPD), claimant's impairment responded to bronchodilator treatment and his pO2 improved with exercise. *Id*. Dr. Fino performed a record review and determined that claimant's obstructive disease was unrelated to coal dust exposure. *Id*.

Dr. Cohen examined claimant on November 30, 2007, and diagnosed both clinical and legal pneumoconiosis.[6] Director's Exhibit 8. Dr. Cohen indicated that

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claimant invoked the rebuttable presumption set forth in amended 30 U.S.C. §921(c)(4), and that employer established that claimant does not have clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

[6] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

claimant is suffering from a severe obstructive defect caused by coal dust exposure and smoking. *Id*. At his March 18, 2009 deposition, Dr. Cohen testified that coal dust exposure can cause bullous emphysema. Claimant's Exhibit 3 at 28.

Dr. Renn reviewed claimant's medical records and prepared a report dated October 5, 2008. Dr. Renn diagnosed bullous emphysema, COPD, and a severe ventilatory defect. Employer's Exhibit 4. With respect to claimant's emphysema, Dr. Renn stated that it was caused solely by claimant's cigarette smoking. *Id*. In a deposition taken on March 17, 2009, Dr. Renn reiterated his conclusions. Employer's Exhibit 5. On October 5, 2009, Dr. Renn provided a supplemental opinion in response to Dr. Mayer's review of his report. Employer's Exhibit 6. Dr. Renn acknowledged that coal dust exposure can cause obstructive airway disease, but identified a number of factors supporting his conclusion that claimant's obstructive lung disease is unrelated to coal dust exposure. *Id*. These included the variability in claimant's FEV1/FVC ratio, the evidence of air trapping on lung volume studies, the waxing and waning of the impairment as measured by pulmonary function studies, and a consistently low diffusing capacity. *Id*. Dr. Renn also referred to numerous medical journal articles and textbooks that bolster his conclusion, that damage from cigarette smoking can continue after smoking ceases and that coal dust exposure is associated with centrilobular emphysema, but does not cause, or aggravate, bullous emphysema. *Id*. With respect to the latter issue, Dr. Renn stated:

> Proving a negative is oftentimes difficult, if not impossible, and that is no different in the case of bullous emphysema and the absence of its association with exposure to coal mine dust. However, the very existence of scientific literature listing, in the positive, the subtypes of emphysema that do exist in some with exposure to coal mine dust, effectively lays to rest the consideration that coal mine dust could give rise to bullous emphysema.

Id. Dr. Renn further indicated that because the CT scan, obtained on March 9, 2005, was negative for centrilobular emphysema, claimant's coal dust exposure, after he quit smoking in the early 1990s, did not have an additive effect on his obstructive lung disease. *Id*.

Dr. Mayer reviewed claimant's medical records, including Dr. Renn's opinion, and submitted a report dated February 14, 2009. Claimant's Exhibit 1. Dr. Mayer stated, in strong terms, that Dr. Renn's exclusion of coal dust exposure as a cause of claimant's bullous emphysema was contrary to the objective data and the medical literature. *Id*. In support of his opinion, Dr. Mayer cited a number of medical journal articles, textbooks, and the comments of the Department of Labor (DOL) regarding the amended definition of legal pneumoconiosis. *Id*. Dr. Mayer further noted that the materials upon which Dr. Renn relied predated the scientific community's recognition of coal dust exposure as a

cause of obstructive lung disease. *Id*. Dr. Mayer was deposed on February 17 and September 25, 2009 and reiterated his findings. Claimant's Exhibits 1, 5. Dr. Mayer also reviewed Dr. Renn's deposition testimony and provided a written rebuttal to Dr. Renn's criticisms of his record review. Claimant's Exhibit 4.

The administrative law judge reviewed the relevant medical opinions and determined that Dr. Cohen's opinion was entitled to little weight because he relied, in large part, upon a positive x-ray interpretation that conflicted with the administrative law judge's finding that the x-ray and CT scan evidence was negative for pneumoconiosis. Decision and Order at 11. The administrative law judge also found that Dr. Cohen's attribution of claimant's obstructive impairment to coal dust exposure and smoking was poorly reasoned, as Dr. Cohen indicated that he could not differentiate between the two etiological factors. *Id*. at 12. With respect to Dr. Mayer's opinion, the administrative law judge stated:

> I find that Dr. Mayer's testimony has no probative value. His disparaging critique of Dr. Renn is unprofessional, not to mention misdirected, and his arrogance seemingly knows no bounds, leading me to have little confidence in his opinion. Further, he has no expertise in pulmonary medicine and was wrong about key points. Moreover, much of what he said was irrelevant, since he was refuting statements Dr. Renn did not make.

Id. at 11. The administrative law judge further determined that the opinion in which Dr. Renn ruled out the presence of both clinical and legal pneumoconiosis was entitled to great weight, based on his expertise, the quality of his explanations, and his familiarity with the relevant medical literature. *Id*. at 7, 12. Accordingly, the administrative law judge found that Dr. Renn's opinion was sufficient to establish that claimant does not have pneumoconiosis. *Id*. at 12. The administrative law judge concluded, therefore, that employer rebutted the presumption that claimant is totally disabled due to pneumoconiosis. *Id*.

Claimant asserts that the administrative law judge erred in according greatest weight to Dr. Renn's opinion, that claimant's obstructive lung disease is attributable solely to smoking, without addressing flaws in the reasoning and documentation underlying his opinion. Claimant argues that Dr. Renn cited material that is not part of the record and that none of the literature referenced by Dr. Renn affirmatively establishes that coal dust exposure does not cause, or aggravate, bullous emphysema.

Claimant also maintains that the administrative law judge did not explain why Dr. Renn's qualifications as a Board-certified pulmonologist were superior to Dr. Mayer's qualifications as an expert in epidemiology, the branch of medical science concerned with the incidence, distribution and control of disease in a population. In addition, claimant contends that, because Dr. Renn did not identify any evidence in support of his conclusion that claimant had emphysema when he quit smoking, the administrative law

judge erred in independently determining that the record contained evidence establishing Dr. Renn's conclusion. Claimant also alleges that Dr. Renn's opinion is contrary to the prevailing medical science accepted by DOL and the record evidence that demonstrates that claimant has centrilobular emphysema. Claimant further asserts that the administrative law judge did not address the fact that Dr. Renn relied on outdated studies in which the authors concluded that there must be x-ray evidence of coal workers' pneumoconiosis before a pulmonologist can attribute a miner's COPD to coal dust exposure. In addition, claimant alleges that the administrative law judge erred in discrediting the opinions of Drs. Cohen and Mayer and did not adequately resolve the conflicts between their opinions and Dr. Renn's opinion. Moreover, claimant argues that the administrative law judge did not address Dr. Renn's contradictory statements regarding whether centrilobular emphysema can progress to panlobular emphysema.

Initially, we hold that claimant's allegation of error regarding employer's failure to submit copies of every article or textbook chapter that Dr. Renn cited in support of his opinion is without merit. Dr. Renn attached selected portions of this material to his reports and provided detailed citations to the articles and books that he referenced. Employer's Exhibits 4, 6. Accordingly, claimant had an adequate opportunity to verify the accuracy of Dr. Renn's synopses of this material and the administrative law judge was not required to exclude or discredit Dr. Renn's opinion on this basis. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-236 (1987).

We also reject claimant's argument that the administrative law judge was required to discredit Dr. Renn's opinion because none of the literature that he referenced establishes that coal dust exposure does not cause, or aggravate, bullous emphysema. Dr. Renn identified several sources in which descriptions of the types of emphysema caused by coal dust exposure did not include any reference to bullous emphysema and stated that they stood for the proposition that bullous emphysema is not caused, or aggravated, by coal dust inhalation. Employer's Exhibits 4, 6. Claimant maintains that the omission of bullous emphysema is not equivalent to an affirmative statement that coal dust exposure does not cause bullous emphysema. Contrary to claimant's contention, the administrative law judge acted within his discretion as fact-finder in accepting Dr. Renn's characterization of the studies and textbooks that he cited. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); Decision and Order at 6-7.

Claimant's assertion, that the administrative law judge did not explain why Dr. Renn's qualifications as a Board-certified pulmonologist were superior to Dr. Mayer's qualifications as an expert in epidemiology, is also without merit.[7] The administrative

[7] According to Dr. Mayer's curriculum vitae, he is a medical doctor, certified to practice as a public health physician, and has advanced degrees in statistics. Claimant's

law judge noted that Dr. Mayer stated that Dr. Renn had "no advantage whatsoever," over him in offering an opinion in this case and found that "[t]his is a remarkable statement since this case deals with the cause of claimant's pulmonary disease, for which expertise in pulmonary medicine is vital, even for an epidemiologist." Decision and Order at 8, *quoting* Claimant's Exhibit 5 at 8. The administrative law judge's finding that Dr. Renn possessed superior qualifications, by virtue of his status as a Board-certified pulmonologist, was within his discretion. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We emphasize, however, that qualifications alone do not provide a basis for giving greater weight to a particular physician's opinion; that opinion must also be adequately reasoned and documented. *See Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18-19 (2003).

Claimant's remaining allegations of error have merit, however. Regarding Dr. Renn's assertion, that claimant had already developed emphysema when he quit smoking, the administrative law judge stated:

> Although Dr. Renn did not have evidence of claimant's condition going back to 1991, such evidence is in the record. This evidence consists of medical evidence related to claimant's arthroscopic knee surgery in September, 1991. At that time, claimant was still smoking. An x-ray was taken which showed pulmonary hyperexpansion. Further[,] the History and Physical Examination report from the hospitalization for that operation contains a diagnosis of COPD and emphysema. This evidence is uncontradicted and confirms Dr. Renn's belief that claimant already had emphysema at the time he quit smoking, which is central to his conclusion that claimant's obstructive impairment is due to smoking and not coal mining.

Decision and Order at 6 (internal citations omitted). Claimant is correct in maintaining that the administrative law judge's finding must be vacated, as the administrative law judge did not consider whether the bases for the diagnoses of COPD and emphysema were identified, nor did he acknowledge that he relied upon his own view, rather than that of a medical expert, in finding that the September 1991 x-ray supported a diagnosis of COPD and/or emphysema. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Claimant is also correct in maintaining that the administrative law judge did not consider whether Dr. Renn's opinion, and the older studies upon which he relied, are

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Exhibit 2. Dr. Mayer testified that he is currently a professor of epidemiology and statistics and practices psychiatry. Claimant's Exhibit 5 at 5.

contrary to the prevailing scientific view accepted by DOL. Dr. Renn ruled out coal dust exposure as either a direct, or contributing, cause of claimant's bullous emphysema and severe obstructive impairment. Several of the studies and texts that he cited are ones in which the authors concluded that there must be x-ray evidence of coal workers' pneumoconiosis before a pulmonologist can attribute a miner's COPD to coal dust exposure – a view that is contrary to the scientific evidence cited by DOL in support of the amended definition of legal pneumoconiosis. *See* Claimant's Exhibit 1 at 4; Employer's Exhibit 6. In responding to comments regarding the proposed definition of legal pneumoconiosis, DOL stated:

> Allowing for decrements due to age and smoking history, Attfield and Hodous demonstrated a clear relationship between dust exposure and a decline in pulmonary function of about 5 to 9 milliliters a year, even in miners with no radiographic evidence of clinical coal workers' pneumoconiosis.
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> ***
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> Smokers who mine have additive risk for developing significant obstruction. The risk of chronic bronchitis clearly increases with increasing dust exposure; again[,] smokers who mine have an additive risk of developing chronic bronchitis. The message from the Marine study is unequivocal: Even in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. The risk is additive with cigarette smoking.
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> . . . [D]ust-induced emphysema and smoke[-]induced emphysema occur through similar mechanisms – namely, the excess release of destructive enzymes from dust- (or smoke-) stimulated inflammatory cells in association with a decrease in protective enzymes in the lung.

65 Fed. Reg. 79,940-43 (Dec. 20, 2000) (internal citations omitted). Because the administrative law judge did not address the conflict between Dr. Renn's opinion and the scientific view accepted by DOL, we must vacate his decision to accord greatest weight to Dr. Renn's opinion. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004)*; Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

We also find merit in claimant's argument that the administrative law judge did not resolve the conflict between Dr. Renn's statement, that the CT scan obtained on March 9, 2005, was negative for centrilobular emphysema, and Dr. Wheeler's contrary reading. Dr. Wheeler found "[a]t least minimal emphysema with few small subpleural bullous blebs right apex and anterior medial RUL and tiny bleb in anterior medial left

apex *and centrilobular emphysema* upper lobes with areas of decreased and distorted lung markings." Employer's Exhibit 12 (emphasis added). Accordingly, we must vacate the administrative law judge's crediting of Dr. Renn's statement that, because the March 9, 2005 CT scan was negative for centrilobular emphysema, the coal dust exposure that claimant experienced after he quit smoking in the early 1990s did not have an additive effect on his obstructive lung disease. *See Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988); *Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987).

Claimant is also correct in alleging that the administrative law judge did not provide an adequate rationale for discrediting the opinions of Drs. Mayer and Cohen and did not adequately resolve the conflicts between their opinions and Dr. Renn's opinion. The administrative law judge found that Dr. Cohen's opinion was not probative because, *inter alia*, his "diagnosis relies to a great extent on an erroneous x-ray reading, inadequately explained conclusions, and an opinion contrary to the Act." Decision and Order at 12. In addition to his diagnosing clinical pneumoconiosis, based on his positive interpretation of an x-ray dated November 1, 2007, Dr. Cohen diagnosed legal pneumoconiosis in the form of COPD and emphysema caused by coal dust exposure and smoking. Director's Exhibits 1, 8; Claimant's Exhibit 3 at 32, 45-53. Dr. Cohen indicated that he based the latter diagnosis on claimant's history of exposures, his severely reduced diffusing capacity, FEV1 and FEV1/FVC ratio, with no significant response to bronchodilators, his increased total lung capacity (TLC), reserve volume (RV) and RV/TLC – signifying air trapping – and findings of diminished air sounds and inspiratory crackles on physical examination. Director's Exhibits 1, 8.

Moreover, contrary to the administrative law judge's finding, Dr. Cohen did not merely note that, because coal dust inhalation can cause obstruction, it must have contributed to claimant's obstructive impairment. *See* Decision and Order at 12. As claimant asserts, Dr. Cohen explained:

> The best way that we have of trying to attribute impairment is looking at the large epidemiologic studies that were conducted by researchers at NIOSH, part of the national study of coal workers[']s pneumoconiosis, which estimated the impairment due to coal mine dust as being about – equivalent to about half to two-thirds a pack a year for miners that mined after 1970, so that it's a little bit less than a pack year of smoking, for people that mined before 1970, equal to about a pack-and-a-half to two pack years of underground coal mining.
>
> So they are very comparable exposures, and certainly Mr. Johnson's 22 years of coal mine dust exposure was significantly contributing.

Claimant's Exhibit 3 at 52-53. Dr. Cohen further stated that, although there are miners with comparable exposures who have no lung disease or minimal impairment, claimant's individual susceptibility to pulmonary toxins accounts for the development of his very

severe lung impairment from both tobacco and coal mine dust toxins. *Id.* at 55. Upon considering a smoking history of thirty-one pack years, rather than the twenty-eight years found by the administrative law judge, Dr. Cohen declined to alter his opinion that claimant's coal mine dust exposure was significantly contributory to his severe pulmonary impairment, with some proportional increase due to tobacco smoke exposure, based on studies that show that both exposures are additive. *Id.* at 55.

In addition, Dr. Cohen's inability to distinguish between the effects of cigarette smoking and coal dust exposure did not, in and of itself, provide a basis for discrediting his opinion. The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that it is not necessary for physicians to determine, with precision, the percentage of claimant's impairment that is attributable to pneumoconiosis and the percentage that is due to other causes. *See Summers*, 272 F.3d at 482, 22 BLR at 2-280; *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 15 BLR 2-79 (7th Cir. 1991); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). Rather, the administrative law judge only has to be persuaded, based on all available evidence, that pneumoconiosis was a contributing cause of the impairment. *See Summers*, 272 F.3d at 482, 22 BLR at 2-280. Thus, because the administrative law judge did not accurately consider the entirety of Dr. Cohen's opinion, we must vacate his determination that Dr. Cohen's diagnosis of legal pneumoconiosis was not probative. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318.

We must also vacate the administrative law judge's determination that Dr. Mayer's opinion "has no probative value." Decision and Order at 11. Although the administrative law judge acted within his discretion in rejecting portions of Dr. Mayer's critique of Dr. Renn's opinion, because he found that Dr. Mayer's statements were "unprofessional" and "irrelevant," the administrative law judge did not accurately characterize other portions of Dr. Mayer's opinion.[8] *See Williams*, 400 F.3d at 999, 23 BLR at 2-318. The administrative law judge found that "much" of Dr. Mayer's opinion consisted of bolstering a view that neither Dr. Renn nor employer dispute – that cigarette smoking and coal dust exposure can both cause emphysema." Decision and Order at 10. However, the administrative law judge did not consider Dr. Mayer's citation of epidemiological studies showing that: coal dust exposure has an additive effect in causing emphysema in a smoker; that it is impossible to quantify the contribution of one exposure when both risk factors are present; that exposure to coal dust triples the risk of developing obstructive lung disease; and that Dr. Renn's conclusion, that coal dust-

[8] Dr. Mayer expressed several of his criticisms of Dr. Renn's opinion in harsh terms. For example, he stated, Dr. Renn's "analysis would be humorous were it not so sophomoric" and "[a]nyone who makes as many mistakes in facts and logic as does Dr. Renn in his report and deposition could surely benefit from taking one of my courses." Claimant's Exhibit 4 at 2, 23.

induced emphysema never progresses to bullous emphysema, is unsupported by the current medical literature. Claimant's Exhibits 1 (at 14, 28, 33-34, 37), 4, 5 (at 12-13, 29-30, 32-33, 35-39, 44, 49-50). In addition, based on Dr. Renn's opinion, the administrative law judge discredited Dr. Mayer's testimony, that it is highly unlikely that claimant's COPD was caused by smoking, as claimant was first diagnosed with COPD in 2003, had not smoked for the previous fourteen years, and had been exposed to coal mine dust in the interim. Decision and Order at 10. However, we have vacated the administrative law judge's finding that the evidence confirms Dr. Renn's belief that claimant already had emphysema at the time he quit smoking in the early 1990s. *See* slip op. at 7.

Claimant is also correct in asserting that the record does not support the administrative law judge's determination that Dr. Mayer misstated Dr. Renn's testimony concerning whether centrilobular or panlobular emphysema can progress to bullous emphysema. Decision and Order at 10. Dr. Mayer noted that, in concluding that only tobacco smoke-induced emphysema progresses to bullous emphysema, Dr. Renn contradicted his statement that bullae can develop with any type of emphysema. Employer's Exhibit 5 at 79 and 132; Claimant's Exhibit 4 at 18-20. Contrary to the administrative law judge's determination, Dr. Mayer did not take Dr. Renn's testimony, as transcribed on page seventy-nine of the deposition transcript, out of context. Decision and Order at 10; Employer's Exhibit 5 at 79. Dr. Mayer also considered Dr. Renn's testimony, on page seventy-eight, that he based his opinion on "knowledge and the literature that states that exposure to coal mine dust will result in centrilobular emphysema but does not result in panlobular emphysema and, without that nexus, there could be no connection. There can be no progression to bullous emphysema." Claimant's Exhibit 4 at 19, *quoting* Employer's Exhibit 5 at 78-79. Dr. Mayer then noted that Dr. Renn contradicted his testimony by agreeing that "bullae can develop in association with "*any type* of PE, pulmonary emphysema." Claimant's Exhibit 4 at 19, *quoting* Employer's Exhibit 5 at 132 (emphasis added). Because the administrative law judge did not consider Dr. Mayer's opinion as a whole and did not accurately characterize his opinion, we vacate his finding that it has no probative value. *See Williams*, 400 F.3d at 999, 23 BLR at 2-318.

In light of our decision to vacate the administrative law judge's crediting of Dr. Renn's opinion and his discrediting of the opinions of Drs. Cohen and Mayer, we must also vacate the administrative law judge's finding that employer established rebuttal of the fifteen-year presumption by affirmatively proving that claimant does not have legal pneumoconiosis. On remand, the administrative law judge must reconsider whether employer has rebutted the presumption of total disability due to pneumoconiosis by proving that claimant does not have legal pneumoconiosis or is not totally disabled by it. In so doing, the administrative law judge must reevaluate the medical opinions of Drs. Renn, Cohen and Mayer and determine whether they are reasoned, documented, and consistent with DOL's view of the prevailing scientific literature. *See Williams*, 400 F.3d

at 999, 23 BLR at 2-318; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). In determining whether the relevant medical opinions are documented, the administrative law judge must determine whether any pulmonary function studies upon which the physicians rely conform to the quality standards set forth in 20 C.F.R. §§718.103 and 718.204(c)(1). The administrative law judge must also ascertain whether the December 2, 2005 pulmonary function study pre-bronchodilator and post-bronchodilator results are part of the record. Dr. Renn identified this study in a chart that appears in his October 5, 2008 medical review report, but it could not be located in the record. *See* Employer's Exhibit 4. In addition, on the issue of whether pulmonary function studies showing a reversible obstructive impairment establish that claimant's obstructive lung disease is caused solely by smoking, the administrative law judge must be aware that there can be a coexisting, fixed impairment that is related to coal dust exposure. *See Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Underwood v. Elkay Mining, Inc.* 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Accordingly, the Decision and Order Denying Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.[9]

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9] Claimant's request that this case be assigned to a different administrative law judge on remand is moot, as Judge Tureck has retired from the Office of Administrative Law Judges.