U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0247 BLA

JAMES N. SHORTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK KENTUCKY MINING	)	DATE ISSUED: 04/28/2016
	)	
and	)	
	)	
ISLAND CREEK COAL 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 Granting Benefits of Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Tennessee for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2012-BLA-05870) of Administrative Law Judge Paul R. Almanza, rendered on a claim filed on May 16, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(i), (iv), and total disability causation at 20 C.F.R. §718.204(c). Accordingly, he awarded benefits.[1]

On appeal, employer argues that the administrative law judge did not properly weigh the medical opinion evidence concerning legal pneumoconiosis and disability causation and held employer's evidence to a higher standard than the other evidence of record. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).[2]

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal

[1] The administrative law judge rejected the parties' stipulation to 13.48 years of underground coal mine employment and instead determined that claimant had 14.43 years. Because claimant did not establish at least fifteen years, however, he could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). We affirm the administrative law judge's length of coal mine employment and total respiratory disability findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 21.

[2] It is difficult to determine from the record where claimant's last coal mine employment occurred for the purposes of establishing jurisdiction. The administrative law judge noted that claimant last worked in Kentucky, and that he would apply the law of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 2. Claimant lives in Virginia, however, and received compensation from the Virginia Workers' Compensation System for a work-related injury during the time period he worked for employer. Director's Exhibits 2, 8, 13. We will apply the law of both circuits because there is no meaningful difference in their precedents relevant to the issues raised by this appeal. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (en banc). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The regulations treat the issues of the existence of legal pneumoconiosis and total disability due to the disease separately. To establish the existence of legal pneumoconiosis, a claimant must prove by a preponderance of the evidence that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2), (b). To establish that he is totally disabled due to legal pneumoconiosis, a claimant must prove that it is a "substantially contributing cause of [his] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1).

While the regulations treat these elements distinctly, the courts have recognized that in practice the "two-step causal chain" often can be "collapsed" into a single inquiry: "whether the miner's disability arose out of his coal mine employment." *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-446 (6th Cir. 2013); *see also Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-245 (4th Cir. 2013). Under this standard, we hold that the administrative law judge acted within his discretion in determining that Dr. Splan's opinion that claimant suffers from totally disabling chronic obstructive pulmonary disease (COPD) caused in significant part by coal dust exposure was sufficient to establish entitlement to benefits in the absence of credible contrary evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998).

Dr. Splan examined claimant on August 31, 2011, recording his medical, employment, and smoking histories. Decision and Order at 11; Director's Exhibit 14. Dr. Splan noted that claimant "gets short of breath after walking less than a city block," that he cannot climb stairs or hills of "any degree," and that he "has been this way for the past four or five years." Director's Exhibit 14. He further noted that claimant has a history of morning cough with clearing of three to four teaspoons of clear sputum and that he coughs frequently throughout the day. *Id.* While recognizing that the coughing had been occurring "for approximately four years," Dr. Splan indicated that it "has been getting worse the past year and a half." *Id.* Among other things, Dr. Splan recorded a medical history of "chronic bronchitis," "chronic airway obstruction," "probable pneumoconiosis," and "obstructive sleep apnea." Decision and Order at 11-12, *quoting* Director's Exhibit 14.

Dr. Splan acknowledged two environmental factors relevant to claimant's condition. Director's Exhibit 14. He indicated that claimant worked underground and was exposed to coal dust for his entire mining career, hauling and shoveling coal as a shuttle car operator. Director's Exhibit at 14. He further noted that claimant started smoking cigarettes at the age of sixteen and that he quit "approximately 30 years later" at the age of forty-six. While claimant was a pack-a-day smoker when he smoked, Dr. Splan noted that claimant "has not smoked at all since 1991." *Id.* As part of the physical examination, Dr. Splan further "performed electrocardiogram, pulmonary function testing, blood gas studies, and a chest x-ray." *Id*.

Based on his physical examination, claimant's reporting of his histories, and the objective testing, Dr. Splan diagnosed totally disabling COPD in the form of chronic bronchitis and emphysema. Director's Exhibit 14. Dr. Splan attributed claimant's COPD to a mixture of cigarette smoking and coal dust exposure. *Id*. While specifically recording that claimant was "noticeably obese" on physical examination, Dr. Splan did not consider that condition a cause of claimant's impairment: he instead apportioned sixty percent of it to smoking and forty percent to coal dust exposure. *Id*.

The administrative law judge found that Dr. Splan's report "succinctly explains the bases upon which he grounded his opinion that [claimant's] respiratory impairment was caused by his exposure to coal dust" and he incorporated the relevant portion of Dr. Splan's opinion that supported his finding into his decision.[3] Decision and Order at 18.

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[3] The administrative law judge quoted the following passage from Dr. Splan's report:

> IMPAIRMENT: It is thought that [claimant's] impairment is moderately severe and as such being the case he cannot return to work in the coal mines. Likely his impairment related to his respiratory problems is 60% related to tobacco smoke and 40% related to changes as the result of coal dust. No clinical pneumoconiosis based on chest x-ray B read. Legal pneumoconiosis based on 16 years of coal dust exposure, chronic bronchitis, definite emphysema as seen on chest x-ray, moderately severe obstruction as seen on pulmonary function test with FEV1 36% of predicted, FEV1/FVC 63%, MVV 32% of predicted pre bronchodilator, FEV1 42% of predicted, FEV1/FVC 67%, MVV 33% of predicted post bronchodilator test. DLCO 72% of predicted. Mild hypoxemia on Arterial blood gases the PO2 67 at rest and PO2 72.8 during exercise.

Decision and Order at 18, *quoting* Director's Exhibit 14.

The administrative law judge found further support for Dr. Splan's credibility in that he accounted for "the significant contribution [claimant's] smoking history made to his respiratory impairment" without minimizing "the impact of that history." *Id.* Likewise, the administrative law judge noted that Dr. Splan had an accurate view of claimant's employment and "included that history in concluding that [claimant's] respiratory impairments were caused at least in part by his exposure to coal dust." *Id.* Moreover, the administrative law judge recognized that, although Dr. Splan did not apportion a percentage of claimant's obstruction specifically to his bronchitis or emphysema, his conclusions were still "consistent with the preamble, which finds that chronic bronchitis, emphysema, and obstructive disease can [all] constitute legal pneumoconiosis if due to a miner's coal mine employment." *Id.*, *citing* 65 Fed. Reg. 79,920, 79,940-44.

In light of Dr. Splan's reasonable explanation of how the results of his physical examination, the objective tests, and medical and employment histories led to his diagnosis, *supra* n.4, we hold that the administrative law judge rationally determined that Dr. Splan provided a reasoned and documented opinion supporting entitlement. The administrative law judge, therefore, acted within his discretion in crediting it. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341 (the determination of whether a medical report is documented and reasoned is committed to the discretion of the administrative law judge); *Sterling Smokeless Coal v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

In so doing, we reject employer's allegation that the administrative law judge did not adequately address its allegation that Dr. Splan's failed to consider whether obesity played a role in claimant's disabling impairment. First, employer is simply incorrect that the administrative law judge did not address Dr. Splan's assessment of claimant's obesity. The administrative law judge logically inferred that Dr. Splan excluded obesity as a cause of claimant's impairment, based on Dr. Splan's acknowledgement of the condition in combination with his identification of claimant's lengthy smoking and dust exposure histories as the combined causes of his impairment.[4] The inference was well within his discretion as trier-of-fact. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Director's Exhibit 14.

[4] The administrative law judge noted "[t]he only potential weakness in Dr. Splan's opinion is that it does not specifically explain what effect, if any, [claimant's] being 'noticeably obese' . . . had on his respiratory impairment. I conclude, however, that as Dr. Splan was aware of [claimant's] obesity and did not mention it as contributing to his respiratory impairment, Dr. Splan necessarily concluded that [claimant's] obesity did not contribute to that impairment." Decision and Order at 18, *quoting* Director's Exhibit 14.

Second, employer has not demonstrated how Dr. Splan's alleged failure to address claimant's obesity amounts to reversible error. It is claimant's burden to establish that he suffers from a "chronic lung disease or impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(a)(2), (b). There is no statutory or regulatory requirement that dust exposure be the only, or even primary, cause of the impairment. *Id.* Nor is there any requirement that claimant disprove other possible causes for the impairment if his affirmative burden is met. *Id.* Under this framework, employer has failed to explain how a more detailed consideration of claimant's obesity would have altered Dr. Splan's reasonable opinion that dust exposure was a significant causal factor in claimant's disabling respiratory impairment given his many years of underground mining. Employer thus failed to demonstrate why claimant failed to meet his burden in this case. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference.").

We also reject, as similarly immaterial, employer's argument that the administrative law judge should have made a more specific finding of whether the evidence of record supports Dr. Splan's diagnosis of emphysema. As the administrative law judge found, COPD, which Dr. Splan diagnosed, is an umbrella disease that encompasses more than just emphysema. The preamble to the 2001 regulatory revisions provides "[t]he term 'chronic obstructive pulmonary disease' includes three disease processes characterized by airway dysfunction: chronic bronchitis, emphysema and asthma." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). There was no requirement for claimant to establish anything more specific than a disabling obstructive lung condition caused by dust exposure to meet his burden, and neither employer, nor our dissenting colleague, has pointed to any contrary authority. 20 C.F.R. § 718.201(a)(2), (b); *see, e.g., Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269 (4th Cir. 1995). (If a physician concludes the miner suffers from chronic obstructive pulmonary disease arising out of coal mine employment, then his opinion supports a finding of legal pneumoconiosis).

Having rejected employer's allegations of error, we affirm the administrative law judge's finding of Dr. Splan's credibility as within his broad discretion as factfinder.[5]

[5] Contrary to our dissenting colleague, we hold that the possibility that Dr. Splan's opinion could be viewed in another light does not provide a basis for vacating the administrative law judge's reasonable exercise of his discretion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Moreover, the administrative law judge permissibly discredited the only other medical opinions of record, based on findings that we affirm *infra*.

See Napier, 301 F.3d at 713-714 22 BLR at 2-553 (a reviewing court "is required to defer to the ALJ's assessment of the physicians' credibility"); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012) (the decision to credit one opinion over another "is a matter of credibility, which we cannot revisit"); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133 (the Administrative Procedure Act [(APA)] does not "impose a duty of long-windedness on an ALJ;" to the contrary, "if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied.") (citations omitted); Decision and Order at 18.

As the administrative law judge permissibly gave significant weight to Dr. Splan's opinion, he logically gave little weight to the contrary opinions of Drs. Fino and Rosenberg that claimant's respiratory impairment is due solely to his obesity. Decision and Order at 18-20; Director's Exhibit 15. The administrative law judge did not discount Drs. Fino and Rosenberg for failure to meet a particular legal standard, however, as employer and our dissenting colleague allege. Rather, the administrative law judge considered the explanations given by Drs. Fino and Rosenberg for why *they* each concluded that claimant's impairment was completely unrelated to either smoking or coal dust exposure, and he ultimately concluded that their reasoning was not credible.

As the administrative law judge observed, Dr. Fino's report does not contain an analysis of claimant's many years of underground "coal mine employment, or his 30 pack year smoking history." Decision and Order at 19. Similarly, Dr. Rosenberg acknowledged that claimant had "chronic coughing and sputum production -- symptoms of chronic bronchitis" but his "only explanation for why these symptoms were not caused by exposure to coal dust (or cigarette smoke) was that [claimant] stopped working in the mines over 20 years ago and therefore those symptoms would not be caused by coal dust exposure." *Id.* In focusing entirely on claimant's obesity, it was well within the administrative law judge's discretion to determine that neither physician adequately explained their conclusions that thirty years of smoking and fourteen years of underground dust exposure played no part in claimant's impairment. *See Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. A medical opinion in which the physician that does not explain the basis for his or her conclusions is not reasoned and should not be credited, regardless of the legal standard of review. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Williams v. Black Diamond Coal Mining Co.*, 6 BLR 1-282 (1983).

The administrative law judge also permissibly found that portions of the opinions of Drs. Fino and Rosenberg conflicted with the revised definition of pneumoconiosis and the prevailing scientific view recognized in the preamble to the 2001 revised regulations: that the disease can be latent and progressive. Dr. Fino stated, the "reversible airways obstruction would have nothing to do with coal mine dust or even smoking since he has not worked in the mines since 1991 and he has not smoked since 2002." Director's

Exhibit 15. Dr. Rosenberg testified at his deposition that the "coughing and sputum production that [claimant] currently has would not relate to a coal mine exposure which ceased 20 or more years ago." Employer's Exhibit 1A at 14. Both statements plainly contradict the regulations. 20 C.F.R. §718.201(c); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; 65 Fed. Reg. 79,920, 79,937 (Dec. 20, 2000); Decision and Order at 18-19.

Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Fino and Rosenberg as to the cause of claimant's lung disease and totally disabling impairment, we affirm his weighing of these opinions. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We further affirm the administrative law judge's finding that Dr. Splan's opinion that claimant is totally disabled due to legal pneumoconiosis is entitled to controlling weight in the absence of credible contrary evidence and, thus, sufficient to establish entitlement. *See* 20 C.F.R. §§718.201(a), 718.202(a), 718.204(c).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's affirmance of the administrative law judge's findings that claimant established 14.43 years of coal mine employment, and that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv). However, I respectfully dissent from the majority's decision to affirm the administrative law judge's

finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Specifically, I disagree with the majority that the administrative law judge permissibly found that Dr. Splan's opinion is sufficient to establish the existence of legal pneumoconiosis.

"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). A disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(b).

Dr. Splan diagnosed (1) chronic bronchitis; (2) chronic obstructive pulmonary disease; and (3) obstructive sleep apnea. Director's Exhibit 14. Dr. Splan next provided, without elaboration or explanation, the following three etiologies for these diagnoses: (1) tobacco smoke; (2) coal dust; and (3) hereditary factors. *Id.* Dr. Splan concluded by stating:

> IMPAIRMENT: It is thought that [claimant's] impairment is moderately severe and as such being the case he cannot return to work in the coal mines. Likely his impairment related to his respiratory problems is 60% related to tobacco smoke and 40% related to changes as the result of coal dust. No clinical pneumoconiosis based on chest x-ray B read. Legal pneumoconiosis based on 16 years of coal dust exposure, chronic bronchitis, definite emphysema as seen on chest x-ray, moderately severe obstruction as seen on pulmonary function test with FEV1 36% of predicted, FEV1/FVC 63%, MVV 32% of predicted pre bronchodilator, FEV1 42% of predicted, FEV1/FVC 67%, MVV 33% of predicted post bronchodilator test. DLCO 72% of predicted. Mild hypoxemia on Arterial blood gases the PO2 67 at rest and PO2 72.8 during exercise.

Director's Exhibit 14.

In addressing whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge found that Dr. Splan's opinion was "credible" for three reasons:

> First, Dr. Splan accounts for the significant contribution [claimant's] smoking made to his respiratory impairment. Dr. Splan inquired as to [claimant's] smoking history (one pack per day from age 16 to 2001, DX-14 at 2) before rendering his opinion and did not minimize the impact of that history in determining what caused [claimant's] respiratory impairment. Second, Dr. Splan inquired as to [claimant's] exposure to coal

> dust (16 years, DX-14 at 1) and included that history in concluding that [claimant's] respiratory impairments were caused at least in part by his exposure to coal dust. Third, Dr. Splan's references to chronic bronchitis, emphysema, and obstruction supporting his conclusion of legal pneumoconiosis are consistent with the preamble, which finds that chronic bronchitis, emphysema, and obstructive disease can constitute legal pneumoconiosis if due to a miner's coal mine employment. Final Rule, 65 Fed. Reg. 79,920, 79,940-44. The only potential weakness in Dr. Splan's opinion is that it does not specifically explain what effect, if any, [claimant's] being "noticeably obese" (DX-14 at 5) had on his respiratory impairment. I conclude, however, that as Dr. Splan was aware of [claimant's] obesity and did not mention it as contributing to his respiratory impairment, Dr. Splan necessarily concluded that [claimant's] obesity did not contribute to that impairment.

Decision and Order at 18.

After discrediting the opinions of Drs. Fino and Rosenberg, that claimant's respiratory impairment was due to obesity, the administrative law judge found that the medical opinion evidence established that claimant has "legal pneumoconiosis." Decision and Order at 18-20.

Employer contends that the administrative law judge "failed to adequately analyze" Dr. Splan's opinion. Employer's Brief at 12. For the reasons set forth below, I agree.

Initially, it is noteworthy that the administrative law judge did not identify which of Dr. Splan's diagnoses constituted "legal pneumoconiosis." Although Dr. Splan identified three separate pulmonary "diagnoses" (chronic bronchitis, chronic obstructive pulmonary disease, and obstructive sleep apnea), and a moderately severe respiratory impairment, the administrative law judge did not identify which of these conditions he found supportive of a finding of legal pneumoconiosis. In affirming the administrative law judge's finding of legal pneumoconiosis, the majority likewise fails to identify which of the conditions diagnosed by Dr. Splan actually constitutes "legal pneumoconiosis."

Additionally, because claimant cannot invoke the Section 411(c)(4) presumption, he retains the burden in this case of establishing that he suffers from legal pneumoconiosis. The administrative law judge accurately noted that the preamble recognizes that chronic bronchitis, emphysema, and "obstructive disease" can constitute legal pneumoconiosis if due to a claimant's coal mine employment. However, this does not negate the fact that a claimant who fails to invoke the Section 411(c)(4) presumption has the burden to establish, through credible evidence, that he suffers from a chronic lung

disease or impairment due to his coal mine employment. And, the fact that a physician's opinion does not conflict with the preamble does not automatically equate to a finding that the opinion is reasoned and documented. Because the administrative law judge never identified Dr. Splan's basis for attributing any of claimant's conditions to his coal mine employment,[6] the administrative law judge improperly provided claimant with the benefit of a presumption that they arose out of his coal mine employment.

I also agree with employer that the administrative law judge erred in his consideration of Dr. Splan's opinion. The administrative law judge failed to adequately consider whether Dr. Splan's credibility was undermined by his failure to account for obesity as a potential cause of claimant's pulmonary impairment. Although the administrative law judge characterized Dr. Splan's failure to explain the effect of claimant's obesity on his respiratory impairment as a "potential weakness" in his opinion, he dismisses the failure by noting that "Dr. Splan was aware of [claimant's] obesity and did not mention it as contributing to his respiratory impairment." Decision and Order at 18. The majority holds that it within the administrative law judge's discretion to infer that Dr. Splan excluded obesity as a cause of claimant's pulmonary impairment. Although I agree with the majority that the administrative law judge's inference is a permissible one, its holding misses the crux of employer's argument. Employer is not arguing that Dr. Splan was unaware of claimant's obesity, or that Dr. Splan did not exclude obesity as a cause of claimant's pulmonary impairment. Rather, employer's contention is that Dr. Splan's opinion is undermined by his failure to *explain* why claimant's obesity did not contribute to his pulmonary impairment. The administrative law judge acknowledged that there is evidence in the record supportive of a finding that obesity contributed to claimant's pulmonary impairment.[7] Consequently, I agree with

[6] Although the majority states that the administrative law judge found that Dr. Splan's opinion is "reasoned and documented," a review of the Decision and Order reveals that he did not make such a determination. Despite finding that Dr. Splan "succinctly explains the bases upon which he grounded his opinion that [claimant's] respiratory impairment was caused by his exposure to coal dust," the administrative law judge failed to identify those bases. Decision and Order at 17. The administrative law judge noted only that Dr. Splan "inquired as to [claimant's] exposure to coal dust . . . and included that history in concluding that [claimant's] respiratory impairments were caused at least in part by his exposure to coal dust." *Id.* at 18. The administrative law judge failed to explain why Dr. Splan's notation of claimant's history of coal mine dust exposure sufficed as an explanation for how it contributed to any of his diagnoses or pulmonary impairment.

[7] When considering whether the miner's total disability was due to pneumoconiosis, the administrative law judge acknowledged that there was substantial evidence that claimant's pulmonary function decreased as his weight increased. Decision

employer that the administrative law judge failed to adequately consider whether Dr. Splan's failure to account for claimant's obesity as a potential cause of his pulmonary impairment undermined the credibility of his opinion.

The administrative law judge also engaged in an impermissible selective analysis of the medical opinion evidence. The administrative law judge's treatment of Dr. Fino's opinion stands in stark contrast to his treatment of Dr. Splan's opinion. The administrative law judge found that Dr. Fino's opinion was "inadequately reasoned" because it did not contain an *analysis* of the length of claimant's coal mine employment and smoking histories.[8] Decision and Order at 19. However, the administrative law judge credited Dr. Splan's opinion, even though the doctor failed to provide any analysis in regard to the role that obesity played in causing claimant's pulmonary impairments. Given the administrative law judge's disparate treatment of the two opinions, I would instruct the administrative law judge to reconsider the weight accorded to the opinions of Drs. Span and Fino. *See Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Hess v. Clinchfield Coal Co*., 7 BLR 1-295 (1984).

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and Order at 22. The administrative law judge further noted that the rate of the weight gain appeared to be correlated with the loss in function. *Id.* The administrative law judge noted that the data demonstrated that claimant's spirometry values decreased when he gained weight, and decreased more sharply when he gained weight over a shorter period of time. *Id.* The administrative law judge conceded that this data "may support the opinion of Drs. Fino and Rosenberg that [claimant's] obesity caused the restriction in his airways . . . ." *Id.*

[8] Employer accurately notes that, contrary to the administrative law judge's finding, Dr. Fino considered claimant's coal mine dust exposure and smoking as potential causes of his disabling respiratory impairment. Dr. Fino noted that claimant's pulmonary function was normal in 2006, fifteen years after he ceased coal mine employment and four years after he stopped smoking. Director's Exhibit 15 at 10. Dr. Fino explained that while claimant's 2011 pulmonary function study suggested some reversible airways obstruction, it was not related to coal mine dust exposure or smoking. *Id.* Additionally, Dr. Fino noted that while claimant was not hypoxic with exercise in August of 2011, he had become so by December of 2011. *Id.* Dr. Fino explained that claimant's obesity was responsible for the hypoxemia, explaining that "a coal mine dust related disease would not cause hypoxia with exertion to develop in a mere three months." *Id.* Thus, Dr. Fino did not exclude coal mine dust exposure as a potential cause of claimant's impairment because he did not believe that legal pneumoconiosis could be latent and progressive. Rather, Dr. Fino excluded coal mine dust exposure as a cause of claimant's pulmonary impairment because he found that claimant's rapid development of hypoxemia was consistent with obesity, and not coal mine dust exposure.

In light of the above-referenced errors, I would vacate the administrative law judge's finding that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand this case for further consideration. On remand, when considering whether the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[9] I would instruct the administrative law judge to address the explanations for the physicians' conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

RYAN GILLIGAN
Administrative Appeals Judge

[9] I agree with the majority that the administrative law judge permissibly discredited Dr. Rosenberg's opinion on the issue of legal pneumoconiosis. Consequently, I would remand the case for the administrative law judge to reconsider only the opinions of Drs. Splan and Fino.