U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0168 BLA

LOWELL CHAPPELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION,	)	
Self-Insured by SUNCOKE ENERGY,	)	
INCORPORATED	)	DATE ISSUED: 04/28/2020
	)	
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 of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05480) of Administrative Law Judge Richard M. Clark on a claim filed on October 24, 2013,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge found claimant established twenty-nine years of surface coal mine employment in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4); 20 C.F.R. §725.309(c). The administrative law judge further determined employer did not rebut the presumption and awarded benefits.

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[1] Claimant's two previous claims were denied because he did not establish total disability. Director's Exhibits 1, 2.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Director's Exhibits 1, 2. Consequently, claimant had to submit new evidence establishing total disability in order for the administrative law judge to consider the merits of his subsequent claim. *See* 20 C.F.R. §725.309(c).

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2,[4] and challenges the constitutionality and applicability of the Section 411(c)(4) presumption. On the merits, employer challenges the administrative law judge's findings that claimant established total disability necessary to invoke the Section 411(c)(4) presumption and a change in an applicable condition of entitlement. Employer also argues that administrative law judge erred in finding the presumption unrebutted and in determining the commencement date for benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing employer forfeited its Appointments Clause challenge and urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.[5] Employer filed a reply brief, reiterating its arguments.[6]

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] On January 31, 2020, the Board issued an Order declining employer's request to hold this case in abeyance pursuant to *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (King, J., dissenting) and rejecting its argument the Section 411(c)(4) presumption is unconstitutional. *Chappell v. Whitaker Coal Corp.*, BRB No. 19-0168 BLA (Jan. 31, 2020) (unpub.).

[6] We affirm, as unchallenged, the administrative law judge's finding that claimant established twenty-nine years of qualifying surface coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 6.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's decision and remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[8] Employer's Brief in Support of Petition for Review at 5-6. Employer asserts "[i]t remains unresolved whether the blanket ratification of all prior administrative law judge appointments, such as that rendered by the Secretary of Labor on December 21, 2017, satisfies the Appointments Clause." *Id.* at 5. Employer further asserts Appointments Clause challenges can be waived only by failing to raise the issue in initial briefing to the Board. Employer's Reply Brief at 5.

We agree with the Director, however, that employer forfeited its Appointments Clause argument by failing to raise it when the case was before the administrative law judge. Director's Brief 6-8; *see Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.")

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 7.

[8] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

(citation omitted); *Powell v. Serv. Employees Int'l, Inc.*, BRBS , BRB No. 18-0557 (Aug. 8, 2019).

Lucia was decided more than five months before the administrative law judge issued his Decision and Order Awarding Benefits, but employer failed to raise its arguments while the claim was before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments and, if appropriate, taken steps to have the case assigned for a new hearing before a different administrative law judge. *See Kiyuna v. Matson Terminals, Inc.*, BRBS , BRB No. 19-0103 at 4 (June 25, 2019). Instead, employer waited to raise the issue until after the administrative law judge issued an adverse decision. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Because employer has not raised any basis for excusing its forfeiture of the issue, we reject its argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge. *See Wilkerson*, 910 F.3d at 256.

Invocation of the Section 411(c) Presumption - Total Disability

A miner is totally disabled if a pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found the pulmonary function and arterial blood gas studies non-qualifying, and there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure. He found Dr. Ajjarapu's opinion that claimant is totally disabled and the contrary opinions of Drs. Rosenberg and Castle inadequately reasoned. The administrative law judge concluded, however, that claimant is unable to perform his usual coal mine work based on treatment records diagnosing numerous respiratory conditions, including chronic respiratory failure, and indicating he requires continuous supplemental oxygen.

Employer contends the administrative law judge improperly acted as a medical expert in assessing the treatment records since they do not include a specific statement by a physician concluding claimant is totally disabled. Employer's Brief in Support of Petition for Review at 8, 12-13. Employer asserts the regulations do not provide for establishing total disability at 20 C.F.R. §718.204(b)(2)(iv) in the absence of a reasoned physician's opinion "based on medically acceptable clinical and diagnostic techniques." *Id.* at 12, *quoting* 20 C.F.R. §718.204(b)(2)(iv).[9] Employer also contends the administrative law judge failed to properly explain why he discounted Drs. Rosenberg's and Castle's opinions that claimant is not totally disabled in accordance with the Administrative Procedure Act (APA).[10] Employer's Brief in Support of Petition for Review at 11-12. We reject employer's arguments as without merit.

In determining whether a miner is totally disabled, the administrative law judge must compare the exertional requirements of the miner's usual coal mine work with a physician's description of the miner's pulmonary impairment and physical limitations. S*ee Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000). Contrary to employer's arguments, a physician need not phrase his or her opinion specifically in terms of "total disability" to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990); *Black Diamond Coal Co. v.*

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[9] The regulation states:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine] employment as described in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Benefits Review Board, 758 F.2d 1532, 1534 (11th Cir. 1985). Treatment records may support a finding of total disability if they provide sufficient information from which the administrative law judge can reasonably infer that a miner is unable to do his last coal mine job. *See Cornett*, 227 F.3d at 578; *Poole*, 897 F.2d at 894; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142 (4th Cir. 1995).

The record includes treatment records from Mary Breckenridge Appalachian Regional Healthcare (ARH) from November 28, 2013, through December 15, 2016,[11] Stone Mountain Health Services' St. Charles Breathing Center (Stone Mountain) from August 16, 2016, to September 19, 2016,[12] and Dr. Koura's clinical notes from January 13, 2015, to December 15, 2016.[13] Decision and Order at 12-13, 15; Claimant's Exhibits 3, 5; Employer's Exhibit 6. The administrative law judge found the records show claimant "most recently has been diagnosed with chronic respiratory failure with hypoxia or hypercapnia, dyspnea, chronic

[11] Chest x-rays dated December 5, 2014, showed extensive fibrosis and claimant was diagnosed with chronic obstructive pulmonary disease (COPD). Employer's Exhibit 6. On August 16, 2016, a nurse practitioner reported claimant's oxygen level at rest on room air was 91-94 percent and with ambulation on room air it was 88 percent. *Id.* With ambulation on oxygen, claimant's oxygen was 96 percent; a spirometry produced an FVC of 62, an FEV1 of 74, and an FEV1/FVC ratio of 84 percent. *Id.* On September 19, 2016, claimant was seen for follow-up of his response to oxygen. *Id.* On December 15, 2016, an x-ray again showed extensive COPD. *Id.*

[12] Claimant was diagnosed with dyspnea, cough, coal workers' pneumoconiosis, chronic respiratory failure with hypoxia or hypercapnia, chronic bronchitis, cardiac murmur, and edema. Claimant's Exhibit 3. An August 16, 2016 x-ray showed severe chronic fibrosis and extensive pleural calcifications. *Id.*

[13] On January 13, 2015, claimant was seen for a productive cough and was said to have COPD along with shortness of breath. Claimant's Exhibit 5. He was reported as a non-smoker. *Id.* His FEV1 was stated to be 57 percent and FEV1/FVC ratio was 67 percent. *Id.* He was diagnosed with COPD and prescribed a bronchodilator. *Id.* On April 1, 2015, claimant's Alpha-1 antitrypsin level was normal. *Id.* He was diagnosed with COPD and given nebulization treatments. On June 18, 2015, claimant had wheezes and the same diagnosis was provided. *Id.* On December 17, 2015, he had a cough with sputum production, wheezing and dyspnea. He received breathing medications. *Id.* On December 15, 2016, claimant was diagnosed with COPD and dyspnea on exertion; he was "on oxygen 24/7" and was being treated with inhalers and a nebulizer. *Id.*

obstructive pulmonary disease, and chronic bronchitis." Decision and Order at 15. He also noted that on August 16, 2016, claimant's oxygen level with ambulation on room air was 88 and "on December 15, 2016, [c]laimant was placed on continuous supplemental oxygen, as well as treatment with inhalers and a nebulizer." *Id.*

The administrative law judge also considered the opinions of Drs. Ajjarapu, Rosenberg and Castle. Dr. Ajjarapu conducted the Department of Labor complete pulmonary evaluation on December 4, 2013, and opined claimant is totally disabled, but the administrative law judge found her opinion inadequately reasoned. Decision and Order at 14-15; Director's Exhibit 11.

Dr. Rosenberg examined claimant on May 14, 2014, and opined he had a mild to moderate respiratory impairment, normal diffusion capacity when corrected for lung volumes, no restriction, and a minimally reduced PO2 blood gas study value for his age. Employer's Exhibit 1. He concluded claimant is not totally disabled from his usual coal mine work or similarly arduous labor. *Id.* In a May 21, 2018 supplemental report, he reviewed claimant's treatment records from Mary Breckenridge ARH, Stone Mountain, and Dr. Koura's clinical notes. Employer's Exhibit 7. He opined claimant has "a degree of obstruction" but was not totally disabled. *Id.* The administrative law judge noted Dr. Rosenberg reported claimant's gas exchange was normal at the time of his evaluation four years earlier, but he not address claimant's oxygen saturation levels on August 16, 2016, or his use of continuous oxygen. Decision and Order at 15.

Dr. Castle prepared a report on June 24, 2015, based on his review of the medical evidence. Employer's Exhibit 3. He stated that the one valid pulmonary function study from Stone Mountain showed evidence of moderate obstructive disease with a suggestion of restriction. *Id.* He also noted Dr. Rosenberg's pulmonary function study showed evidence of moderate airway obstruction without definitive restriction. *Id.* He opined claimant is not totally disabled from his usual coal mine employment based on Dr. Rosenberg's pulmonary function testing. *Id.* The administrative law judge noted that while Dr. Castle reviewed the medical evidence pre-dating his June 24, 2015 report, he did not review claimant's more recent treatment records.[14] Decision and Order at 15.

[14] The administrative law judge noted that employer indicated it would submit an addendum from Dr. Castle as Employer's Exhibit 9 but did not do so. Decision and Order at 15.

Contrary to employer's contention, the administrative law judge permissibly found that when considering "all of the evidence as a whole . . . [c]laimant has a totally disabling respiratory impairment as reflected by his need for supplemental oxygen, his pulse oximetry findings, and the clinical reports by Dr. Koura." Decision and Order at 16; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). As the administrative law judge noted, claimant testified that he worked in the coal tipple, picking rock and slate, and performing all kinds of labor. Decision and Order at 3. He also repaired equipment, vibrators and motors. *Id.* He described his job as requiring "heavy lifting . . . up to 150 to 200 pounds at a time." Hearing Transcript at 14; *see* Decision and Order at 3; Director's Exhibit 17 at 24. The administrative law judge reasonably inferred that claimant's need for continuous supplemental oxygen, which is undisputed, precludes him from performing his usual coal mine employment. *See Cornett*, 227 F.3d at 578; *see also Good Coal Co., Inc. v. Haynes*, No. 19-3142, slip op. at 3 (6th Cir., Dec. 6, 2019) (unpub.) (reasonable to conclude that physicians' reports that the miner was on oxygen and unable to leave his house implied inability to perform his usual coal mine employment); Decision and Order at 16.

Moreover, the administrative law judge permissibly found the opinions of Drs. Rosenberg and Castle unpersuasive because they did not discuss claimant's use of continuous oxygen in relation to whether he could perform his usual coal mine work. *See Stephens*, 298 F.3d at 522; *Rowe*, 710 F.2d at 255; *see also Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of a miner's health); Decision and Order at 15.

The administrative law judge's function is to weigh the evidence, draw appropriate inferences and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). The Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's determination claimant established total disability based on claimant's treatment records and in consideration of all relevant evidence. 20 C.F.R. §718.204(b)(2). Thus, we affirm the administrative law judge's finding

claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).[15]

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that he has neither legal nor clinical pneumoconiosis,[16] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer did not rebut the presumption by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

[15] Employer asserts the administrative law judge did not consider whether claimant established a change in an applicable condition of entitlement in "any meaningful way." Employer's Brief in Support of Petition for Review at 14 n.1. The administrative law judge stated that he relied on the evidence in claimant's current claim over his prior claim's evidence because it is "the most accurate reflection of claimant's current condition." Decision and Order at 21. Thus, he found the new evidence established total disability and a change in an applicable condition of entitlement. *Id.* Employer does not explain how the administrative law judge erred. *See* 20 C.F.R. §802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987).

[16] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). Clinical pneumoconiosis consists of "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).

The United States Court of Appeals for the Sixth Circuit holds that this standard requires employer to "disprove the existence of legal pneumoconiosis by showing that [claimant's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis."[17] *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). Employer relies on the opinions of Drs. Rosenberg and Castle to disprove legal pneumoconiosis.

In his initial report, Dr. Rosenberg stated "[i]t is conceivable that some of [claimant's] airflow obstruction relates to legal [coal workers' pneumoconiosis], being a nonsmoker" and opined it is possible that claimant has legal pneumoconiosis. Employer's Exhibit 1 at 3. He indicated it would be helpful to review claimant's past treatment records to "track the natural history of his pulmonary impairment." *Id.* In his supplemental report, Dr. Rosenberg summarized claimant's more recent treatment records and noted pulmonary function studies in August 2016 showed "a degree of obstruction" with an FEV1 of 74% of predicted. Employer's Exhibit 7 at 2. He stated that "the improvement in FEV1 over time supports the fact [claimant] does not have legal [pneumoconiosis]" because "such improvement would not be expected" with legal pneumoconiosis. *Id.*

The administrative law judge rejected employer's argument in its post-hearing brief that Dr. Rosenberg explained how the treatment records "rule out any legal coal workers' pneumoconiosis." Decision and Order at 19, *quoting* Employer's Post-Hearing Brief at 22.[18] He also found Dr. Castle's opinion

[17] The Sixth Circuit further explained that "an employer may prevail under the not 'in part' standard by showing that coal dust exposure had no more than a *de minimis* impact on the miner's lung impairment." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 407 (6th Cir. 2020), *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

[18] Employer stated Dr. Rosenberg "explained the records rule out any legal [coal workers' pneumoconiosis] which show an increase in FEV1 to 74 [percent] predicted in 2016 and such improvement from [sic] is not indicative of obstruction due to past coal mine dust exposure (which tends to cause a fixed and permanent impairment)." Employer's Post-Hearing Brief 11-12. The parenthetical regarding a fixed and permanent impairment is a rationale employer asserted, not from Dr. Rosenberg. Employer's primary assertion to the administrative law judge was that claimant had not provided a reasoned opinion to establish he has legal pneumoconiosis. *Id.* at 22.

insufficient to disprove legal pneumoconiosis, noting Dr. Castle's specific statement that it was "not possible to exclude" legal pneumoconiosis as a cause for claimant's obstructive respiratory impairment. Employer's Exhibit 3. Contrary to employer's contention, the administrative law judge's quoting the words "rule out" from employer's post-hearing brief and "exclude" from Dr. Castle's report does not show he applied an incorrect legal standard in considering legal pneumoconiosis.[19] Employer's Brief in Support of Petition for Review at 16. Indeed, the administrative law judge properly stated that to rebut legal pneumoconiosis employer must establish that claimant's respiratory disease or impairment is not significantly related to, or substantially aggravated by, dust exposure in his coal mine employment. Decision and Order at 19. Thus, we reject employer's contention the case should be remanded for application of the correct legal standard.

We also reject employer's contention that the administrative law judge did not explain his rationale for rejecting Drs. Rosenberg's and Castle's opinions. Employer's Brief in Support of Petition for Review at 17. The administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he did not explain why claimant's "improvement in FEV1 over time" necessarily establishes claimant does not have legal pneumoconiosis. Employer's Exhibit 7; *see Stephens*, 298 F.3d at 522; *Rowe*, 710 F.2d at 255. The administrative law judge also rationally found Dr. Castle's opinion insufficient to rebut the presumption because he stated he could not exclude a diagnosis of legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b). We therefore affirm the administrative law judge's finding employer did not disprove legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 19. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge found employer did not establish that no part of claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 20. Other

[19] Employer argues the administrative law judge improperly conflated the issues of legal pneumoconiosis and disability causation. Employer argues he applied the wrong legal standard in requiring its physicians to "rule out" or "exclude" coal mine dust exposure as a contributing cause of claimant's respiratory impairment when considering whether employer disproved legal pneumoconiosis.

than its arguments on legal pneumoconiosis which we have rejected, employer raises no specific error with regard to the administrative law judge's finding on disability causation. *See* 20 C.F.R. §802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, we affirm the administrative law judge's finding that employer did not establish claimant's respiratory disability was unrelated to legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(ii), and did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. We therefore affirm the administrative law judge's award of benefits.

Commencement Date for Benefits

The commencement date for benefits is the month in which the claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-604 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence, benefits will commence with the month in which the claim was filed, unless evidence the administrative law judge credits establishes that the miner was not totally disabled at any subsequent time. 20 C.F.R.§725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118 (4th Cir. 1986); *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The administrative law judge summarily awarded benefits commencing October 2013, the month in which claimant filed his subsequent claim. Decision and Order at 23. Employer maintains that the earliest date benefits can commence is August or December 2016 based on the administrative law judge's crediting of claimant's treatment records to establish total disability. Employer also argues that as of May 2014, claimant was not totally disabled based on Dr. Rosenberg's opinion. Employer's Brief in Support of Petition for Review at 18.

Contrary to employer's contention, the onset date is not established by the first medical evidence of record indicating total disability, as such medical evidence shows only that the miner became totally disabled at some time prior to the date of such medical evidence. *See Owens*, 14 BLR at 1-50; *Meraschoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). However, because the administrative law judge did not provide any rationale for awarding benefits as of October 2013, we vacate his commencement date finding and remand this case for further consideration of this issue. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, the administrative law judge must determine the

commencement date for benefits. He should consider whether the onset date of claimant's total disability is ascertainable from the record evidence and if any credible evidence establishes the miner was not totally disabled subsequent to the filing date of his claim. *See Owens*, 14 BLR at 1-50. In rendering his commencement date findings, the administrative law judge must explain his rationale in accordance with the APA.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge