U.S. Department of Labor

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

BRB No. 20-0120 BLA

RICKY L. DEAL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KTK MINING & CONSTRUCTION COMPANY	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 08/20/2021
	)	
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 Scott R. Morris, Administrative law Judge, United States Department of Labor.

Lee Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Elena S. Goldstein, Deputy 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, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Scott R. Morris's Decision and Order Awarding Benefits (2018-BLA-05116) rendered on a miner's claim filed on November 20, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 24.27 years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] He further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer alleges the administrative law judge erred in finding Claimant's work in coal mine construction qualified him as a "miner" under the Act, and thus erred in finding Claimant established 24.27 years of coal mine employment. Employer also asserts the administrative law judge erred in finding Claimant totally disabled and therefore invoked the Section 411(c)(4) presumption. It further argues the administrative law judge erred in finding Employer did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting the administrative law judge properly found Claimant's coal mine construction work qualified as coal mine employment.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that Claimant 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) (2018); *see* 20 C.F.R. §718.305.

[2] The Director also contends the administrative law judge erred in finding Employer rebutted the presumed existence of legal pneumoconiosis. Director's Brief at 1 n.1. In view of our disposition of this case, we need not address this argument.

evidence, and in accordance with applicable law.[3] 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).

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

Status as a Miner and Length of Qualifying Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, Claimant must establish he worked as a "miner" for at least fifteen years in underground or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Under the Act:

> The term miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a), (b).

Claimant bears the burden of proving the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold the administrative law judge's length of coal mine employment finding if it is based on a reasonable method of computation and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-25, 1-27 (2011).

The administrative law judge found Claimant worked as a miner throughout his coal mining and coal mine construction career and established 24.27 years of qualifying coal mine employment. Decision and Order at 3-5, 8-13. Employer argues the administrative law judge erred in crediting Claimant with 3.4 years of coal mine employment with two entities he considered to be one company, Navistar and International Harvester, and 5.9 years of coal mine construction work with various other companies. Subtracting these amounts from the 24.27 year total, Employer asserts Claimant should have been credited

[3] The Board will apply the law of the Unites States Court of Appeals for the Sixth Circuit as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 16.

with only 14.97 years of qualifying coal mine employment. Employer's Brief at 5-8. We disagree.

As an initial matter, the administrative law judge did not credit Claimant with 3.4 years of coal mine employment during the years he was employed by Navistar/International Harvester; he credited Claimant with 3.37 years. Decision and Order at 10. Thus, even if we were to accept all of Employer's allegations of error as true, it has identified only 9.27 years of coal mine employment that could be subtracted from Claimant's 24.27 year total (3.37 years with Navistar/International Harvester and 5.9 years of coal mine construction work). Employer's Brief at 5-8. This would leave Claimant with exactly 15 years of coal mine employment, which is sufficient to invoke the Section 411(c)(4) presumption. Employer therefore has not identified how the alleged errors could have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

Moreover, Employer has not identified any error in the administrative law judge's finding that Navistar and International Harvester are the same entity and that Claimant's employment with these companies was underground coal mine work. Employer's Brief at 7-8. While Employer asserts there is "no evidence" to support these findings, the administrative law judge specifically found that Claimant "clearly" recalled beginning his coal mine work in 1973 or 1974, which corresponds to the income reported for Navistar on his Social Security Administration earnings statement beginning in 1974. Decision and Order at 9; Hearing Transcript at 24-25; Director's Exhibit 7. Moreover, the administrative law judge found Claimant's recollection that his underground coal mine employer in 1974 was called International Harvester, but had undergone several name changes, confirmed by the Illinois Secretary of State Certificate of Good Standing database identifying International Harvester as a former name of Navistar. Decision and Order at 9 n.10. As Employer does not address or otherwise challenge these findings, we affirm the administrative law judge's determination that Claimant's work for Navistar/International Harvester constitutes coal mine employment and that Claimant established 3.37 years with the company.[4] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The administrative law judge calculated 3.37 years by dividing Claimant's earnings with Navistar as reported by the Social Security Administration by the coal mine industry average wage for 125 days of work found in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*. Decision and Order at 10; Director's Exhibit 7. Employer does not allege error in this method of calculation. Employer's Brief at 5-8.

We further reject Employer's assertion that the administrative law judge erred in crediting Claimant with 5.9 years of coal mine construction work with several companies[5] because he did not work as a "miner" and was neither directly involved in the extraction of coal nor directly exposed to coal mine dust. Employer's Brief at 6-7. Under the Act, coal mine construction workers are considered to be miners if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). These workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment.[6] 20 C.F.R. §725.202(b)(1)(i). The presumption may be rebutted by evidence demonstrating the worker either was not regularly exposed to coal mine dust or did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii). Thus, contrary to Employer's assertion, Claimant was not required to establish the specific dust conditions during his employment as a coal mine construction worker. Rather, Employer had the burden to rebut the presumption by establishing Claimant was not regularly exposed to coal mine dust during his construction work in or around the coal mines. 20 C.F.R. §725.202(b).

As the administrative law judge accurately noted, Claimant asserted all of his coal mine constructions jobs, except the one with Judy Construction, exposed him to coal mine dust. Decision and Order at 5; Director's Exhibit 31 at 5, 10-11. The administrative law judge also accurately found that Employer offered no evidence to contradict Claimant's assertions. Decision and Order at 13. Because "[n]o evidence establishes that Claimant's surface mine construction work did not regularly expose him to dust, or that this employment did not regularly require him to be in or around coal mines or coal preparation facilities," we affirm the administrative law judge's finding that Employer failed to rebut the 20 C.F.R. §725.202(b) presumption and that Claimant was a coal miner during his coal mine construction work. *Id*.

[5] Employer specifically objects to crediting Claimant with 5.9 years of coal mine employment with Darby Construction, Erwin Construction Company, Georgetown Development, Erection Specialists, Inc., E.E. Gillespie, Garland Company, Powell Thomas Horton aka Powell Construction, and Diversified Management. Employer's Brief at 7.

[6] Further, as the Director correctly notes, a coal mine construction worker does not have to extract or prepare coal to be considered a miner under the Act. *See Glem Co. v. McKinney*, 33 F.3d 340, 342 (4th Cir. 1994) (declining to impose the two-step situs-function test on coal mine construction workers because coal mine construction involves neither the extraction nor preparation of coal, and thus under such a test coal mine construction workers "would rarely, if ever, qualify as miners under the Act"); Director's Brief at 3 n.2.

Lastly, the administrative law judge found Claimant established 8.94 years of qualifying surface coal mine employment performing maintenance for Employer at a coal washing and processing plant. Employer alleges the administrative law judge erred in finding Claimant worked for it in conditions substantially similar to those in an underground mine. Employer's Brief at 8. We disagree.

First, Employer does not attempt to explain with any specificity how the administrative law judge erred. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Second, the administrative law judge did not err. The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The administrative law judge noted Claimant stated his job for Employer was "to 'keep the coal dust down at all times,'" and "[t]he plant ran over 2000 tons of coal an hour, which Claimant stated kept the plant 'real dusty.'" Decision and Order at 13, *quoting* Hearing Transcript at 17, 40. The administrative law judge permissibly found Claimant's unrefuted testimony credible regarding the coal mine dust levels in his employment. Decision and Order at 13; *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663-65 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014); Decision and Order at 12-13; Hearing Transcript at 17. As it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established 8.94 years of qualifying coal mine employment with Employer.[7] Decision and Order at 11, 13. Thus, we affirm the administrative law judge's finding that Claimant established 24.27 years of qualifying coal mine employment in total. *Id.* at 13.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable and 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

[7] Even if we accepted Employer's contentions as true, Claimant established at least fifteen years of coal mine employment based on his underground coal mining and coal mine construction work.

pulmonale with right-sided congestive heart failure, or medical opinions.[8] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all contrary evidence. *See Defore v. Ala. By-Products Corp.*, 9 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Employer contends the administrative law judge erred in finding Claimant established total disability based on the pulmonary function studies and medical opinions. Employer's Brief at 8-11.

Pulmonary Function Studies

The administrative law judge considered five pulmonary function studies conducted on October 30, 2014, January 25, 2016, March 24, 2016, December 12, 2017 and April 26, 2018. Decision and Order at 14-16; Director's Exhibits 13, 16, 17; Claimant's Exhibit 5; Employer's Exhibit 3. He found all of the studies valid, except the December 12, 2017 study. Decision and Order at 15-16. Relying on Claimant's "most commonly recorded height" of sixty-seven inches, the administrative law judge determined that all of the valid studies were qualifying,[9] except the October 30, 2014 pulmonary function study. *Id*. at 14-15. Based on the preponderance of the qualifying studies, the administrative law judge found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(i) *Id*. at 16.

Employer argues the administrative law judge erred in rejecting Drs. Vuskovich's and Dahhan's opinions invalidating Dr. Ajjarapu's January 25, 2016 and March 24, 2016 studies.[10] Employer's Brief at 10. We disagree.

[8] The administrative law judge found the blood gas study evidence insufficient to establish total disability and no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 16-17.

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

[10] Employer also asserts this case must be remanded because the administrative law judge did not address pulmonary function studies in Claimant's treatment records: qualifying February 9, 2011 and October 26, 2015 pulmonary function studies and a non-qualifying February 12, 2014 pulmonary function study. Employer's Brief at 8-9; Employer's Exhibit 4. We consider any error to be harmless as the preponderance of these pulmonary function studies are also qualifying and therefore would not alter the administrative law judge's reason for finding total disability established by the pulmonary

With regard to the January 25, 2016 pulmonary function study, Dr. Vuskovich opined Claimant did not put forth the effort required to generate valid spirometry results and the flow-volume loop displayed technical deficits. Director's Exhibit 21 at 4. Dr. Dahhan also opined Claimant did not give optimum effort in performing the test. Employer's Exhibit 1 at 4. The administrative law judge permissibly found neither physician adequately explained the bases for their conclusions that Claimant gave sub-optimal effort or how the alleged technical defects resulted in invalid results.[11] *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 483 (6th Cir. 2003) (conclusory statements do not reflect reasoned medical judgment); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 16, 23 n.18; Director's Exhibit 21 at 4; Employer's Exhibit 1 at 4. Similarly, the administrative law judge acted within his discretion in rejecting Dr. Vuskovich's opinion that the March 24, 2016 study was invalid because he failed to persuasively explain why either the FEV1/FVC or MVV results were unacceptable. *See Flynn*, 353 F.3d at 483; *Clark*, 12 BLR at 1-155; Decision and Order at 16; Director's Exhibit 24 at 3. As Employer raises no other arguments regarding the validity of the pulmonary function studies, we affirm the administrative law judge's finding that all are valid, except the December 12, 2017 study.[12]

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function study evidence. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 14-16; Director's Exhibits 13, 16, 17; Employer's Exhibits 3; 4 at 3-6, 14-16. Moreover, Employer's expert, Dr. Jarboe, reviewed all of the pulmonary function study evidence, including the February 9, 2011, February 12, 2014, and October 26, 2015 studies, and opined Claimant is totally disabled based on them. Employer's Exhibit 5 at 28-36.

[11] Substantial evidence also supports the administrative law judge's conclusion that the test is valid. Dr. Ajjarapu, the administering physician, criticized Dr. Vuskovich's invalidation as relying on outdated "Knudson 76" criteria, which is "usually not used" to assess symptoms or the severity of chronic obstructive pulmonary disease. Director's Exhibit 27 at 1. Dr. Gaziano validated the pulmonary function study. Director's Exhibit 12. Dr. Jarboe accepted the pulmonary function study as valid. Employer's Exhibit 5 at 36. And, the administering technician indicated "good" effort and understanding. Director's Exhibit 13.

[12] Employer's additional argument that none of Claimant's pulmonary function studies are reliable because they show a "significant fluctuation" due to poor effort is unsupported by the evidence and is contradicted by the opinion of its own medical expert, Dr. Jarboe, that the variations are consistent with a reversible lung impairment. Employer's Exhibit 5 at 41-44; Employer's Brief at 8-9.

Employer also argues the administrative law judge erred in finding Claimant's height is sixty-seven inches for purposes of applying the table values at Appendix B of 20 C.F.R. Part 718. It asserts he should have used an average height of 66.7 inches and therefore applied the closest greater table height at 66.9 inches. Employer's Brief at 9. We disagree.

First, Employer has not explained why the alleged error requires remand. Applying Employer's suggested height of 66.7 inches would not change any of the qualifying studies to non-qualifying.[13] *Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278; Decision and Order at 14; Director's Exhibits 13, 16, 17; Claimant's Exhibit 5; Employer's Exhibit 3.

Second, contrary to Employer's contention, the administrative law judge was not required to apply an average height; instead, he had discretion to resolve the conflict in recorded heights using a reasonable method. He permissibly found Claimant's height is sixty-seven inches because it is the "most commonly recorded height" and thus properly applied the closest greater table height of 67.3 inches in Appendix B. *See Island Creek Coal Co. v. Bryan*, 937 F.3d 738, 756 (6th Cir. 2019); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 1140 n.2 (4th Cir. 1995); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114, 116 n.6 (4th Cir. 1995); *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 14-15; Director's Exhibits 13, 16, 17; Claimant's Exhibit 5; Employer's Exhibit 3. We therefore affirm the administrative law judge's finding that Claimant established total disability based on the pulmonary function studies.[14] Decision and Order at 16.

Medical Opinion Evidence

[13] Employer notes the administrative law judge incorrectly stated in his decision that, "[a]s indicated in the chart below, the physicians listed Claimant's height at 60, 60.5, and 67 inches." Decision and Order at 14; Employer's Brief at 9. We consider this reference to be a scrivener's error and harmless, as the administrative law judge correctly listed the recorded heights in his chart of the pulmonary function studies and in determining whether the studies were qualifying or non-qualifying. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 14-16.

[14] The five pulmonary function studies contained height measurements of 66, 66.5 and 67 inches (recorded three times). Director's Exhibit 16, 13, 17; Claimant's Exhibit 5; Employer's Exhibit 3.

The administrative law judge also considered three medical opinions. He credited Drs. Ajjarapu's and Jarboe's opinions that Claimant is totally disabled over Dr. Dahhan's contrary opinion. Decision and Order at 17-24; Director's Exhibits 13, 26, 27; Employer's Exhibits 1-3, 5. Employer argues Dr. Ajjarapu's opinion is not credible because she changed her diagnosis from her initial report in her subsequent supplemental report. Employer's Brief at 11. We disagree.

Dr. Ajjarapu evaluated Claimant on behalf of the Department of Labor (DOL) on January 25, 2016. She indicated the pulmonary function studies were non-qualifying and Claimant could perform his usual coal mine employment. Director's Exhibit 13 at 8. When a DOL claims examiner asked her to reconsider her opinion because she relied on the wrong table values to determine whether the studies were qualifying, Dr. Ajjarapu concluded Claimant is totally disabled from performing his usual coal mine work. Director's Exhibits 26, 27.

Employer's general assertion that Dr. Ajjarapu's opinion is not credible regarding total disability is a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within her discretion in finding Ajjarapu's opinion adequately reasoned and supported by the objective evidence, we affirm her credibility determination. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985); Decision and Order at 23-24; Director's Exhibits 26, 27. We further affirm, as unchallenged, the administrative law judge's crediting of Dr. Jarboe's opinion that Claimant is totally disabled and his rejection of Dr. Dahhan's opinion that Claimant is not totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-24.

We therefore affirm the administrative law judge's findings that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and based on the evidence as a whole. 20 C.F.R. §718.204(b)(2). Thus, we affirm the administrative law judge's determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018).

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish that Claimant has neither

legal nor clinical pneumoconiosis,[15] 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 failed to establish rebuttal by either method.[16]

Employer asserts the administrative law judge erred in evaluating the x-rays, computed tomography (CT) scans, and medical opinions relevant to whether it disproved clinical pneumoconiosis. Employer's Brief at 11-12. We disagree.

Clinical Pneumoconiosis

X-rays

The parties submitted readings of five x-rays, all by dually-qualified B readers and Board-certified radiologists. The administrative law judge found the readings of three x-rays dated October 1, 2015, October 21, 2016, and December 12, 2017 in equipoise because each had one positive and one negative reading by dually-qualified physicians.[17] Decision

[15] "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). The definition includes "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).

[16] The administrative law judge found Employer disproved legal pneumoconiosis. Decision and Order at 30-32. However, Employer must disprove both legal and clinical pneumoconiosis to rebut the presumption under 20 C.F.R. §718.305(d)(1)(i). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011).

[17] Dr. DePonte interpreted the October 1, 2015 x-ray as positive for pneumoconiosis, while Dr. Adcock interpreted it as negative. Director's Exhibit 15; Employer's Exhibit 9. Dr. DePonte read the October 21, 2016 and December 12, 2017 x-rays as positive for pneumoconiosis, while Dr. Wolfe read the October 21, 2016 x-ray as negative, and Dr. Adcock read the December 12, 2017 x-ray as negative. Director's Exhibit 23; Claimant's Exhibits 1, 3; Employer's Exhibit 6.

and Order at 28. The administrative law judge found the January 25, 2016 x-ray positive for pneumoconiosis because both Drs. DePonte and Miller interpreted it as positive for pneumoconiosis, while only Dr. Wolfe interpreted it as negative.[18] Decision and Order at 28; Director's Exhibits 13, 20; Claimant's Exhibit 4. Lastly, the administrative law judge credited Dr. Kendall's negative reading of the April 26, 2018 x-ray. Decision and Order at 28; Employer's Exhibit 3.

Evaluating the x-ray evidence as a whole, the administrative law judge concluded the preponderance of the x-ray evidence is in equipoise as to the existence of clinical pneumoconiosis because readings of three x-rays are in equipoise, one x-ray is positive, and one x-ray is negative. Decision and Order at 28. Employer argues the administrative law judge should have given determinative weight to Dr. Kendall's negative reading because it is the most recent x-ray. Employer's Brief at 11-12. We disagree. It is irrational to credit more recent evidence solely on the basis of recency unless the more recent evidence shows that the miner's condition has progressed or worsened. *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20 (6th Cir. 1993). Because pneumoconiosis is a progressive disease and the condition of a miner with pneumoconiosis would be expected to deteriorate, it is impossible to reconcile conflicting evidence based on its chronological order if a miner's condition in fact has improved. *Id.* at 319, *citing Adkins v. Director, OWCP*, 958 F.2d 49, 51-52 (4th Cir. 1992) ("[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier").

Because the administrative law judge properly conducted a quantitative and qualitative analysis of the x-ray evidence, taking into consideration the readers' qualifications, he permissibly concluded the x-ray evidence is in equipoise and therefore insufficient to satisfy Employer's burden of proof. *See Woodward*, 991 F.2d at 319-20. Thus, we affirm the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis based on the x-ray evidence.

CT Scans

The record contains two CT scans taken on June 16, 2010 and May 5, 2017. Claimant's Exhibits 6, 7. Employer contends the administrative law judge erred in considering the CT scans in regard to legal pneumoconiosis but not to clinical pneumoconiosis. Employer's Brief at 12. We disagree.

[18] Dr. Lundberg read the January 25, 2016 x-ray for quality purposes only. Decision and Order at 28 n.20; Director's Exhibit 14.

In the section of his decision entitled "Other Medical Evidence," the administrative law judge permissibly found the CT scan evidence merited little weight because neither party submitted evidence demonstrating that the scans are medically acceptable and relevant to establishing or refuting Claimant's entitlement to benefits. 20 C.F.R. §718.107(b); Decision and Order at 32-33; Claimant's Exhibits 6, 7. Further, the administrative law judge permissibly found the CT scans less probative because they did not address the presence or absence of clinical pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (administrative law judge may find an x-ray that is silent on the existence of pneumoconiosis inconclusive); Decision and Order at 33 n.22; Claimant's Exhibits 6, 7.

Medical Opinions

We further reject Employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe that Claimant does not have clinical pneumoconiosis. Employer's Brief at 12. As the administrative law judge correctly noted, each physician relied, in part, on negative x-rays to support their opinions that Claimant does not have clinical pneumoconiosis, contrary to his determination that the x-ray evidence is in equipoise. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514 (6th Cir. 2003); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12 (4th Cir. 2000); Decision and Order at 30; Employer's Exhibits 1 at 5; 2 at 14-15; 3 at 8; 5 at 27-28.

Conclusion on Clinical Pneumoconiosis

As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence considered as a whole is insufficient to establish Claimant does not have clinical pneumoconiosis. Decision and Order at 30. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we affirm the administrative law judge's finding that Employer failed to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i).[19]

[19] Because the administrative law judge gave a permissible reason for discrediting Dr. Jarboe's opinion, we need not address Employer's contentions of error regarding the additional reasons he provided for rejecting it. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 30; Employer's Brief at 12.

Disability Causation

The administrative law judge next considered whether Employer established that "no part of [Claimant's] 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)(ii). He rationally discounted the opinions of Drs. Dahhan and Jarboe that Claimant's disability is not due to pneumoconiosis because they did not diagnose clinical pneumoconiosis, contrary to his finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 34-35; Employer's Exhibits 1, 2, 3, 5. Therefore, we affirm the administrative law judge's finding that Employer failed to disprove clinical pneumoconiosis as a cause of Claimant's total disability at 20 C.F.R. §718.305(d)(1)(ii).

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and Employer did not rebut it, we affirm the administrative law judge's award of benefits.[20]

[20] The administrative law judge awarded benefits from November 2015, the month in which Claimant filed his claim, because the evidence did not establish when Claimant first became totally disabled due to pneumoconiosis. Decision and Order at 35. Without more, Employer asserts "[t]he administrative law judge erred in concluding that the Claimant was entitled to benefits as of November 2015." Employer's Brief at 15. Because Employer fails to identify and explain how the administrative law judge erred in assessing the benefits commencement date, we affirm his finding that Claimant is entitled to benefits beginning November 2015. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 35; Employer's Brief at 15.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge