BRB No. 09-0456 BLA

EDGAR MARTIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 03/16/2010
	)	
LIGON PREPARATION COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 Awarding Benefits on Third Remand of Request of Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Steven A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Third Remand of Request of Modification (98-BLA-1166) of Administrative Law Judge Alice M. Craft rendered on a 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 fourth time pursuant to claimant's request for modification on a claim that he originally filed on June 22, 1987. Director's Exhibits 1, 141. The Board, in its last decision, set forth this claim's full procedural history. *Martin v. Ligon Preparation Co.*, BRB No. 06-0454 BLA, slip op. at 1-5 and n.4 (Dec. 29, 2006)(unpub.).

At this point in the claim proceedings, it is settled that claimant has demonstrated a change in conditions under 20 C.F.R. §725.310 (2000)[2] by establishing, with new evidence, that he is totally disabled by a respiratory or pulmonary impairment. [2006] *Martin*, slip op. at 5-7; *Martin v. Ligon Preparation Co.*, BRB No. 00-0959 BLA slip op. at 7 (Aug. 30, 2001)(unpub.). Thus, his claim is being considered on its merits.

In a Decision and Order on Remand issued on September 27, 2002, Administrative Law Judge Daniel J. Roketenetz denied benefits because he found that claimant had not established the existence of pneumoconiosis based on the medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *Martin v. Ligon Preparation Co.*, BRB No. 03-0147 BLA (Oct. 28, 2003)(unpub.).

Subsequently, upon review of claimant's appeal, the United States Court of Appeals for the Sixth Circuit[3] held that substantial evidence did not support Judge Roketenetz's reasons for crediting the opinions of Drs. Broudy and Fino, that claimant

[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 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] Although Section 725.310 has been revised, those revisions apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

[3] Because claimant's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

does not have pneumoconiosis, over the opinion of Dr. Rasmussen, diagnosing him with pneumoconiosis.[4] *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005). Accordingly, the court remanded the case for further consideration by Judge Roketenetz.

In a Decision and Order on Remand issued on February 16, 2006, Judge Roketenetz again found that the medical opinion evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and he denied benefits. Pursuant to claimant's appeal, the Board held that substantial evidence did not support Judge Roketenetz's decision, because he disregarded the Sixth Circuit's opinion when he found that: (1) Dr. Rasmussen's diagnoses of clinical and legal pneumoconiosis were unreasoned diagnoses that were based solely on an x-ray and coal dust exposure history; (2) that Dr. Fino's opinion was not undermined by Dr. Rasmussen's exercise blood gas study results despite Dr. Fino's failure to consider those results; and (3) that Dr. Fino's qualifications are superior to those of Dr. Rasmussen. [2006] *Martin*, slip op. at 7-11 and n. 13. Accordingly, the Board remanded the case to the Office of Administrative Law Judges for further consideration.[5] *Id*. at 11.

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[4] The United States Court of Appeals for the Sixth Circuit held that Dr. Fino's opinion was improperly accorded determinative weight based upon the physician's qualifications, and because Dr. Fino's report was based on extensive documentation. The court concluded that Dr. Fino's credentials were not necessarily superior to those of Dr. Rasmussen, and that Dr. Fino's opinion lacked any discussion of Dr. Rasmussen's exercise blood gas study, which reflected the type of impairment that the physicians agreed would be indicative of pneumoconiosis. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005). Moreover, the court held that Dr. Broudy's opinion was irrationally accorded more weight than Dr. Rasmussen's opinion, when Dr. Broudy's opinion was found to contain little explanation, and Dr. Rasmussen's opinion was found to be well-reasoned. *Martin*, 400 F.3d at 307, 23 BLR at 2-285-86. The court further held that, contrary to the Board's conclusion that Dr. Rasmussen diagnosed claimant with clinical pneumoconiosis only, "Dr. Rasmussen's report establishes that Dr. Rasmussen in fact diagnosed Martin with legal pneumoconiosis." *Martin*, 400 F.3d at 306, 23 BLR at 2-284.

[5] In remanding the case, the Board noted that Judge Roketenetz was no longer with the Office of Administrative Law Judges. *Martin v. Ligon Preparation Co.*, BRB No. 06-0454 BLA, slip op. at 11 n.14 (Dec. 29, 2006)(unpub.). Subsequently, the Board summarily denied employer's motion for reconsideration *en banc*. *Martin v. Ligon Preparation Co.*, BRB No. 06-0454 BLA (Feb. 29, 2008)(unpub. Order on Reconsideration *En Banc*).

On remand, because Judge Roketenetz was no longer with the Office of Administrative Law Judges, the case was reassigned, without objection, to Administrative Law Judge Alice M. Craft (the administrative law judge). The administrative law judge reconsidered the x-ray and medical opinion evidence, and found that while the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the medical opinion evidence established the existence of both clinical and legal pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant's clinical pneumoconiosis arose out of his sixteen years of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge further found that claimant established that his total disability is due to clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a)(4), and total respiratory disability pursuant to Section 718.204(b)(2).[7] Employer also challenges the administrative law judge's finding that claimant established total disability due to clinical and legal pneumoconiosis pursuant to Section 718.204(c). Claimant responds in support of the administrative law judge's award. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief, but in a footnote to his letter, the Director argues that, contrary to employer's contention, the administrative law judge properly considered the preamble to the revised regulations when she evaluated the medical opinions pursuant to Section 718.202(a)(4). Employer filed a reply brief, reiterating its contentions.

[6] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] The Board accepts employer's petition for review and brief although it was filed one day out of time. 20 C.F.R. §§802.211, 802.217(e).

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Rasmussen, Sundaram, Wright, Broudy, Fino, Vuskovich, Chandler, and Sutherland.[8] Dr. Rasmussen diagnosed coal workers' pneumoconiosis arising out of coal mine employment and attributed claimant's disabling pulmonary impairment to smoking, possible asthma, and coal dust exposure. Claimant's Exhibit 1. Dr. Wright diagnosed claimant with chronic bronchitis due to both his smoking and coal dust exposure. Director's Exhibit 49. Dr. Sundaram diagnosed chronic obstructive pulmonary disease (COPD), due, in part, to coal dust exposure. Director's Exhibit 61 at 18; *see also* Director's Exhibits 49, 74, 75, 77, 141. Dr. Broudy opined that claimant does not have coal workers' pneumoconiosis but suffers from chronic bronchitis that is due solely to smoking. Dr. Broudy excluded coal dust as a cause by noting that claimant quit his coal mine employment five years before his first evaluation with Dr. Broudy. Employer's Exhibit 11 at 15-16, 19. Dr. Fino opined that claimant's mild obstruction is due to smoking, and not coal dust exposure. Director's Exhibit 101; Employer's Exhibits 9, 12, 14. Drs. Vuskovich, Chandler, and Sutherland related claimant's pulmonary problems to smoking. Director's Exhibits 19, 92, 105.

In weighing the medical opinions, the administrative law judge accorded the greatest weight to Dr. Rasmussen's opinion, based on his credentials as a Board-certified internist with extensive experience in treating coal workers' pneumoconiosis, and because Dr. Rasmussen performed the most recent examination and testing, and thus, his

[8] The administrative law judge considered thirteen medical opinions in all. In addition to the eight medical opinions mentioned above, the administrative law judge considered, and discounted, the opinions of Drs. Potter, Martin, Leslie, Anderson, and Dahhan. Because the administrative law judge's treatment of these remaining medical opinions is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

opinion most accurately reflected claimant's current condition. The administrative law judge further found that Dr. Rasmussen's opinion was well-documented and well-reasoned. Additionally, the administrative law judge found that Dr. Rasmussen's opinion was supported by the opinions of Drs. Sundaram and Wright, and that all three opinions were better supported by their objective evidence, and the overall weight of the medical evidence. By contrast, the administrative law judge gave less weight to the opinions of Drs. Broudy and Vuskovich, because the physicians' reasoning was inconsistent with the underlying premise of the regulations that pneumoconiosis may be a progressive disease. The administrative law judge further discounted Dr. Broudy's opinion, because Dr. Broudy did not administer an exercise blood gas study or review Dr. Rasmussen's exercise blood gas study, even though Dr. Broudy acknowledged that an exercise blood gas study is used to detect interstitial disease. Additionally, the administrative law judge gave little weight to Dr. Fino's opinion because Dr. Fino did not address Dr. Rasmussen's most recent exercise blood gas study, which detected a drop in claimant's blood oxygenation. Finally, the administrative law judge discounted the opinions of Drs. Chandler and Sutherland because they were unexplained.

Employer first contends that the administrative law judge erred in finding that the opinions of Drs. Rasmussen, Sundaram, and Wright were reasoned opinions diagnosing clinical and legal pneumoconiosis because, employer argues, the doctors diagnosed clinical pneumoconiosis exclusively by x-ray. We disagree. The administrative law judge found that Drs. Rasmussen, Sundaram, and Wright all diagnosed both clinical and legal pneumoconiosis. The administrative law judge found that although these doctors based their diagnoses, in part, on a positive x-ray, which was undermined by her finding that pneumoconiosis was not established by the x-ray evidence, the doctors relied on other factors apart from an x-ray to support their opinions.[9]

In this case, the Sixth Circuit court held that Dr. Rasmussen's opinion diagnosed claimant with legal pneumoconiosis, because the opinion is based on other evidence, including a physical examination, diffusing capacity test, blood gas study, and claimant's coal mine employment and smoking histories. *Martin*, 400 F.3d at 306, 23 BLR at 2-284-85. The court's holding constitutes the law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1991). For this reason, in the Board's last decision, we held that Judge Roketenetz, on remand, "erred in finding that Dr. Rasmussen's diagnoses of clinical and legal pneumoconiosis are based solely on an x-ray and coal dust

[9] The administrative law judge found that Dr. Rasmussen relied on objective testing, including a qualifying exercise blood gas study and reduced diffusing capacity, to support his opinion of pneumoconiosis. The administrative law judge found that Dr. Sundaram's opinion was also based on other objective testing and clinical findings, and that Dr. Wright's opinion is supported by the evidence available to him.

exposure history." [2006] *Martin*, slip op. at 9; *Brinkley*, 14 BLR at 1-150-51. Employer has shown no basis for an exception to the law of the case doctrine. Further, the opinions of Drs. Sundaram and Wright do not constitute mere restatements of x-rays, because the record reflects that they are based on other factors, beyond a positive x-ray reading.[10] Thus, employer's contention that the administrative law judge was required to discount the opinions of Drs. Rasmussen, Sundaram, and Wright, because they were mere restatement of x-rays, and diagnoses of clinical but not legal pneumoconiosis, lacks merit and is rejected. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000).

Employer also contends that the administrative law judge erred by requiring employer's doctors to explain why coal dust exposure was not a factor in claimant's respiratory impairment. In weighing the opinions of Drs. Broudy, Vuskovich, Chandler, and Sutherland, the administrative law judge found that the physicians did not adequately explain why they eliminated coal dust exposure as a cause of claimant's pulmonary impairment.

Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Broudy and Vuskovich, because the doctors' reasoning suggested that coal dust-related disease cannot progress after the cessation of coal mine employment.[11] *See Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638-39, --- BLR --- (6th Cir. 2009); 20 C.F.R. §718.201(c). With respect to the opinions of Drs. Chandler and Sutherland, the administrative law judge reasonably found that the doctors did not explain their opinions that claimant's chronic bronchitis is due to smoking and not

[10] Dr. Sundaram based his opinion on claimant's coal mine employment and smoking histories, as well as a physical examination. Director's Exhibits 49, 61, 74, 75, 77, 141. Dr. Wright based his opinion on claimant's coal mine employment and smoking histories, as well as a pulmonary function study indicating a moderate obstructive ventilatory impairment and a blood gas study indicating slight hypercapnia at rest. Director's Exhibit 49.

[11] Dr. Broudy stated that claimant's chronic bronchitis was not due to coal dust exposure because claimant quit his coal mine employment five years prior to his first evaluation with Dr. Broudy. Employer's Exhibit 11 at 19. Dr. Vuskovich stated that, "[s]ince [claimant] quit mining in July of 1982, it would be very unlikely any decrease in pulmonary function would be related to his occupation in the coal industry." Director's Exhibit 92.

coal dust exposure.[12] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Director's Exhibits 19, 105.

Employer further contends that the administrative law judge erred in discounting Dr. Fino's opinion because the doctor did not consider the results of Dr. Rasmussen's exercise blood gas study. Dr. Fino reviewed Dr. Rasmussen's most recent evaluation, and concluded that it showed mild obstruction and moderate resting hypoxia consistent with a smoking-induced lung condition. Employer's Exhibit 14. Dr. Fino set out the resting blood gas study of Dr. Rasmussen that he reviewed, but not the exercise blood gas study.[13] Employer's Exhibit 14 at 2-3, 6-7. The administrative law judge discounted Dr. Fino's opinion because he failed to discuss Dr. Rasmussen's exercise blood gas study, after acknowledging that a drop in PO2 with exercise indicates impairment.

Contrary to employer's contention, the administrative law judge permissibly discounted Dr. Fino's opinion. As the Board noted in its last decision, the Sixth Circuit court, in this case, implied that it is "irrational for an administrative law judge to credit a doctor's diagnosis [that pneumoconiosis does not exist] when that doctor is unaware of [certain] test results, and has nothing comparable to rely upon." [2006] *Martin*, slip op. at 10; *see Martin*, 400 F.3d at 307, 23 BLR at 2-287. We also note that, contrary to employer's assertion, it is clear that Dr. Fino did not consider the results of Dr. Rasmussen's exercise blood gas study:

> Dr. Fino did not review all of Dr. Rasmussen's studies. Dr. Fino's report, dated March 30, 1999, lists the medical evidence he considered while reviewing [claimant's] medical records. The report includes a reference to the resting blood-gas results from Dr. Rasmussen, but not to the exercise blood-gas results.

Martin, 400 F.3d at 307, 23 BLR at 2-286. Consequently, we reject employer's allegation of error in the administrative law judge's analysis of Dr. Fino's opinion, and

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[12] Dr. Chandler stated, without elaboration, that claimant has "chronic bronchitis as a result of his prolonged and heavy cigarette smoking." Director's Exhibit 105. Dr. Sutherland diagnosed claimant with occupational exposure to coal dust, chronic bronchitis, and chronic obstructive pulmonary disease (COPD), and checked a "no" box to indicate that the diagnoses were not related to coal dust exposure. Director's Exhibit 19.

[13] Dr. Rasmussen performed a resting and exercise blood gas study, and reported that these tests showed minimal to moderate hypoxia at rest, and moderate hypoxia on exercise. Claimant's Exhibit 1 at 3.

we affirm the administrative law judge's finding that claimant established the existence of clinical and legal pneumoconiosis by medical opinion evidence pursuant to Section 718.202(a)(4).[14] *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121.

Pursuant to Section 718.204(b)(2)(ii), the administrative law judge considered twelve blood gas studies. Of the twelve blood gas studies, only the most recent January 22, 1999 resting and exercise blood gas studies, conducted by Dr. Rasmussen, are qualifying.[15] Director's Exhibits 17, 20, 48, 49, 65, 71, 82, 92, 103; Employer's Exhibits 1, 11; Claimant's Exhibit 1. In weighing the blood gas studies, the administrative law judge focused on the three blood gas studies that measured both resting and exercise values.[16] The administrative law judge relied on Dr. Rasmussen's qualifying resting and exercise blood gas studies, as the most probative of claimant's current condition.

[14] In affirming the administrative law judge's finding that clinical and legal pneumoconiosis were established, we reject employer's argument that the administrative law judge erred in referring to the preamble to the revised regulations for guidance in assessing the reasoning of the medical opinions. Decision and Order at 33-34. The administrative law judge, as the trier-of-fact, has the discretion to determine whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor (DOL) when it revised the definition of pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. Nov. 29, 2007)(unpub.); *J.O.* [*Obush*] *v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009). In this case, the administrative law judge noted accurately that DOL, in the preamble to the revised regulations, recognized that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis, and noted further that, it remains claimant's burden to establish that his obstructive lung disease arose out of coal mine employment. Decision and Order at 33-34, *citing* 65 Fed. Reg. 79938-43 (Dec. 20, 2000). The administrative law judge did not err in stating that she would bear those principles in mind as she considered the conflicting medical opinions. *See Obush*, slip op. at 8-9.

[15] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values listed in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[16] In addition to Dr. Rasmussen's 1999 blood gas study, the record contains two resting and exercise blood gas studies, performed in 1987 and 1990. These studies yielded non-qualifying values. Director's Exhibits 20, 71.

Employer contends that the administrative law judge erred in basing her finding on Dr. Rasmussen's January 1999 qualifying blood gas study, when a blood gas study taken four months earlier did not qualify. Employer's Brief at 24. Employer's contention lacks merit. The administrative law judge recognized that Dr. Broudy's September 4, 1998 blood gas study, which was taken at rest only, was non-qualifying. Decision and Order at 15, 40. However, the administrative law judge permissibly focused on the blood gas studies that included exercise tests to detect whether there was an impairment in claimant's blood oxygenation. *See Martin*, 400 F.3d at 307, 23 BLR at 2-286; *see also* 20 C.F.R. §718.105(b)(2000). The January 1999 blood gas study was qualifying, both at rest and with exercise. Claimant's Exhibit 1. The administrative law judge reasonably found that this most recent test, which reflected a drop in claimant's PO_2 level with exercise, was the most reflective of claimant's respiratory condition. *See Martin*, 400 F.3d at 307, 23 BLR at 2-286. Thus, the administrative law judge permissibly weighed the blood gas study evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); 20 C.F.R. §718.105(b)(2000). We therefore affirm the administrative law judge's finding that the blood gas study evidence establishes total disability pursuant to Section 718.204(b)(2)(ii).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the most recent opinions of Drs. Rasmussen, Broudy, and Fino were the most probative of claimant's current condition. Dr. Rasmussen opined that claimant has a moderately severe loss of respiratory function that renders him unable to perform his usual coal mine employment. Claimant's Exhibit 1. Dr. Broudy stated that claimant retains the respiratory capacity to perform his usual coal mine employment. Employer's Exhibits 10; 11 at 16. Dr. Fino stated that claimant has a minimal respiratory impairment that does not prevent him from returning to his usual coal mine employment. Employer's Exhibits 9; 12 at 15. The administrative law judge gave the greatest weight to Dr. Rasmussen's opinion, because the doctor examined and tested claimant most recently, and because his opinion was better supported by the objective evidence. The administrative law judge found that Dr. Broudy's opinion was flawed, because the doctor did not consider Dr. Rasmussen's most recent testing. The administrative law judge discounted Dr. Fino's opinion, because he had not considered the results of Dr. Rasmussen's exercise blood gas study and reduced diffusing capacity.

Employer contends that the administrative law judge erred in discounting Dr. Fino's opinion. Contrary to employer's contention, the administrative law judge rationally discounted Dr. Fino's opinion on total disability, because Dr. Fino had not considered the results of Dr. Rasmussen's exercise blood gas study. *See Martin*, 400 F.3d at 307, 23 BLR at 2-287; [2006] *Martin*, slip op. at 10.

The administrative law judge then weighed together all of the contrary, probative evidence to determine that claimant established total respiratory disability pursuant to Section 718.204(b)(2). The administrative law judge found that Dr. Rasmussen's opinion, together with the qualifying blood gas study evidence, established total respiratory disability.[17] In the course of making this finding, the administrative law judge additionally stated, "Moreover, I find that the qualifying objective tests support the conclusion that the Claimant was disabled without regard to the exertion required by his job as a coal truck driver." Decision and Order at 41.

Employer focuses on the above statement by the administrative law judge, and contends that the administrative law judge erred in failing to determine whether claimant is totally disabled from performing the exertional requirements of his usual coal mine employment. Employer's argument misconstrues the administrative law judge's finding. The administrative law judge based her total disability finding on Dr. Rasmussen's opinion, that claimant's moderately severe loss of respiratory function renders him unable to perform his usual coal mine employment as a coal truck driver, which required heavy manual labor. Claimant's Exhibit 1 at 2, 3. Thus, the administrative law judge took into account the exertional requirements of claimant's usual coal mine employment in finding that total disability was established based on Dr. Rasmussen's opinion, together with the qualifying resting and exercise blood gas studies that the doctor performed. *See Cornett*, 227 F.3d at 577-78, 22 BLR at 2-123-24. The administrative law judge's finding that claimant established total respiratory disability based on Dr. Rasmussen's opinion and the doctor's qualifying blood gas studies is supported by substantial evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). Consequently, we affirm the administrative law judge's finding that claimant established total respiratory disability when all of the contrary probative evidence was weighed together, pursuant to Section 718.204(b)(2).

Pursuant to Section 718.204(c), the administrative law judge found that claimant established that his total disability is due to clinical and legal pneumoconiosis, based on Dr. Rasmussen's opinion. The administrative law judge discounted the opinions of Drs. Broudy and Fino because the doctors had not diagnosed claimant with either clinical or legal pneumoconiosis, contrary to the administrative law judge's finding.

Employer contends that the administrative law judge erred in discounting the opinions of Drs. Broudy and Fino. We disagree. The administrative law judge

[17] The administrative law judge determined that, although the pulmonary function studies of record did not meet the qualifying values for total disability, they did "not contradict the blood gas studies, as they measure a different aspect of lung function." Decision and Order at 41.

permissibly discounted the disability causation opinions of Drs. Broudy and Fino, because the physicians did not diagnose claimant with pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Employer also contends that the administrative law judge failed to adequately analyze the reasoning of Dr. Rasmussen's disability causation opinion. Dr. Rasmussen opined that coal mine dust exposure is a "major contributing factor" to claimant's totally disabling respiratory impairment. Claimant's Exhibit 1 at 3. Given the administrative law judge's reasons to credit Dr. Rasmussen's opinion, as well-reasoned, on the existence of pneumoconiosis and total disability, the administrative law judge reasonably relied on Dr. Rasmussen's opinion to find disability causation established. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). We, therefore, affirm the administrative law judge's finding that claimant established that his total disability is due to clinical and legal pneumoconiosis pursuant to Section 718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a), total respiratory disability pursuant to Section 718.204(b), and total disability due to clinical and legal pneumoconiosis pursuant to Section 718.204(c), we affirm the administrative law judge's award of benefits.

Finally, we address claimant's counsel's fee petition for work performed in the three prior appeals to the Board. On March 17, 2009, claimant's counsel filed a fee petition with the Board requesting a total fee of $11,306.25, representing 21.5 hours of attorney services at an hourly rate of $175 in BRB No. 00-0959 BLA, 13.25 hours of attorney services at an hourly rate of $200 in BRB No. 03-0147 BLA, and 21.75 hours of attorney services at an hourly rate of $225 in BRB No. 06-0454 BLA. No objection to the fee petition was filed. Upon review of the fee petition, the Board finds the requested fee to be reasonable in light of the services performed and approves a fee of $11,306.25, to be paid directly to claimant's counsel by employer. *See B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 666-67, 24 BLR 2-106, 2-126-27 (6th Cir. 2008); 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Third Remand of Request for Modification is affirmed, and claimant's counsel is awarded a fee of $11,306.25, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge