BRB No. 03-0307 BLA

ALICE BREWER (Widow of COLUMBUS BREWER)	)	
Claimant-Respondent	)	
v.	)	
ARCH ON THE NORTH FORK, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 02/27/2004
ARCH MINERAL CORPORATION	)	
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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (97-BLA-1445) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits in a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for the second time. Initially, the administrative law judge found that employer was precluded from relitigating the prior findings in the miner's claim regarding the length of the miner's coal mine employment, the existence of pneumoconiosis arising out of coal mine employment, and the miner's smoking history. Decision and Order at 5-6. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that claimant[2] established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) (2000). Decision and Order at 6-9. Accordingly, benefits were awarded, commencing October 1995. Decision and Order at 9.

In response to employer's appeal, the Board initially held that the administrative law judge improperly applied the doctrine of collateral estoppel to Administrative Law Judge Donald W. Mosser's characterization of the miner's smoking history.[3] *See Brewer v. Arch on the North Fork, Inc.*, BRB No. 01-0198 BLA (Nov. 8, 2001)(unpub.). Additionally, the Board vacated the administrative law judge's 20 C.F.R. §718.205(c) (2000) finding because the administrative law judge improperly relied upon Judge Mosser's understanding of the miner's smoking history to discredit the opinions of Drs. Naeye and Powell regarding the cause of the miner's death. *Brewer*, *slip op.* at 4-5. The Board also instructed the administrative law judge, in reconsidering the medical opinion evidence on remand, to reconsider his determination that Dr. Powell's opinion is undermined by Judge Mosser's 20 C.F.R. §718.204(b) (2000) finding because "it is not

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[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant is Alice Brewer, widow of the miner, who filed her claim for benefits on March 11, 1996. Director's Exhibit 1. The miner, Columbus Brewer, filed two claims for benefits. The miner's first claim, filed on August 21, 1973, was finally denied on March 31, 1980. Director's Exhibits 27-378, 27-398. On July 12, 1994, Administrative Law Judge Donald W. Mosser awarded benefits on the miner's second claim, which was filed on May 11, 1987. Director's Exhibits 27-16, 27-703.

[3]The Board affirmed as unchallenged the administrative law judge's application of the doctrine of collateral estoppel to Judge Mosser's findings of the existence of pneumoconiosis and total respiratory disability. *See Brewer v. Arch on the North Fork, Inc.*, BRB No. 01-0198 BLA (Nov. 8, 2001)(unpub.).

apparent how Dr. Powell's opinion, regarding the cause of the miner's total disability, affected his opinion regarding the cause of the miner's death." *Brewer*, *slip op.* at 5. Furthermore, the Board instructed the administrative law judge to reconsider Dr. Fino's opinion because he erred in rejecting this physician's opinion on the ground that Dr. Fino exhibited bias against claimant. *Id.* Lastly, the Board determined that the administrative law judge must reconsider the weight he accorded to the opinions of Drs. Florence and McManis because he erred in mechanically according deference to their opinions based on Dr. Florence's status as treating physician and Dr. McManis' status as autopsy prosector. *See Brewer*, *slip op.* at 6.

On remand, the administrative law judge again found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Decision and Order on Remand at 8-11. Accordingly, benefits were awarded.

In its current appeal to the Board, employer asserts that the administrative law judge erred in his consideration of the miner's smoking history. Employer's Brief at 7-8. Employer also contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205(c). Employer's Brief at 8-19. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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

Employer asserts that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 718.205(c). Employer's Brief at 9-19. Prior to reconsidering the evidence to determine the cause of the miner's death, the administrative law judge addressed the evidence regarding the miner's smoking history. Decision and Order on Remand at 2-3. Employer additionally challenges the administrative law judge's finding regarding the miner's smoking history. Specifically, employer asserts that the administrative law judge failed to adequately explain his finding that the miner smoked a pack per day for twenty years. Employer's Brief at 7-8. Employer asserts that the administrative law judge's error is significant because the administrative law judge failed to consider the miner's smoking history when weighing the relevant medical opinion evidence on remand. Employer's Brief at 8. Employer's contentions have merit.

In its previous Decision and Order, the Board vacated the administrative law judge's application of the doctrine of collateral estoppel to Judge Mosser's finding of a

"minimal" smoking history.[4] *Brewer*, slip op. at 4-5. The Board held that because "the determination regarding the miner's use of cigarettes was not a critical or necessary part of the judgment in the miner's claim," the application of collateral estoppel to Judge Mosser's smoking history finding is precluded in the survivor's claim. *Brewer*, slip op. at 4. On remand, after considering all the relevant evidence regarding the miner's smoking history,[5] the administrative law judge determined the miner's smoking history to be one pack per day for twenty years, ending in 1986. Decision and Order on Remand at 3-4. The administrative law judge based this finding on the miner's testimony at a June 19, 1992 hearing before Administrative Law Judge J. Michael O'Neill which the administrative law judge found to be "forthright and credible," as it is recorded in the transcript. *Id*. at 2.

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[4]In his first Decision and Order, the administrative law judge referred to a specific smoking history of ten to twelve pack years. Decision and Order at 8.

[5]The relevant evidence regarding the miner's smoking history is as follows: At the 1992 hearing, the miner testified that he smoked about one pack of cigarettes per day for a total of twenty years, quitting completely in 1986. Director's Exhibit 27 at 596-597. When questioned as to why the physicians would have documented a thirty-six year smoking history, the miner responded that they might have confused his smoking history with his coal mine employment history. *Id.* On July 1, 1987, the miner responded to employer's interrogatory regarding his smoking history by stating that he always smoked less than a pack per day "over a period of approximately thirty-five (35) years" and was not smoking at the present time. Director's Exhibit 27 at 132. Drs. Lane, Myers, B.D. Wright, and Mettu effectively recorded a smoking history of thirty-six pack years, ending in 1986. Director's Exhibits 6, 27 at 65, 76, 78. In 1987, Dr. Broudy characterized the miner's smoking history as heavy, noting that the miner consumed a pack or more daily since he was a teenager (the miner was fifty-seven at the time of the examination) before cutting down to one-half a pack per day two or three years ago and quitting in 1986. Director's Exhibit 27 at 65. Dr. Williams reported that the miner smoked a pack a day for thirty years and quit in 1986. Director's Exhibit 27 at 73. However, in 1975 Dr. Williams recorded an eight year smoking history. Director's Exhibit 27 at 387. In his report dated May 14, 1987, Dr. Clarke stated that the miner smoked one-half a pack of cigarettes a day for "all his life." (The miner was fifty-seven at the time of the examination.) Director's Exhibit 27 at 68. Dr. Jackson noted a smoking history of fifty pack years, with the miner quitting at the age of fifty-six (in 1986). Director's Exhibit 27 at 283.

On remand, the administrative law judge, in determining the length of the miner's smoking history, stated that the miner's 1992 testimony is consistent with his answer to employer's interrogatory and that the physicians of record, excluding Dr. Jackson, consistently recorded the miner's smoking history as a pack per day for thirty-six years. Decision and Order on Remand at 3. Moreover, the administrative law judge found that the miner's consistent reporting "to the physicians that examined him bolsters his credibility." *Id.* The administrative law judge determined that the miner's smoking history "spans a period of 35 years" and that the miner "stopped smoking twice during those 35 years." *Id.* Accordingly, the administrative law judge concluded that the evidence establishes a smoking history of "one pack per day for 20 years." *Id.*

As employer asserts, the administrative law judge failed to adequately explain his finding of a twenty-pack year smoking history for the miner. First, it is unclear, without further elaboration from the administrative law judge, why he finds that the miner's 1992 testimony regarding his smoking history is consistent with his answer to employer's interrogatory. In 1992, the miner testified on cross-examination as follows:

> A. Well, I quit three times in my life. And when I was working deep mines, doing most of that track work and gathering coal, I could not smoke. You asked me about how long in years?
> Q. Yes, sir.
> A. Put it all together, it would probably be 20 years.
> Q. Okay. Do you know why the doctors would have documented 36 years?
> A. Not unless Dr. Broudy got it tangled up into 36 years of coal mining. I think that is where it originated from.

Director's Exhibit 27 at 597. On July 1, 1987, the miner responded to employer's interrogatory regarding his smoking history by stating that he always smoked less than a pack per day "over a period of approximately thirty-five (35) years" and was not smoking at the present time. Director's Exhibit 27 at 132. Therefore, contrary to the administrative law judge's finding, these two statements from the miner do not appear to be consistent.

Second, in rendering his finding, the administrative law judge stated that the miner's smoking history "spans a period of 35 years," that the miner "stopped smoking twice during those 35 years," and that the miner "finally stopped smoking in 1986." Decision and Order on Remand at 3. However, the administrative law judge failed to explain how this evidence or other evidence of record supports his finding of a twenty-pack year smoking history. Therefore, we vacate the administrative law judge's smoking history determination and remand this case for the administrative law judge to reconsider his conclusion, providing a detailed rationale of his finding on remand. *See Wojtowicz v.*

Duquesne Light Co., 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). We also instruct the administrative law judge to reconsider the credibility of the relevant physicians' opinions after rendering a finding regarding the miner's smoking history. *See Sellards v. Director, OWCP*, 17 BLR 1-77 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Addison v. Director, OWCP*, 11 BLR 1-68 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Our dissenting colleague states that a remand is unnecessary because the administrative law judge identified and discussed fully the evidence he relied on to support his smoking history finding. Contrary to the dissent's analysis, it is not explicit from the administrative law judge's decision how he determined that the miner has a twenty-pack year smoking history from the record evidence. While the miner testified that he attempted to stop smoking two times during the many years that he smoked, there is no information in the record discussing the length of the two unsuccessful attempts to quit. The dissent additionally points out that the administrative law judge noted that the physicians of record consistently recorded the miner's smoking history to be one pack per day for thirty-six years. Our colleague states that it is obvious that these physicians were unaware of the two times that the miner attempted to quit smoking and that it is not surprising that the physicians did not ask if the miner had attempted to quit or that the miner failed to offer this information. The level of analysis demonstrated by the dissent is far more detailed than the reasoning provided by the administrative law judge in his discussion of the miner's smoking history. The United States Court of Appeals for the Sixth Circuit has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case . . . ." *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). The regulations state that the Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301. The dissent's discussion here goes beyond our scope of review and attempts to "fill in the gaps" in the administrative law judge's reasoning in order to affirm his findings.

The dissent further states that even if the administrative law judge erred in finding a twenty-pack year smoking history, such a finding is harmless error because it would not affect the administrative law judge's weighing of the evidence in this case. In his Decision and Order on Remand, the administrative law judge stated that he relied on the opinions of Drs. McManis, Florence, and Robinette pursuant to 20 C.F.R. §718.205(c). *See* Decision and Order on Remand at 8-11. The dissent reasons that even though Dr. McManis noted that the miner was a light smoker, this fact "has no bearing on the doctor's specific findings." Our dissenting colleague explains that because "Dr. McManis was the prosector, his opinion was based strictly upon his clinical findings." While Dr. McManis is the prosector and his opinion is based upon the evidence presented

on autopsy, how Dr. McManis interprets what he sees on autopsy is based on what he knows of the miner's personal and medical histories. Therefore, contrary to the dissent's analysis, Dr. McManis' view of the miner's smoking history is not irrelevant to his pathological findings. Accordingly, the administrative law judge's reliance on Dr. McManis' opinion is significant because this physician noted in his autopsy report that the miner "denied history of tobacco use but was a 'light smoker' at one time" which is inconsistent with a finding of twenty pack years and is unsupportive of a conclusion that the administrative law judge's smoking history determination is harmless error.[6] Director's Exhibit 7.

Pursuant to Section 718.205(c), the administrative law judge reviewed the relevant opinions of Drs. McManis, Florence, Robinette, Powell, Naeye, and Fino on remand. Decision and Order on Remand at 8-11. Drs. McManis, Florence, and Robinette opined that pneumoconiosis contributed to the miner's death whereas Drs. Powell, Naeye, and Fino found that pneumoconiosis did not contribute to the miner's death. After reconsidering the specific weight to be accorded to these opinions in light of the Board's instructions, the administrative law judge concluded, "Claimant has proven by a preponderance of the evidence that pneumoconiosis hastened the death of [the] Miner." Decision and Order on Remand at 8.

Employer asserts that the administrative law judge erred in according greater weight to the opinions of Drs. McManis, Florence, and Robinette. Employer's Brief at 10-13. In particular, employer contends that the administrative law judge again erred by automatically crediting Dr. McManis' opinion, based on this physician's status as autopsy prosector, and Dr. Florence's opinion, based on this physician's status as the miner's treating physician. Employer's Brief at 11. Employer also asserts that the administrative law judge "offered no valid basis for favoring Dr. Robinette's opinion." *Id.*

We hold that employer's assertion, that the administrative law judge automatically credited the opinion of Dr. McManis based on his status as autopsy prosector and the

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[6]In considering the evidence at 20 C.F.R. §718.205(c), the administrative law judge stated that "[a]ll physicians considered similar . . . smoking histories, which were consistent with the findings of this decision." Decision and Order on Remand at 8. However, this statement is not accurate inasmuch as the administrative law judge's Section 718.205(c) finding is based, in part, on Dr. McManis' opinion and this physician noted in his autopsy report that the miner was a "light smoker" at one time, Director's Exhibit 7. *See* discussion, *supra*.

opinion of Dr. Florence based on his status as treating physician, is without merit. The administrative law judge found Dr. McManis' opinion to be "well-reasoned and well-documented," stating that Dr. McManis "provided pathological findings based upon gross and microscopic examinations of [the] Miner's lungs." Decision and Order on Remand at 9. In weighing the opinion of Dr. McManis against the contrary opinion of Dr. Powell, the administrative law judge assigned greater weight to Dr. McManis' opinion because Dr. Powell did not review the autopsy slides, Director's Exhibit 25 at 20. Decision and Order on Remand at 10. Therefore, contrary to employer's contention, the administrative law judge did not mechanically accord greater weight to Dr. McManis' opinion based on his status as autopsy prosector, but accorded his opinion greater weight because he reviewed the miner's lung tissue microscopically whereas the physicians who provided contrary opinions did not.[7] *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also did not defer to Dr. Florence's opinion solely because he treated the miner. Instead, the administrative law judge permissibly accorded greater weight to Dr. Florence's opinion based on his status as the miner's treating physician only after first finding his opinion to be well-reasoned and well-documented.[8] Decision and Order on Remand at 5, 9; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, BLR (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, BLR (6th Cir. 2003).

Furthermore, employer's assertion that the administrative law judge "offered no valid basis for favoring Dr. Robinette's opinion" is unfounded. The administrative law judge found Dr. Robinette's opinion to be well-reasoned and well-documented, stating that Dr. Robinette "provided pathological findings and observations" and "[h]is conclusion is rational and flows from his findings." Decision and Order on Remand at 11. Accordingly, we reject employer's contention inasmuch as the administrative law judge provided an adequate rationale for his finding that Dr. Robinette's opinion is well-reasoned and well-documented as required by the Administrative Procedure Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C.

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[7]Dr. Fino did not review the autopsy slides prior to rendering his opinion that pneumoconiosis played no role in the miner's death. Employer's Exhibits 1, 2.

[8]Specifically, the administrative law judge stated that Dr. Florence "was aware of [the Miner's] coal mine employment and smoking history. He provided clinical and pathological findings and observations in his report. His reasoning is supported by adequate data." Decision and Order on Remand at 9.

§919(d) and 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591; *see also Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47.

Employer additionally asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino,[9] Powell, and Naeye. Employer's Brief at 13-19. Employer first asserts that the administrative law judge, having found critical portions of the opinions of Drs. Fino and Naeye to be well-reasoned and well-documented, failed to offer valid reasons for discrediting the opinions of Drs. Fino and Naeye regarding the miner's death. Employer's Brief at 13-15. Contrary to employer's contention, the administrative law judge permissibly found Dr. Fino's opinion regarding the cause of the miner's death to be unreasoned and undocumented, stating that this physician's conclusions are not supported by clinical or pathological findings or adequate data. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47. Additionally, contrary to employer's statement, the administrative law judge did not discredit Dr. Naeye's opinion regarding the cause of the miner's death. Rather, the administrative law judge found Dr. Naeye's opinion to be "well-reasoned and well-documented" and "entitled to probative weight," but insufficient to establish that pneumoconiosis contributed to the miner's death "when balanced against the opinions of Drs. McManis, Florence, and Robinette." Decision and Order on Remand at 9, 11.

Employer next contends that the administrative law judge erred in discounting Dr. Powell's opinion as hostile to the Act or, alternatively, as lacking in probative value. Employer's Brief at 15-19. The administrative law judge found that Dr. Powell's opinion was hostile to the Act and entitled to no weight because this physician testified that simple coal workers' pneumoconiosis would never cause a respiratory or pulmonary impairment. Decision and Order on Remand at 9; Director's Exhibit 25 at 18-19. The issue on which Dr. Powell expressed a view that may be hostile to the Act, *i.e.*, the cause of the miner's total respiratory disability, is not the dispositive issue in this case. Therefore, the administrative law judge irrationally discredited Dr. Powell's opinion regarding the cause of the miner's death based on this physician's erroneous assumption that simple pneumoconiosis will never cause a respiratory impairment because such an inquiry is relevant at Section 718.204(c), not Section 718.205(c). 20 C.F.R.

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[9]Employer contends that the administrative law judge erroneously stated that Dr. Fino did not offer an opinion as to the cause of the miner's death. Employer's Brief at 13. Contrary to employer's assertion, the administrative law judge's statement is correct inasmuch as Dr. Fino found that coal workers' pneumoconiosis played no role in the miner's death, but did not offer an opinion as to what disease process *did* play a role. Employer's Exhibits 1, 2.

§§718.204(c), 718.205(c); *see also Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

The administrative law judge also discredited Dr. Powell's opinion because he found it to be "merely conclusory" and unsupported by "sound medical analysis" or "adequate data." Decision and Order on Remand at 10. In his earlier Decision and Order, the administrative law judge found "Dr. Powell's opinion merits weight because of his credentials and his review of the medical records and autopsy report,"[10] but accorded that opinion less weight based on this physician's reliance on an inaccurate smoking history. Decision and Order at 8. On remand, the administrative law judge found Dr. Powell's opinion to be entitled to "less probative weight" because it is unreasoned and undocumented. Decision and Order on Remand at 10. However, as employer asserts, the administrative law judge does not provide any rationale as to why his opinion regarding the adequacy of the documentation of Dr. Powell's opinion has changed. Accordingly, we vacate the administrative law judge's finding regarding Dr. Powell's opinion and remand this case for the administrative law judge to provide an adequate explanation for changing his opinion regarding the credibility of Dr. Powell's report on remand.[11] *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591.

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[10]Implicit in the administrative law judge's statement that "Dr. Powell's opinion merits weight because of . . . his review of the medical records and autopsy report," is a finding that Dr. Powell's opinion is documented. Decision and Order at 8.

[11]The dissent asserts, citing *Lane v. Union Carbide Corporation*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997), that there is no basis in law for our holding regarding Dr. Powell's opinion. The facts in *Lane* are distinguishable from the facts in this case. In *Lane*, the claimant was awarded benefits twice by an administrative law judge who subsequently retired. On appeal, the Board remanded the case again to the Office of Administrative Law Judges where a new administrative law judge was assigned and denied benefits. The claimant in *Lane* asserted that because of his two prior awards, "extraordinary justification is required for the [second] ALJ's denial of benefits on second remand . . . when he reversed, without explanation, the prior ALJ's findings." *Lane*, 105 F.3d at 174, 21 BLR at 2-48. The United States Court of Appeals for the Fourth Circuit stated that when the Board vacated the prior administrative law judge's findings and remanded this case for the second administrative law judge to reconsider the evidence, no assurances were given that this administrative law judge would again award benefits and the administrative law judge did not err when he reconsidered the weight of the relevant evidence on second remand. *Lane*, 105 F.3d at 174, 21 BLR at 2-48. It is significant that the change in reasoning in *Lane* involved two different administrative law judges whereas the change in the instant case involved the same administrative law judge.

Moreover, while an administrative law judge may discredit a medical opinion that he finds is not adequately supported by its underlying documentation, *Lucostic*, 8 BLR at 1-47, or is not well reasoned, *see Clark*, 12 BLR at 1-155, the administrative law judge, in finding the opinion of Dr. Powell to be unreasoned and undocumented on remand, appears to have impermissibly substituted his judgment for that of the physician,[12] *see Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see generally Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). Our dissenting colleague asserts that the only issue to be considered by the Board with regard to Dr. Powell's opinion is whether the administrative law judge's analysis in the decision under review is correct. As discussed above, the administrative law judge, in his Decision and Order on Remand erred in finding the opinion of Dr. Powell to be unreasoned and undocumented. Therefore, notwithstanding the issue of whether the administrative law judge was required to provide a rationale for changing his opinion regarding Dr. Powell's report, we instruct the administrative law judge to reconsider his discussion of this opinion.

[12] Specifically, the administrative law judge stated that Dr. Powell "provided no reasoning to support his opinion that Miner's restrictive disease was due to pneumoconiosis." Decision and Order on Remand at 10. At his deposition, Dr. Powell testified that the miner had a restrictive and obstructive component to his lung disease. Director's Exhibit 25 at 12. Dr. Powell testified that emphysema from smoking caused the obstructive lung disease in the miner. *Id.* at 13. Dr. Powell further stated that pneumonia would add a restrictive component to the miner's disease and testified why simple coal workers' pneumoconiosis would not cause a significant restrictive defect. *Id.* at 12. Therefore, Dr. Powell concluded that the miner's death was due to emphysema and pneumonia and not hastened, or contributed to, by coal workers' pneumoconiosis. *Id.* at 12-17; Director's Exhibits 7, 21.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination that this case must be remanded to the administrative law judge to provide a detailed rationale of his findings regarding the miner's smoking history and to explain why he changed his opinion regarding the credibility of Dr. Powell's report, between the time he issued the prior decision and the decision currently under review. I would affirm the administrative law judge's decision awarding benefits.

I believe that the administrative law judge has adequately discussed the miner's smoking history finding and, even if he had not, any error would be harmless because the discrepency between the administrative law judge's finding and employer's contention has no bearing on the evaluation of the evidence. Unfortunately, the majority has permitted employer to deceive it into believing that the miner's statements regarding his smoking history were materially inconsistent and because the administrative law judge relied upon claimant's smoking history, that his finding must be vacated. The administrative law judge determined:

> I find that Miner's smoking history spans a period of 35 years. I find that Miner stopped smoking twice during those 35 years. I find that Miner finally stopped smoking in 1986. I find that Miner's cumulative history amounts to one pack per day for 20 years.

2002 Decision and Order at 3.

The administrative law judge credited the miner's hearing testimony, which he found to be consistent with the miner's answer to employer's interrogatory. In that answer the miner had stated that he had "smoked over a period of approximately thirty-five (35) years," that he was not currently smoking, but when he had smoked, it was "always . . . less than a pack of cigarettes a day." Director's Exhibit 27 at 132. Employer explored the subject more deeply on cross-examination at the hearing:

> A. Well, I quit three times in my life. And when I was working deep mines, doing most of that track work and gathering coal, I could not smoke. You asked me about how long in years?
> Q. Yes, sir.
> A. Put it all together, it would probably be 20 years.
> Q. Okay. Do you know why the doctors would have documented 36 years?
> A. Not unless Dr. Broudy got it tangled up into 36 years of coal mining. I think that is where it originated from.

Director's Exhibit 27 at 597. The miner also stated that he had last quit smoking in 1986, and that when he had smoked, the number of cigarettes was in the "neighborhood" of a pack a day. Director's Exhibit 27 at 598. As the administrative law judge found, the miner's statements are entirely consistent: he had smoked over a period spanning approximately thirty-five (35) years, but during that time-frame there were two periods during which he did not smoke because he had decided to give it up and there was a period when he could not smoke, because he was "working deep mines . . . ." Director's Exhibit 27 at 597. When asked "how long in years" he had smoked, the miner subtracted the non-smoking periods from the approximately thirty-five years and then combined the remaining periods to determine he had a twenty-year smoking history: "Put it all together it would probably be 20 years." *Id.* Employer had ample opportunity to ask additional questions about the length of the non-smoking periods, but chose not to. As a result, there is nothing in the record to refute the miner's testimony and nothing for the administrative law judge to discuss more fully: when the miner deducted the non-smoking periods from the span of years over which he had smoked, the miner estimated a twenty-year smoking history, testimony which the administrative law judge determined "to be forthright and credible." 2002 Decision and Order at 2. This analysis is a precise summary of the administrative law judge's findings.

The administrative law judge also considered the fact that most of the doctors reported a thirty-six year smoking history which the administrative law judge found showed that the miner had been consistent in telling them when he had started and when he had finally stopped smoking, but, obviously, they were unaware of the extended

periods within that time-frame when the miner was not smoking.[13] It is not surprising that the doctors failed to ask whether there were significant periods when the miner was not smoking; nor is it surprising that the miner, who had a seventh grade education, failed to appreciate the relevance of this information and for that reason did not volunteer it.

As I have shown, the miner's hearing testimony is simply more detailed than his answer to employer's interrogatory; there is no inconsistency. At the hearing the miner made clear that there were periods during which he was not smoking before he finally quit and that he calculated the twenty-year smoking history by adding together those periods when he had been a smoker. The evidence provides abundant support for the administrative law judge's explicit findings:

> I find that Miner's smoking history spans a period of 35 years. I find that Miner stopped smoking twice during those thirty-five years. I find that Miner finally stopped smoking in 1986. I find that Miner's cumulative history amounts to one pack per day for 20 years.

2002 Decision and Order at 3.

The record reflects that the administrative law judge analyzed all the relevant evidence and credited the miner's "forthright and credible testimony" that he had smoked "one pack per day for 20 years." 2002 Decision and Order at 3. The majority's order of remand for the administrative law judge to identify the evidence he relied upon to support his smoking history finding is unnecessary since the administrative law judge has cited the specific evidence, the hearing testimony, and discussed it fully. 2002 Decision and Order at 2-3. It is well established that the administrative law judge's determination of a witness's credibility is entitled to deference. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218, 20 BLR 2-360, 2-374 (6th Cir. 1996). Furthermore, since the administrative law judge fully credited the miner's testimony, "[a]ny discrepancy in the evidence regarding [the subject of his testimony] was therefore implicitly resolved in his favor." *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-553 (6th Cir. 2002).

Thus, the record reflects that substantial evidence supports the administrative law judge's finding, "one pack per day for twenty years." 2002 Decision and Order at 3. But

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[13]Although the majority asserts that it is not obvious that the doctors were unaware of the significant periods when the miner had stopped smoking, I believe that is the only reasonable inference from the omission of this material fact from their reports. To believe otherwise would require belief in a conspiracy of lies.

even if the administrative law judge had erred in finding a twenty-year smoking history rather than a thirty-six year smoking history which employer relies upon as more consistent with the medical reports, the error would be harmless. Employer argues that the difference between the two smoking histories is significant because "it is clear that Drs. Naeye, Fino and Powell relied upon an accurate smoking history in rendering their opinions" and "[t]his weighs in favor of their conclusions that the miner's death was not hastened by pneumoconiosis . . . ." Brief for Employer at 8. The majority accepts employer's argument, acknowledging that the administrative law judge credited the opinions of three doctors, Drs. Florence, Robinette and McManis, one of whom, Dr. McManis, was misinformed about the miner's smoking history, *i.e.*, he was told that the miner had been a "light smoker." The majority recognizes that Dr. McManis was the autopsy prosector and that his opinion was based strictly upon his clinical findings. Nevertheless, the majority suggests that the doctor's interpretation of his clinical findings could have been influenced by the erroneous smoking history he was provided. That appears plausible until one looks at the doctor's specific, pathological findings. In the third diagnosis listed on the miner's autopsy report, Dr. McManis indicated the pathological findings supporting the diagnosis:

> Multiple bilateral carbonaceous pigmented fibrous nodules consistent with coal worker's [sic] pneumoconiosis.

Director's Exhibit 7 at 1. Dr. McManis later explained the significance of these clinical findings:

> Although the immediate cause of death was extensive bronchopneumonia with lobar pneumoconiosis of the right upper and middle lobes, his ability to recover from that would have been impaired by a pre-existing lung condition which is consistent with coal worker's [sic] pneumoconiosis. This condition (CWP) contributed to the emphysema in his lungs which this patient exhibited.

Director's Exhibit 22. It is pellucid that Dr. McManis's misapprehension of the miner's smoking history had no bearing on the doctor's specific findings supporting his diagnoses, including *inter alia*: "Throughout the lung there are scattered red perivascular and peribronchial deposits of black carbonaceous pigment in association with a well established fibrosis." Director's Exhibit 7 at 5. It is noteworthy that there was no dispute among the doctors on whether smoking contributed to the miner's lung disease. The only dispute was whether coal dust exposure contributed to the lung disease. Dr. McManis's findings definitively resolved that question.

In sum, the administrative law judge credited the opinions of three doctors, two of whom were aware of essentially the same smoking histories as employer's doctors and

one, whose view of the miner's smoking history was completely irrelevant to his pathological findings. Given this record, the only reasonable conclusion is that the administrative law judge's smoking history finding did not affect his weighing of the medical evidence. Hence, any error in his smoking history determination would be harmless and would not warrant remand of the case. *See Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995)(If the outcome of a remand is foreordained, we need not order one); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 558, 15 BLR 2-227, 2-231 (7th Cir. 1991).

The majority has determined that the instant case must also be remanded for the administrative law judge to explain why his opinion of Dr. Powell's report changed after he wrote his previous decision. In his prior decision the administrative law judge stated:

> Dr. Powell's opinion merits weight because of his credentials and his review of the medical records and autopsy report. However, I find that Dr. Powell's opinion that the miner's pneumoconiosis did not cause any pulmonary impairment or disability is contrary to Judge Mosser's finding, as affirmed by the Benefits Review Board and the Sixth Circuit.

2002 Decision and Order at 8. In the decision under review the administrative law judge stated in relevant part:

> Assuming *arguendo* that Dr. Powell's medical assumptions do not conflict with the Act, a further analysis of his opinions is warranted. Dr. Powell continuously asserted his opinion that Miner's death was not caused by, related to or brought about by pneumoconiosis. He initially opined that Miner died from respiratory failure, secondary to COPD, bullous emphysema with superimposed pneumonia. Then he opined that, since Miner only had simple CWP, that Miner's death was due to pulmonary emphysema and possibly heart disease. Dr. Powell testified at his deposition that Miner's death was caused by COPD and pneumonia. Dr. Powell did not review the autopsy slides. He had previously testified that CWP causes a restrictive disease, which allows physicians to use PFT values to determine if a person's impairment is a restrictive disease caused by CWP or an obstructive disease caused by cigarette smoking. Dr. Powell found Miner, based upon the PFTs contained in the record, to have suffered from an obstructive and a restrictive disease at the time of his death. Even though Dr. Powell testified that Miner suffered from simple CWP, and that CWP causes a restrictive disease, he attributed Miner's restrictive disease to pneumonia. He provided no reasoning to support

> his opinion that Miner's restrictive disease was due to pneumonia. Moreover, the only PFTs contained in the record were from 1975 and 1987. Miner was not diagnosed with pneumonia in 1975 or 1987. Dr. Powell's collective opinions exhibit inconsistencies and were based on a less extensive review of medical records than others. His first narrative opinion did not contain pathological observations or findings. It was little more than bare, conclusory language. In his second narrative opinion, Dr. Powell provided pathological observations to support his diagnosis of simple CWP. The remainder of his second opinion was, again, merely conclusory language. The conclusions Dr. Powell provided during deposition were frequently based on medical assumptions regarding simple CWP, rather than his findings and conclusions regarding Miner's specific symptoms. Dr. Powell's opinions do not exhibit sound medical analysis. Dr. Powell does not provide adequate data to support his conclusions. His opinions exhibit inconsistencies. Dr. Powell's opinions are not well-reasoned and well-documented. I find that Dr. Powell's opinions are entitled to less probative weight. In so doing, I note that I have considered Dr. Powell's credentials as a board certified pulmonary specialist. Additionally, since Dr. Powell did not review the autopsy slides, it is reasonable to assign greater weight to Dr. McManis' opinions over Dr. Powell's opinions. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985).

Decision and Order on Remand at 10. The record reveals that the administrative law judge's 2002 opinion was not a reversal of his earlier opinion: he had never found Dr. Powell's opinion to be reasoned and documented. In his 2000 decision the administrative law judge had offered reasons for discounting Dr. Powell's opinion, including its conflict with the weight of the medical evidence in the miner's claim that pneumoconiosis contributed to the miner's total disability, as found by the administrative law judge and affirmed by both the Board and the Sixth Circuit. In his 2002 decision the administrative law judge discounted Dr. Powell's opinion because it is not well-reasoned and documented, findings which he fully explained. Thus, there is no basis in fact for the majority's holding that the administrative law judge was required to explain the change in his findings regarding Dr. Powell's opinion.

Nor is there any basis in law for this holding. The Fourth Circuit expressly rejected a similar argument in *Lane v. Union Carbide Corporation*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997):

> When the BRB enters such a remand order, the ALJ may fully consider whether the claimant satisfied his or her burden of proving

> the element at issue. Claimant concedes that the BRB's decision returned the parties to the *status quo ante* the prior ALJ's decision, but he nonetheless argues, without citation to authority, that the ALJ had to explain his reason for a contrary finding on the second remand . . . . The ALJ did not err when he reconsidered the weight of the relevant evidence, pursuant to the BRB's order, on the second remand.

As I have shown, the administrative law judge in the case at bar did not "do[] an about face on remand," as employer asserted (Employer's Brief at 18), and even if he had, there is no legal obligation to explain a change in opinion, as the Fourth Circuit has made clear. The majority seeks to evade the force of this authority by pointing out that *Lane* involved two different administrative law judges. That is a distinction without a difference. The court's fundamental point is that a BRB remand order returns the parties to the *status quo ante* the prior decision. The relevant portions of the prior decision have been vacated.

The only issue is whether the administrative law judge's analysis in the decision under review is correct. *See Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 957, 22 BLR 2-46, 2-71 (6th Cir. 1999). Employer's only response to the administrative law judge's findings that Dr. Powell's opinion is not well-reasoned and documented is: "Dr. Powell in his report and deposition testimony gave his reasoning for his medical opinion." (Brief for Employer at 17). Employer does not even attempt to explain that reasoning or to provide a page citation where that reasoning could be found. Instead, employer is content to assert: "If Dr. Powell's opinion may be discounted as being 'conclusory', then so to [sic] must the opinions of Drs. McManis, Florence and Robinette." (Brief for Employer at 18). Although employer is unable to point to the reasoning or documentation supporting Dr. Powell's opinion, the majority asserts that in finding Dr. Powell's opinion unreasoned and undocumented the administrative law judge substituted his judgment for that of the doctor. In defense of that charge the majority cites Dr. Powell's deposition testimony in which he explained why the miner's restrictive impairment was due entirely to pneumonia and not coal workers' pneumoconiosis. While acknowledging that coal workers' pneumoconiosis may cause a restrictive impairment, he explained that the miner's restrictive impairment must have been due to pneumonia because simple pneumoconiosis plays no role in developing a respiratory condition (Director's Exhibit 25 at 10); simple pneumoconiosis will never cause a respiratory or pulmonary impairment (Director's Exhibit 25 at 17-18). Dr. Powell revealed that the premise of his opinion that the miner's death was not caused by pneumoconiosis is that simple pneumoconiosis never causes or contributes to a respiratory impairment. Because Dr. Powell foreclosed all possibility that simple pneumoconiosis can be totally disabling, the administrative law judge properly discredited his opinion on causation. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119,

10 BLR 2-69, 2-72 (6th Cir. 1987). Thus, review of the record does not support the majority's claim that Dr. Powell provided a credible, reasoned opinion.[14] On the contrary, the record reveals that the administrative law judge provided a reasonable and extensive critique of Dr. Powell's various statements and his equally various diagnoses. *See supra* and Decision and Order on Remand at 10. The errors which the majority purports to find in the administrative law judge's discussion of Dr. Powell's opinion do not exist in fact or in law.

Finally, I am mystified by the majority's assertion that the administrative law judge could not rationally discredit Dr. Powell's opinion on the issue of whether pneumoconiosis caused or contributed to death at 20 C.F.R. §718.205(c) based upon what the majority acknowledges, is "this physician's erroneous assumption that simple pneumoconiosis will never cause a respiratory impairment." The majority considers this erroneous assumption relevant only to the issue of whether pneumoconiosis is a substantially contributing cause of claimant's disability pursuant to 20 C.F.R. §718.204(c). The majority nowhere explains how if pneumoconiosis cannot cause a respiratory impairment, it could, nevertheless, cause or hasten death. It is the majority's criticism which defies logic. This was, I believe, one of several, rational, alternative reasons the administrative law judge gave for according less weight to Dr. Powell's opinion. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 843, 21 BLR 2-92, 2-100 (7th Cir. 1997).

In sum, the record does not support the majority's finding that the administrative law judge erred in determining the miner's smoking history and even if he had, the error would be harmless and therefore insufficient to justify remand of the case. *See Webb*, 49 F.3d at 249, 19 BLR at 2-133. The record also fails to support the majority's other allegation of error, that the administrative law judge reversed his opinion of Dr. Powell's report, and erroneously failed to explain the change: the administrative law judge discounted Dr. Powell's report in both decisions and even if he had reversed his opinion without explanation, he would have violated no legal obligation. *See Lane*, 105 F.3d at 174, 21 BLR at 2-48. Hence, remand of the case at bar is "futile (and costly)." *Newell v. Director, OWCP*, 933 F.3d 510, 512, 15 BLR 2-124, 2-127 (7th Cir. 1991). Review of the record reveals that remand of the case is entirely unwarranted for either further

[14] Another noteworthy statement in Dr. Powell's testimony is his blanket assertion: "There's no relationship between chronic obstructive lung disease and simple coal worker's [sic] pneumoconiosis." Director's Exhibit 25 at 15.

explanation of the administrative law judge's smoking history finding or explanation of the "change" in his opinion of Dr. Powell's reports. I would affirm the administrative law judge's decision awarding benefits.

REGINA C. McGRANERY
Administrative Appeals Judge