BRB No. 10-0271 BLA

VERNON G. THOMAS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 02/16/2011
	)	
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2007-BLA-5664) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[1] 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*)) (the Act).[2] Upon stipulation of the parties, the administrative law judge credited claimant with at least twenty-three years of qualifying coal mine employment, and adjudicated this claim, filed on June 7, 2006, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). After finding that the present claim was timely filed pursuant to 20 C.F.R. §725.308, the administrative law judge considered the entire record, and determined that the evidence was sufficient to establish the existence of legal pneumoconiosis, but not clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that the administrative law judge abused his discretion and deprived employer of due process in denying it the "ability to respond to claimant's last minute evidence with proof of its choosing," and in failing to find good cause for employer to obtain a third examination and testing of claimant. Employer also contends that the administrative law judge erred in his application of 20 C.F.R. §725.414, when he excluded Dr. Spitz's re-reading of the July 27, 2006 x-ray. On the merits, employer challenges the administrative law judge's analysis in finding the evidence sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging

[1] Claimant's initial claim was filed on August 3, 1993, and was administratively denied on January 13, 1994. Director's Exhibit 1. Claimant's second claim was filed on January 27, 1999, and was administratively denied on May 10, 1999. Director's Exhibit 2. The district director awarded benefits in the current claim, and employer requested a hearing. Director's Exhibits 45, 53.

[2] We accept employer's brief in support of its petition as part of the record before the Board. 20 C.F.R. §802.217.

affirmance of the administrative law judge's evidentiary rulings and asserting that the administrative law judge permissibly relied on the preamble to the revised regulations in weighing the record evidence. Employer has filed a reply brief, responding to both the Director and claimant, urging that the award of benefits be vacated and that the case remanded for further consideration.[3]

On April 6, 2010, the Board received employer's Motion to Remand this case for the opportunity to respond to changes in law resulting from the amendments to the Act. Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending on March 23, 2010, the effective date of the amendments. The Director has responded, urging denial of the motion, and claimant agrees, asserting that Section 4111(c)(4), 30 U.S.C. §921(c)(4), is relevant only if the Board does not affirm the administrative law judge's factual findings and the award of benefits.[4] The Director maintains that, in that event, the case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and, if so, to allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause. By Order dated May 6, 2010, the Board denied employer motion.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence was insufficient to establish clinical pneumoconiosis at 20 C.F.R. §§718.202(a), but sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[5] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Transcript at 38.

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

Turning first to the evidentiary issues, employer contends that it was deprived of due process when the administrative law judge denied employer's request to obtain a third pulmonary evaluation of claimant. In this regard, employer sought to have claimant re-examined in rebuttal to Dr. Forehand's medical report, submitted by claimant just prior to the twenty-day requirement imposed by 20 C.F.R. §725.456(b)(2).[6] Claimant's Exhibit 4. Employer maintains that 20 C.F.R. §725.414(a)(3)(i) limits only the amount of evidence that may be submitted, not the amount of evidence that a party may develop, and asserts that, pursuant to *North Am. Coal Co. v. Miller*, 870 F.2d 948, 950-51, 12 BLR 2-222 (3d Cir. 1989), and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*), it was not limited to a record review, but had the right to respond with a "contemporaneous examination, cross-examination, or both." Lastly, employer contends that, even if there were a limitation on the evidence it may obtain, it established good cause for exceeding it. Employer Brief at 8-11. Employer's arguments lack merit.

The administrative law judge admitted Dr. Forehand's medical opinion, dated September 19, 2008, into the record at the hearing, and specifically allowed employer additional time to respond. Hearing Transcript at 22; Claimant's Exhibit 4. Employer submitted Dr. Dahhan's November 6, 2008 opinion as rebuttal to Dr. Forehand's opinion. Employer's Exhibit 10. After the submission of preliminary briefs addressing evidentiary issues, the administrative law judge issued an Order denying employer's request for a new pulmonary evaluation, citing to *C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA (Oct. 31, 2007)(unpub.),[7] and to Section 725.414(a)(3)(i).[8] The

[6] Section 725.456(b)(2) provides, in part, that "any documentary material, including medical reports, which was not submitted to the district director, may be received into evidence subject to the objection of any party, if such evidence is sent to all parties at least 20 days before a hearing is held in connection with the claim." 20 C.F.R. §725.456(b)(2).

[7] In *C.L.H.* [*Hill*] *v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA (Oct. 31, 2007)(unpub.), the Board stated,

If the opposing party has already submitted medical reports by its two doctors when it receives the other party's medical report, the opposing party may have its doctors respond to the new report either by testifying at the hearing or by deposition, 20 C.F.R. §725.414(c), by preparing a new, comprehensive medical report (to be submitted in the place of the original report), or by preparing a supplemental medical report. *Hill*, slip op. at 5.

administrative law judge determined that, while employer was entitled to respond to Dr. Forehand's report, the regulations do not entitle employer to a third physical examination and testing of claimant. Administrative Law Judge Exhibit 5. Upon employer's request for reconsideration, the administrative law judge further found that the preamble to the revised regulations supported his determination that employer is entitled to no more than two pulmonary evaluations of claimant, absent a finding of good cause. *See* 65 Fed. Reg. 79,992 (Dec. 20, 2000);[9] Administrative Law Judge Exhibit 6. In determining that good cause did not exist in this case, the administrative law judge balanced employer's argument, that it was surprised by claimant's last-minute submission of evidence, with the fact that employer responded with a consultative report that constituted substantial evidence. The administrative law judge noted that:

> . . . this case was first set for hearing on November 8, 2007, [h]owever, employer requested a continuance in order to respond to claimant's submission of . . . a [medical] report, which was exchanged forty-one days prior to the November 2007 hearing. Employer now wants to obtain a third pulmonary evaluation because of the age of its medical evidence and because it was "surprised" by claimant. However, claimant has complied with the regulations both times and employer has been granted additional time to respond. . . and . . .opposing parties are able to have such a medical report reviewed along with its related objective evidence, that physicians

---

[8] Section 725.414(a)(3)(i) provides, in part, that the responsible operator designated pursuant to Section 725.410 shall be entitled to *obtain and submit*, in support of its affirmative case, no more than . . . two medical reports. 20 C.F.R. §725.414(a)(3)(i) (emphasis added).

[9] The preamble to the revised regulations states, in part, that:

> The Department recognizes that the testing may be difficult for some claimants. In the absence of good cause, the Department's regulations limit the maximum total number of tests to five in the vast majority of cases involving a designated responsible operator . . . and spread these tests out over time. The first such test will be performed in connection with the complete pulmonary evaluation shortly after the claimant files his application, §725.406. The last test will most likely be performed shortly before the formal hearing, as parties seek to complete the development of their evidence before the twentieth day prior to the hearing, as required by §725.456(b)(2).

65 Fed. Reg. at 79992 (2000).

> are able to offer an opinion as to whether the tests are valid and properly conducted, that they often provide consultative reports where they have never examined the claimant and only review the medical evidence of record, and that these reports constitute substantial evidence.

Administrative Law Judge Exhibit 6.

We reject employer's argument and conclude that the administrative law judge acted within his discretion in rendering his evidentiary ruling. Although the United States Court of Appeals for the Third Circuit, in *Miller*, recognized that due process requires that a party be provided with an opportunity for rebuttal where it is necessary to the full presentation of the case, and *Shedlock* requires that a party be given an opportunity to respond to evidence submitted immediately prior to the twenty-day requirement imposed by Section 725.456, employer's opportunity to respond herein does not include an automatic right to have claimant re-examined. *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990). A determination as to whether an additional examination is required rests within the sound discretion of the administrative law judge, based on his review of the evidentiary record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Insofar as the administrative law judge gave employer the opportunity to respond to the medical report of Dr. Forehand, by allowing employer to submit rebuttal evidence in the form of a supplemental report from Dr. Dahhan, the administrative law judge satisfied the requirements of *Shedlock*. The administrative law judge reasonably found that an additional complete pulmonary evaluation is not appropriate under the facts of this case, and we find no abuse of his discretion. Administrative Law Judge Exhibits 5, 6; *see Miller*, 870 F.2d at 951-51, 12 BLR at 2-228-29; *Owens*, 14 BLR at 1-47; *Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200.

We also find no merit to employer's contention that the administrative law judge erred in excluding Dr. Spitz's rebuttal x-ray reading of the Department of Labor x-ray dated July 27, 2006, as employer seeks to submit rebuttal evidence to claimant's rebuttal evidence, in contravention of 20 C.F.R. §725.414, which allows employer to submit rebuttal evidence for each piece of affirmative evidence submitted by claimant. *See* 20 C.F.R. §725.414(a)(3)(ii). Accordingly, we affirm the administrative law judge's evidentiary rulings.

On the merits of the case, employer asserts that the administrative law judge provided invalid reasons for crediting the opinions of Drs. Rasmussen and Forehand, over those of Drs. Dahhan and Fino, to find legal pneumoconiosis and disability causation established. Employer alleges that the administrative law judge impermissibly resolved the conflicts in the medical opinion evidence by taking judicial notice of the preamble to the amended regulations and treating it as a "fact" in this case, thereby violating

employer's right to due process by "ambushing it with non-record evidence without affording it notice and an opportunity to respond." Employer's Brief at 11-16.

We are not persuaded that the administrative law judge imposed an improper evaluative framework for his assessment of the conflicting medical opinion evidence. An administrative law judge, as part of his deliberative process, may examine whether medical rationales are consistent with the conclusions contained in medical literature and scientific studies relied upon by the Department of Labor in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79940-45 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009). Moreover, because the preamble to the amended regulations and the Department of Labor's comments are relevant to the appropriate interpretation of the 2001 amendments to the regulations, their use cannot come as a surprise to parties involved in the litigation of black lung claims under these regulations. The preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *See Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). We therefore reject employer's assertion that the administrative law judge's review of the medical opinions in light of the preamble constituted use of extra-record evidence, improper judicial notice of a fact, or a denial of due process.

We next address employer's challenge to the administrative law judge's analysis of the medical opinion evidence of record on the issue of legal pneumoconiosis under Section 718.202(a)(4). Employer asserts that Dr. Forehand's opinion is insufficient to establish legal pneumoconiosis, and argues that the administrative law judge failed to provide a valid reason for crediting the opinion of Dr. Rasmussen; mischaracterized the opinions of Drs. Fino and Dahhan; and subjected the opinions to inconsistent treatment. Employer's Brief at 11-22. Employer's arguments lack merit.

The record contains newly submitted medical reports from Drs. Alam,[10] Rasmussen, Forehand, Dahhan, and Fino. Dr. Rasmussen[11] performed the Department of

[10] The administrative law judge found Dr. Alam's opinion, diagnosing clinical and legal pneumoconiosis, to be insufficiently reasoned, and, therefore, accorded it little weight. Decision and Order at 21.

[11] Dr. Rasmussen opined that:

> cigarette smoke and coal dust exposure cause identical forms of emphysema including centriacinar, panacinar, bullous, etc., in a minority of

Labor examination and diagnosed chronic obstructive pulmonary disease and emphysema due to coal dust exposure and smoking. Director's Exhibit 16; Claimant's Exhibit 6. Dr. Forehand[12] diagnosed "cigarette-smokers' lung disease, coal workers' pneumoconiosis," and found that claimant has a totally disabling respiratory impairment arising from claimant's cigarette smoking and coal dust exposure. Claimant's Exhibits 4, 8. Dr. Fino[13] diagnosed emphysema due entirely to smoking, and determined that there was

---

> heavy smokers and a minority of heavily exposed coal miners, perhaps 15% of each group. The changes are the result of identical stimulation of lung scavenger cells, which in turn unleash a cascade of cellular and enzymatic processes, which basically dissolve lung tissue. These changes occur independent of radiographic findings and are indistinguishable.

Director's Exhibit 16.

Dr. Rasmussen further stated that coal dust exposure is a significant contributing cause of claimant's disabling lung disease and his clinical pneumoconiosis is a material contributing factor. He opined that all of claimant's impairment could be due to smoking or all of the impairment could be due to coal dust exposure, but that neither of those would be medically justifiable. Claimant's Exhibit 6.

[12] Dr. Forehand examined claimant on September 19, 2008, and diagnosed "cigarette smokers' lung disease, coal workers' pneumoconiosis, and coronary artery disease" as well as a totally disabling respiratory impairment due to smoking and twenty-seven years of underground coal mine employment. Dr. Forehand opined that the near normal diffusing capacity of the lung for carbon monoxide (DLCO) indicates that smoking is not the only cause of claimant's impairment, especially in light of the abnormal arterial blood gas study. Claimant's Exhibits 4, 8.

[13] Dr. Fino examined claimant on March 1, 2007. He diagnosed emphysema due entirely to smoking, but acknowledged that coal dust may cause emphysema independent of cigarette smoking. Dr. Fino stated that it is helpful to estimate the amount of clinical pneumoconiosis present in order to assess the contribution to the clinical emphysema from coal dust inhalation. He determined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis; that claimant's totally disabling respiratory impairment is due to smoking; and that claimant would be as disabled as he is today had he never stepped foot in the mines. Dr. Fino saw a very significant loss in the FEV1, but because claimant's treatment with bronchodilators was more consistent with a smoking-related condition, the amount of FEV1 loss that he could attribute to coal dust was clinically insignificant. Employer's Exhibits 1, 2, 3.

insufficient objective medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Employer's Exhibits 1, 2, 3. Dr. Dahhan opined that claimant does not have either medical or legal pneumoconiosis. He stated that claimant's severe respiratory impairment is caused by emphysema due to a lengthy smoking habit. Employer's Exhibits 4, 7, 10; Director's Exhibit 18.

In determining that the weight of the newly submitted medical opinions supported a finding of legal pneumoconiosis,[14] the administrative law judge accurately summarized the conflicting medical opinion evidence and determined that the opinions of Drs. Rasmussen and Forehand, diagnosing pneumoconiosis, were entitled to greater probative weight than the contrary opinions of Drs. Dahhan[15] and Fino. Decision and Order at 24. Based on his weighing of all of the newly submitted medical opinions, the administrative law judge found that claimant satisfied his burden to establish the existence of legal pneumoconiosis, and a change in an applicable condition of entitlement pursuant to Section 725.309. Decision and Order at 24-25. In considering the entirety of the record

[14] The administrative law judge found that the medical opinion evidence with regard to clinical pneumoconiosis was in agreement with his finding that the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis. The administrative law judge determined that Dr. Rasmussen's diagnosis of clinical pneumoconiosis was not sufficiently reasoned and that Dr. Forehand's opinion lacked clarity on this issue, while neither Dr. Dahhan nor Dr. Fino diagnosed coal workers' pneumoconiosis. Decision and Order at 20-24.

[15] Dr. Dahhan examined claimant on July 29, 2006, and found no clinical pneumoconiosis and a moderately severe obstructive impairment as a result of claimant's lengthy smoking habit, with no evidence that it was caused by, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. Dr. Dahhan stated that claimant has not had any exposure to coal dust since 1988, an absence sufficient to cause cessation of any industrial bronchitis that he may have had. Dr. Dahhan concluded that claimant's treatment by his physician with bronchodilators, indicated that the treating physician believes there is a pulmonary response, a finding inconsistent with the permanent adverse effects of coal dust. Dr. Dahhan further opined that cigarette smoke is known to stimulate the release of any enzyme from the leukocyte which causes centriacinar and panacinar emphysema; while coal dust exposure stimulates the production of reticular and fibroblasts, causing fibrosis and scarring. Director's Exhibit 18; Employer's Exhibits 4, 7, 10.

as to the merits of claimant's entitlement, the administrative law judge stated that, "given the latent and progressive nature of pneumoconiosis," he would give controlling weight to the more recent and probative medical evidence, as "claimant's 1993 claim is over fifteen years old and the medical evidence contained in the 1999 claim is over ten years old." Decision and Order at 15. Thus, the administrative law judge concluded that the weight of the evidence of record was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

With respect to Dr. Dahhan's opinion, the administrative law judge initially determined that Dr. Dahhan did not accurately consider claimant's work responsibilities, as the doctor indicated that claimant "worked six and a half years underground loading and [as] a miner operator . . . [t]he rest was outside driving a truck" and, as such, "did not sufficiently consider claimant's at least twenty-three years [of] exposure to coal dust, working all but the last six months underground at the face of the coal." Decision and Order at 22; Director's Exhibit 18. While the record reflects that Dr. Dahhan later acknowledged that claimant worked twenty-seven years underground, *see* Employer's Exhibit 7 at 12, the administrative law judge permissibly assigned less weight to Dr. Dahhan's opinion, that claimant does not have legal pneumoconiosis, because the doctor did not address, to the satisfaction of the administrative law judge, why partial reversibility with bronchodilators demonstrated that claimant's emphysema was caused entirely by smoking. Decision and Order at 23; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 355, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). In addition, the administrative law judge properly determined that Dr. Dahhan's conclusions, that any industrial bronchitis that claimant may have had would have ceased in the absence of continued coal dust exposure, and that emphysema caused by smoking can be distinguished from obstruction caused by coal dust exposure, were inconsistent with the Department of Labor's findings, discussed in the preamble to the revised regulations, that pneumoconiosis is a progressive disease and that smoking-related emphysema and coal dust-related emphysema occur through similar mechanisms. Decision and Order at 22-24; *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). The administrative law judge also acted within his discretion in finding that Dr. Fino's opinion, that claimant's emphysema was due entirely to smoking, was entitled to less weight because Dr. Fino "conflate[d] the concepts of legal and clinical pneumoconiosis" and failed to sufficiently explain his rationale.[16] Decision and Order at 24; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987).

[16] Dr. Fino opined that he did not see abnormalities on x-ray that would show an above average loss of FEV1 due to coal dust. He stated that he saw a markedly reduced

We reject employer's argument that the administrative law judge erred in according Dr. Rasmussen's opinion full probative weight, as the administrative law judge permissibly found that the opinion was consistent with the underlying premises of the regulations and the medical literature that "supports the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 20, *citing* 65 Fed. Reg. 79943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009). Additionally, the administrative law judge acted within his discretion in determining that Dr. Forehand's statement, that claimant has a totally and permanently disabling respiratory impairment that arose, in part, from smoking cigarettes and from working at the face as a driller and miner operator, was a diagnosis of legal pneumoconiosis. Decision and Order at 21; s*ee* 20 C.F.R. §718.201; *Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *Clark*, 12 BLR at 1-155. Because substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings that the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence of record established the existence of legal pneumoconiosis at Section 718.202(a).

Finally, we reject employer's assertion that the administrative law judge erred in finding that claimant established disability causation at Section 718.204(c). Employer's Brief at 23. To the extent that Drs. Dahhan and Fino did not diagnose legal pneumoconiosis, the administrative law judge properly found that their opinions were entitled to little weight on the issue of the cause of claimant's totally disabling respiratory impairment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). In contrast, the administrative law judge permissibly found that Drs. Rasmussen and Forehand provided reasoned and documented opinions demonstrating that claimant's total disability was due, at least in part, to coal dust exposure. Decision and Order at 27-29; *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1988). Consequently, we affirm the administrative law judge's finding that claimant established total disability due to legal pneumoconiosis pursuant to Section 718.204(c), as supported by substantial evidence, and affirm his award of benefits.[17]

---

diffusing capacity, which is very unusual in a condition resulting from coal dust exposure. Employer's Exhibit 3 at 13.

[17] As we have affirmed the administrative law judge's award of benefits, we need not remand this case for consideration under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge