BRB No. 10-0123 BLA

DAVID RUFUS ASHLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 10/29/2010
	)	
Employer-Petitioner	)	
	)	
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 Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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 Awarding Benefits on Modification (07-BLA-5403) of Administrative Law Judge Alice M. Craft on a claim[1] filed pursuant to the

[1] Claimant, David Rufus Ashley, filed his application for benefits on April 6, 2001. Director's Exhibit 2.

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] By Decision and Order issued on October 28, 2004, Administrative Law Judge Jeffrey Tureck adjudicated this claim pursuant to 20 C.F.R. Part 718, and credited claimant with nineteen years of qualifying coal mine employment. Judge Tureck found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, benefits were denied. On October 20, 2005, claimant filed a petition for modification, which the district director denied on May 17, 2006. Director's Exhibits 42, 62. Subsequently, claimant requested reconsideration on May 26, 2006, which the district director denied on November 2, 2006. Director's Exhibits 63, 67. Claimant then requested a hearing, and the case was assigned to Administrative Law Judge Alice M. Craft (the administrative law judge), who conducted a formal hearing on May 1, 2008.

In her adjudication of claimant's petition for modification, the administrative law judge credited the parties' stipulation, from the prior proceedings before Judge Tureck, that claimant worked in qualifying coal mine employment for nineteen years. The administrative law judge considered the new evidence submitted in support of modification, in conjunction with the earlier evidence, and found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge concluded that modification was appropriate pursuant to 20 C.F.R. §725.310, based on a mistake in Judge Tureck's prior determination of fact that claimant did not have pneumoconiosis. Consequently, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the weight of the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203(b), and disability causation pursuant to Section 718.204(c). Employer also contends that the administrative law judge erred in applying an incorrect standard for the adjudication of claimant's modification request pursuant to Section 725.310. Claimant, who is without the assistance of counsel, has not filed a response brief in this appeal. The

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's award of benefits.[3]

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.[4] 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits, based upon either a change in conditions or a mistake in a determination of fact.

Relevant to Section 725.310, employer argues that the correct standard of review requires the administrative law judge to first consider only the new evidence submitted in support of modification in order to determine whether claimant has satisfied the threshold requirement of establishing a change in conditions or a mistake in a determination of fact. As the administrative law judge conducted a *de novo* review and analysis of all of the evidence of record together, rather than initially limiting her review of the evidence solely to the newly submitted medical opinions of Drs. Cohen, Boersma and Jarboe, employer maintains that the administrative law judge impermissibly retried this case. Employer's Brief at 34-35. Employer's argument lacks merit.

Contrary to employer's assertion, the administrative law judge did not err by declining to limit her initial review of the evidence to the medical opinions submitted on modification. Rather, the administrative law judge properly acknowledged that a mistake in a determination of fact does not require new evidence, but may be demonstrated by "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." Decision and Order on Modification at 3, *citing O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Further, because Section 725.310

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established nineteen years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order on Modification at 7, 35-36.

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

authorizes "an administrative law judge to conduct a *de novo* review of factual determinations on a modification petition," the administrative law judge in this case properly reviewed "all evidence of record" in order to "further reflect on whether any mistakes of fact were made in the previous adjudication of the case." *See Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995); Decision and Order on Modification at 3. Consequently, we reject employer's argument.

Next, employer argues that the administrative law judge engaged in a selective analysis of the evidence, and erred in finding the weight of the medical opinion evidence sufficient to establish legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that the administrative law judge abdicated her duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), to resolve conflicts in the evidence and to provide a valid rationale for her finding that the opinions of Drs. Cohen, Rasmussen, Smiddy, and Boersma outweighed the contrary opinions of Drs. Dahhan, McSharry, and Jarboe. Employer avers further that the administrative law judge improperly applied a presumption that any lung disease in a retired coal miner arose from his occupational exposure to coal dust, thereby shifting the burden of proof to employer to show that claimant's lung disease did not arise out of coal mine employment. Employer's arguments are without support in the record. Our review of the Decision and Order on Modification reveals that the administrative law judge provided valid reasons for her credibility determinations and her findings are rational and supported by substantial evidence. We will now address employer's specific arguments *seriatim*.

Employer maintains that the administrative law judge, when evaluating the medical opinions of record at Section 718.202(a)(4), failed to provide valid reasons for discrediting the opinions of Drs. Dahhan, McSharry, and Jarboe, which employer asserts were better reasoned and documented than those of Drs. Cohen, Rasmussen, Smiddy and Boersma. Specifically, employer asserts that, because Dr. Dahhan adequately explained his rationale for concluding that claimant's pulmonary impairment was related to smoking rather than coal dust exposure, the administrative law judge engaged in a selective analysis of Dr. Dahhan's opinion. Employer similarly contends that the administrative law judge unreasonably discredited Dr. Jarboe's explanation for attributing claimant's obstructive disease to smoking rather than coal dust exposure and, in so doing, improperly shifted the burden of proof to employer to rule out a diagnosis of legal pneumoconiosis. Employer also avers that the administrative law judge impermissibly substituted her expertise for that of Dr. Jarboe, who based his observation, that claimant's reversible airway disease was compatible with asthma and not pneumoconiosis, on his review of the results of all of claimant's pulmonary function studies from 2005 to 2008. Thus, although the administrative law judge found that Dr. Jarboe's own testing did not demonstrate significant reversibility, Dr. Jarboe opined that claimant's overall test results revealed a reversible component that was not typical of pneumoconiosis. Employer also

contends that substantial evidence does not support the administrative law judge's determination that Dr. McSharry's opinion was equivocal for failure to specify the etiology of claimant's impairment. Employer asserts that, albeit "the etiology of the impairment was not clear," Dr. McSharry attributed claimant's impairment to a lung diffusion abnormality, possibly due to idiopathic pulmonary fibrosis. Employer's Brief in Support of Petition for Review at 26. Employer's arguments lack merit.

A review of the Decision and Order reveals that the administrative law judge provided a comprehensive discussion of Dr. Dahhan's opinion, contained in two reports dated August 28, 2001 and June 26, 2003, and did not engage in a selective analysis, but fully delineated the results of the objective tests and additional records supporting the opinion. Decision and Order on Modification at 17-18, 33; Director's Exhibit 25; Employer's Exhibit 11. While finding that Dr. Dahhan was well qualified to render an opinion, the administrative law judge determined that Dr. Dahhan attributed claimant's obstructive defect to smoking unrelated to coal dust because claimant had not been exposed to coal dust since 1992, ruling out industrial bronchitis as a cause of his symptoms. Decision and Order on Modification at 33; Director's Exhibit 25. As she concluded that Dr. Dahhan's opinion was contrary to the premises underlying the regulations, *i.e.*, "that pneumoconiosis is a latent and progressive disease, and that coal dust and smoking have additive effects and cause obstructive disease by the same mechanisms," the administrative law judge, within a permissible exercise of her discretion, found that the probative value of Dr. Dahhan's opinion was undermined. *See* 20 C.F.R. §718.201(c) (pneumoconiosis is recognized as a latent and progressive disease); *Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23 (4th Cir. 1997); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); Decision and Order on Modification at 33. Additionally, while Dr. Dahhan opined that claimant's obstructive disease showed significant response to bronchodilator therapy, which is not found in a coal dust induced disease, the administrative law judge noted that there was also a significant irreversible component shown on claimant's pulmonary function testing. As Dr. Dahhan did not explain why he ruled out coal dust exposure as a contributing cause of the irreversible component, the administrative law judge permissibly accorded his opinion less weight. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order on Modification at 33; Employer's Exhibit 11.

Similarly, the administrative law judge determined that, although Dr. Jarboe was well qualified to render an opinion, his conclusion that claimant did not have legal pneumoconiosis was based on his findings that deposition of coal dust was not visible on x-ray or CT scan; claimant's reduction in the FEV_1/FVC ratio was indicative of smoke-induced lung disease rather than coal workers' pneumoconiosis; and claimant's reduction in diffusing capacity was characteristic of severe emphysema or interstitial lung disease rather than a disease caused by coal dust. Decision and Order on Modification at 34;

Employer's Exhibits 9, 14. Noting that the regulations recognize that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, and that they allow miners to establish disability due to pneumoconiosis based on a reduced FEV_1/FVC ratio, the administrative law judge permissibly discounted Dr. Jarboe's opinion. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 999, 23 BLR 2-302, 2-318 (7th Cir. 2005) ("administrative law judge does not exceed [her] authority in discounting a medical opinion that is influenced by the physician's 'subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act's provisions'."). The administrative law judge also found Dr. Jarboe's opinion unpersuasive because Dr. Jarboe, like Dr. Dahhan, relied on "the reversible component of the Claimant's obstructive disease" to rule out legal pneumoconiosis, contrary to the evidence demonstrating that claimant also exhibited a significant irreversible component, *i.e.*, the qualifying pulmonary function study results of record obtained despite claimant's ongoing bronchodilator treatments, and the pulmonary function studies associated with Dr. Jarboe's examination. *See Clark*, 12 BLR at 1-155; Decision and Order on Modification at 34. Consequently, the administrative law judge properly accorded Dr. Jarboe's opinion less weight.

With regard to Dr. McSharry's opinion, the administrative law judge determined that the physician found it significant that claimant's x-rays were not suggestive of coal workers' pneumoconiosis; that the abnormal, non-reversible pulmonary function study results were "not strongly suggestive" of coal workers' pneumoconiosis; and that a "relatively isolated diffusion abnormality would be unusual" in coal workers' pneumoconiosis. Director's Exhibit 30; Decision and Order on Modification at 19, 33. Dr. McSharry opined that claimant's diffusion abnormalities and crackles in the lung bases were associated with a fibrotic disease of the lung, the specific etiology of which "has not been fully clarified." Director's Exhibit 30. The physician also indicated that claimant "may be suffering from an early stage of one of the interstitial lung diseases," and suggested that a CT scan could differentiate between an idiopathic interstitial disease and coal workers' pneumoconiosis. *Id.* As Dr. McSharry emphasized fibrotic disease and claimant's negative x-rays, the administrative law judge properly concluded that the physician focused on clinical pneumoconiosis rather than legal pneumoconiosis, and that his opinion was vague, equivocal, and entitled to little weight. Decision and Order on Modification at 33; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987).

Next, employer asserts that Dr. Cohen's opinion is "poorly-reasoned and poorly-documented, and fails to sustain the Claimant's burden of proof" on the issue of legal pneumoconiosis at Section 718.202(a)(4). Employer's Brief at 20. Employer argues that, because Dr. Cohen relied solely on his own examination and testing, his opinion "was hampered by an incomplete medical record review," and lacked Dr. Jarboe's advantage of having reviewed a series of objective tests over time. *Id.* Because the administrative

law judge "failed to recognize or reconcile this significant flaw," employer contends that the administrative law judge erred in crediting Dr. Cohen's opinion. *Id.* We disagree. In assessing the probative value of the opinion, the administrative law judge determined that Dr. Cohen possessed "excellent" credentials as a Board-certified pulmonologist with extensive practice experience in pulmonary medicine, as demonstrated by his serving as the Medical Director of the Pulmonary Physiology and Rehabilitation Divisions of the Pulmonary and Occupational Medicine and the Black Lung Clinics Programs; teaching fellows and residents at the University of Illinois School of Public Health; conducting complete pulmonary evaluations of miners seeking federal and state black lung benefits; serving as the Medical Director for the National Coalition of Black Lung and Respiratory Disease Clinics; and publishing thirty-five articles or abstracts on the treatment of coal workers' pneumoconiosis, silicosis, sarcoidosis and tuberculosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998); Decision and Order on Modification at 20-21, 32, 34. The administrative law judge found that Dr. Cohen's diagnosis of clinical pneumoconiosis by x-ray was undermined by the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order on Modification at 32. However, the administrative law judge properly construed Dr. Cohen's conclusion, that both coal dust exposure and smoking were contributing causes of claimant's obstructive disease and diffusion impairment, as a diagnosis of legal pneumoconiosis. *Id*. The administrative law judge acted within her discretion in finding that Dr. Cohen's diagnosis of legal pneumoconiosis was documented and reasoned, as it was based on, and supported by, the evidence available to him, including claimant's coal dust exposure for nineteen years; cigarette smoking history of twenty-five to thirty pack-years; symptoms of worsening shortness of breath, cough, and sputum production; decreased air entry and bilateral wheezing revealed on physical examination; qualifying pulmonary function study results; and qualifying arterial blood gas study results. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order on Modification at 20-23, 32; Director's Exhibit 42. Finding that Dr. Cohen's opinion was consistent with the regulations, the administrative law judge permissibly accorded it probative weight. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-32; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Modification at 32. Consequently, we reject employer's arguments.

Next, employer contends that the administrative law judge erred in construing Dr. Rasmussen's opinion as a diagnosis of both clinical and legal pneumoconiosis at Section 718.202(a). Employer avers that the administrative law judge failed to reconcile her conclusion that Dr. Rasmussen's diagnosis of legal pneumoconiosis was documented and reasoned with her contradictory determination that Dr. Rasmussen's clinical pneumoconiosis diagnosis was undermined because it was based on a positive x-ray that was contrary to the weight of the x-ray evidence. Employer contends further that, absent

the positive x-ray interpretation, Dr. Rasmussen's opinion is predicated on the mere presence of a respiratory impairment and a history of coal dust exposure, which are insufficient bases to diagnose legal pneumoconiosis. Lastly, employer avers that smoking is the "obvious" cause of claimant's pulmonary impairment, and that the administrative law judge's reliance on Dr. Rasmussen's opinion was flawed because Dr. Rasmussen failed to adequately explain how claimant's coal mine employment was a contributing cause of his chronic obstructive pulmonary disease. Employer's Brief at 17.

A review of the administrative law judge's decision belies employer's arguments. The administrative law judge properly acknowledged that Dr. Rasmussen's pulmonary expertise was demonstrated by his Board-certification in internal medicine, his B reader status, and his authorization "by the Department of Labor to perform pulmonary evaluations of miners who apply for black lung benefits;" thus, she concluded that Dr. Rasmussen was "well qualified to provide an opinion." *See Hicks*, 138 F.3d at 537, 21 BLR at 2-341; Decision and Order on Modification at 31. In evaluating Dr. Rasmussen's narrative report dated October 15, 2001, the administrative law judge determined that Dr. Rasmussen not only diagnosed coal workers' pneumoconiosis, but also definitively linked claimant's disabling chronic obstructive pulmonary disease to both smoking and coal mine dust exposure. Director's Exhibits 11, 12. Consequently, the administrative law judge properly found that Dr. Rasmussen's opinion was sufficient to affirmatively establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201(a)(1), (2); Decision and Order on Modification at 31. While the administrative law judge discounted Dr. Rasmussen's clinical pneumoconiosis diagnosis because "most of the x-ray evidence was inconclusive, and …the two most recent x-rays were negative," she permissibly found that Dr. Rasmussen's legal pneumoconiosis diagnosis was "otherwise supported by the evidence available to him." Decision and Order on Modification at 31. The administrative law judge determined that Dr. Rasmussen's opinion was based on claimant's reported symptoms of shortness of breath, morning productive cough, and wheezing; chest x-ray; physical examination findings; pulmonary function studies demonstrating minimal irreversible obstructive ventilatory impairment; arterial blood gas studies indicating marked impairment in oxygen transfer during exercise; and an electrocardiogram. *See Trumbo*, 17 BLR at 1-87; *Clark*, 12 BLR as 1-155; *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order on Modification at 18, 31. Finding that Dr. Rasmussen's rationale was consistent with the language of the regulations, his underlying documentation, and "the overall weight of the medical evidence of record," the administrative law judge reasonably determined that the opinion of Dr. Rasmussen, which supported that of Dr. Cohen, was entitled to probative weight. *See Underwood*, 105 F.3d at 951, 21 BLR at 2-32; Decision and Order on Modification at 31, 35. As the administrative law judge critically examined the various bases supporting Dr. Rasmussen's attribution of claimant's obstructive disease and gas exchange impairment to coal dust exposure and cigarette smoking, and acted within her discretion in finding that Dr. Rasmussen's opinion was well-reasoned and adequately documented, we reject

employer's contention that the administrative law judge erred in according any weight to the opinion.

Employer also challenges the administrative law judge's accordance of any weight to the opinions of Drs. Smiddy and Boersma on the issue of legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that these physicians possess inferior qualifications, failed to adequately explain their conclusions, and relied on positive x-rays to diagnose pneumoconiosis, thus the administrative law judge failed to subject their opinions to the appropriate scrutiny. Employer's Brief at 18-22. While employer's arguments have some merit, any error in the administrative law judge's consideration of these opinions was harmless, as it would not affect the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge accurately reviewed the qualifications of Drs. Smiddy and Boersma,[5] acknowledged various flaws in their opinions, and concluded that their opinions were entitled to some weight, but not added weight pursuant to 20 C.F.R. §718.104(d), based on their status as claimant's treating physicians. After evaluating all of the medical opinions, however, the administrative law judge accorded determinative weight to the opinion of Dr. Cohen, as supported by the opinions of Drs. Rasmussen, Smiddy and Boersma, finding that it was consistent with its underlying documentation, the overall weight of the medical evidence of record, and the premises underlying the regulations, whereas Drs. Dahhan, Jarboe and McSharry failed to persuasively explain why nineteen years of coal dust exposure were not a factor in claimant's obstructive disease and markedly reduced diffusing capacity. As the administrative law judge provided valid reasons for her credibility determinations, we affirm her finding that the weight of the medical opinion evidence established legal pneumoconiosis under Section 718.202(a)(4), and that claimant established the existence of pneumoconiosis by a preponderance of the evidence under Section 718.202(a). *See Compton*, 211 F.3d at 212, 22 BLR at 2-176.

[5] The administrative law judge reasonably concluded that Dr. Smiddy was "well qualified to provide an opinion" based on his Board-certification in internal medicine; Board-eligibility in pulmonary medicine; professorship in internal medicine at Quillen-Dishner School of Medicine; speeches given at the 2000 National Black Lung Conference; presentations on pneumoconiosis; and participation in black lung symposia. Decision and Order on Modification at 15-16, 31. By contrast, the administrative law judge found that Dr. Boersma was the least qualified physician to render an opinion, as she possessed no specialty credentials and did not diagnose pneumoconiosis herself, but relied on the evaluation by a pulmonary specialist, as supported by claimant's clinical and occupational history, test results, and her review of literature confirming that occupational dust exposure causes and exacerbates chronic obstructive pulmonary disease. Decision and Order on Modification at 25-26, 32-33.

Based on her credibility determinations on the issue of legal pneumoconiosis,[6] the administrative law judge also found that the weight of the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis at Section 718.204(c), and we affirm her findings thereunder, as supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that modification was appropriate pursuant to Section 725.310 and that claimant was entitled to benefits.

Accordingly, the Decision and Order Awarding Benefits on Modification of the administrative law judge is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] While the administrative law judge determined that claimant was entitled to the rebuttable presumption, pursuant to 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, we reject employer's challenge thereto, as an "arising out of coal mine employment" determination is subsumed in a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).