U.S. Department of Labor

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

BRB No. 20-0049 BLA

KENNETH MCINTOSH	)	
	)	
Claimant- Respondent	)	
	)	
v.	)	
	)	
LOCUST GROVE, INCORPORATED	)	
	)	DATE ISSUED: 12/23/2020
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 of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Steven B. Berlin's Decision and Order Awarding Benefits (2017-BLA-05054) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 8, 2014.[1]

[1] This is Claimant's second claim for benefits. In a Decision and Order Denying Living Miner's Benefits issued on March 13, 2009, Administrative Law Judge Kenneth A. Krantz denied Claimant's initial claim, filed on February 16, 2007, because he did not

The administrative law judge credited Claimant with twenty-four years of surface coal mine employment in conditions substantially similar to those in an underground mine and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), and thereby established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge improperly invoked the Section 411(c)(4) presumption based on erroneously finding at least fifteen years of qualifying coal mine employment and total disability. Employer further argues he erred in finding it did not rebut the presumption. It also asserts he erred in determining the commencement date for benefits. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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 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 – Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). The "conditions in a mine other than an

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establish any of the elements of entitlement. Director's Exhibit 1. On appeal, the Benefits Review Board affirmed Judge Krantz's finding that Claimant failed to establish the existence of pneumoconiosis and, therefore, the denial of benefits. *McIntosh v. Locust Grove, Inc.*, BRB No. 09-0525 BLA (Feb. 24, 2010)(unpub.); Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

The administrative law judge summarized Claimant's hearing testimony about the working conditions of his job from his initial claim. Decision and Order at 4-5. Claimant testified that when he worked as a surface coal miner for twenty-four years, his main job involved loading coal with an end loader. Director's Exhibit 1 at 62-64. Although the end loader had "an enclosed cab and air conditioning," Claimant stated the air conditioning did not work and dust would come into the enclosed cab. *Id*. Further, when he scooped up "a bucket of coal with the end loader and deposited [the] coal in [a] truck bed," the task generated "a lot" of dust. *Id*. Claimant agreed he would "breathe that dust in on a regular basis throughout the work shift." *Id*. When asked how often he had to wipe the "windshield from the inside because of the dust accumulation," Claimant stated "[s]ometimes [he would] do it two or three times a day and sometimes . . . only do it once." *Id*.

The administrative law judge found Claimant's "uncontradicted testimony establishes [he] worked for [twenty-four] years at surface [coal] mines where he was regularly exposed to coal mine dust. His surface mine work therefore was 'substantially similar' to underground mine work." Decision and Order at 5. Thus the administrative law judge found Claimant established twenty-four years of qualifying coal mine employment. *Id*.

Employer does not challenge the administrative law judge's finding that Claimant had twenty-four years of surface coal mine employment. Decision and Order at 5. Therefore this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the administrative law judge erred in finding Claimant's testimony established at least fifteen of the twenty-four years occurred in conditions "substantially similar" to those in an underground coal mine. Employer's Brief at 5-7. It asserts Claimant never stated the number of years he was exposed to coal dust "on a regular basis" or "how often he was exposed to coal [mine] dust." *Id*. Contrary to Employer's argument, Claimant's counsel asked Claimant if "he would breathe the coal [mine] dust that was generated in the loading process each and every day that [he] worked for the entire [twenty-four] year period," and Claimant responded "[y]es, I'd say so. I was in it everyday." Director's Exhibit 1 at 63-64. Moreover, Claimant was not required to "prove that [he] was around surface coal dust for a full eight hours on any given day for that day to count."

Freeman United Coal Mining Co. v. Summers, 272 F.3d 473, 481 (7th Cir. 2001). The administrative law judge permissibly relied on Claimant's credible, uncontested testimony[4] detailing the working conditions of his job to find Claimant was regularly exposed to coal mine dust for twenty-four years. *See Kennard*, 790 F.3d at 664-65; *Sterling*, 762 F.3d at 490; *Summers*, 272 F.3d at 481; 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); Decision and Order at 4-5. As it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established twenty-four years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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.[5] 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge considered five pulmonary function studies dated November 12, 2014, February 11, 2015, March 3, 2016, March 17, 2016, and January 12, 2017. Decision and Order at 6, 13-14; Director's Exhibits 11-12, 17-18; Claimant's Exhibit 5. He found the November 12, 2014, February 11, 2015, March 17, 2016, and

[4] Employer argues the administrative law judge erred in finding Claimant's employment history forms and answers to interrogatories also sufficient to establish at least fifteen years of qualifying coal mine employment. Employer's Brief at 5-6. Contrary to Employer's argument, the administrative law judge did not credit this evidence as establishing Claimant was regularly exposed to coal mine dust. Decision and Order at 4-5. Rather, he summarized this evidence, but relied on Claimant's uncontradicted testimony from his initial claim when finding twenty-four years of qualifying coal mine employment established. *Id*.

[5] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 14.

January 12, 2017 studies all produced qualifying[6] values for total disability, but the March 3, 2016 study produced non-qualifying values. *Id*. He further found the March 17, 2016 qualifying study valid, but the remaining studies, including the non-qualifying March 3, 2016 study, all invalid for assessing respiratory impairment. Decision and Order at 13-14. Because the record contains only one valid study, and that study is qualifying, the administrative law judge found Claimant established total disability based on that study. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 13-14.

Employer argues the administrative law judge erred in finding the March 3, 2016 non-qualifying study invalid. Employer's Brief at 8. We disagree. Dr. Rosenberg reviewed this study and summarized its pre-bronchodilator and post-bronchodilator results. Employer's Exhibit 1 at 3. He indicated Claimant's "efforts were not maximal based on the shape of the flow-volume and volume-time curves." *Id*. He thus opined the study was performed with incomplete effort. *Id*. Contrary to Employer's argument,[7] the administrative law judge permissibly found the study invalid based on Dr. Rosenberg's opinion.[8] *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Siwiec*,

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[7] Employer argues the administrative law judge erred in finding Dr. Dahhan invalidated the March 3, 2016 study. Employer's Brief at 7-8. Because we affirm the administrative law judge's reliance on Dr. Rosenberg's opinion as establishing the March 3, 2016 study is invalid, any error by the administrative law judge in crediting Dr. Dahhan's opinion on this issue is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 13-14.

[8] Employer generally contends "it is widely accepted that a study that is invalid" but non-qualifying "can be utilized in assessing [a miner's] pulmonary condition -- that is whether or not [a miner] is totally disabled from a pulmonary or respiratory standpoint." Employer's Brief at 7-8. Employer does not, however, allege the administrative law judge failed to consider medical evidence supporting this position. Nor does it identify such medical evidence in the record before the Board. Thus we decline to consider this argument. *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).

894 F.2d 635, 638 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1326 (3d Cir. 1987); Decision and Order at 13-14.

Employer next argues the administrative law judge erred in finding the qualifying March 17, 2016 study valid. Employer's Brief at 8. It asserts he failed to consider Dr. Dahhan's testimony on this issue. *Id*. Contrary to Employer's argument, Dr. Dahhan did not independently invalidate this study. Rather he was provided with Dr. Rosenberg's testimony that the study's post-bronchodilator results are invalid and was asked by Employer's counsel to address whether the study supports a diagnosis of legal pneumoconiosis.[9] Employer's Exhibit 6 at 12. Dr. Dahhan stated that, assuming the study's results are valid, "which apparently they [are] not," it does not support a diagnosis of legal pneumoconiosis. *Id*.

Dr. Rosenberg, however, did not invalidate the qualifying pre-bronchodilator results from this study. He testified the pre-bronchodilator results "appeared valid," but the qualifying post-bronchodilator results are "not valid." Director's Exhibit 18 at 5-6; Employer's Exhibit 7 at 11-12. The administrative law judge permissibly found the March 17, 2016 study "is valid for [the] assessment of Claimant's respiratory capability" because Dr. Rosenberg did not explain "why he felt the post-bronchodilator results [are] invalid." Decision and Order at 13; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. Further, the administrative law judge rationally found that, even if "Dr. Rosenberg's summary claim that the post-bronchodilator values [are] invalid" was credible, the study still supports a finding of total disability because the pre-bronchodilator results are valid and qualifying. Decision and Order at 14 n.12; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 45 Fed. Reg. 13,678, 13,682 (Feb 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

Employer does not challenge the administrative law judge's finding the March 17, 2016 study is qualifying. Decision and Order at 6, 13-14. Thus we affirm this finding.

[9] "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).

Skrack, 6 BLR at 1-711. As the only valid pulmonary function study is qualifying, we affirm as supported by substantial evidence the administrative law judge's finding that the pulmonary function study evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 14.

The administrative law judge next weighed the medical opinions of Drs. Rosenberg and Dahhan that Claimant is not totally disabled.[10] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-15. He found their opinions are not reasoned or documented, and assigned them diminished weight. *Id*. Employer argues the administrative law judge erred in discrediting their opinions. Employer's Brief at 8-10. We disagree.

Dr. Rosenberg initially opined Claimant is totally disabled from a pulmonary standpoint by a "significant" restrictive impairment based on the March 17, 2016 pulmonary function study. Director's Exhibit 18 at 6. After reviewing Dr. Dahhan's March 3, 2016 pulmonary function study, Dr. Rosenberg opined in a supplemental report that Claimant "has no airflow obstruction or associated impairment or disability." Employer's Exhibit 1 at 3. He concluded Claimant "is capable of achieving normal airflow, in contrast to what was obtained at the time of [the March 17, 2016] evaluation." *Id*. Thereafter, Dr. Rosenberg reviewed Dr. Ajjarapu's medical opinion and the results of a November 12, 2014 pulmonary function study. Employer's Exhibit 4 at 4. In a second supplemental report, he opined Claimant "does have moderate restriction which is qualifying" and concluded Claimant is "disabled from a respiratory perspective." *Id*. Finally, Dr. Rosenberg testified in his deposition that "based upon [Dr. Dahhan's March 3, 2016 study] alone," Claimant would not be totally disabled. Employer's Exhibit 7 at 14-15.

The administrative law judge permissibly discredited Dr. Rosenberg's opinion because his "conclusions are contradictory and confusing." Decision and Order at 14-15; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. The administrative law judge explained "it is difficult to determine whether Dr. Rosenberg's opinion . . . is based strictly and narrowly on the results obtained by Dr. Dahhan[,] or whether Dr. Rosenberg stands by his previous conclusion that Claimant has a totally disabling respiratory impairment." Decision and Order at 14-15.

Dr. Dahhan opined in his initial report that Claimant is not totally disabled because there are "no objective findings to indicate any functional pulmonary impairment and/or disability." Director's Exhibit 17 at 4. When presented with Dr. Rosenberg's qualifying

[10] The administrative law judge also weighed Dr. Ajjarapu's opinion that Claimant is totally disabled, but discredited her opinion because she relied on invalid objective testing. Decision and Order at 14; Director's Exhibit 11.

March 17, 2016 pulmonary function study, Dr. Dahhan stated the results "would not be consistent with [an impairment] caused by inhalation of coal [mine] dust." Employer's Exhibit 6 at 12. The administrative law judge found Dr. Dahhan focused on the etiology of any impairment evidenced by the March 17, 2016 pulmonary function study. Decision and Order at 14. He permissibly found Dr. Dahhan's opinion unpersuasive because the doctor did not address whether the March 17, 2016 study "constituted 'objective findings' of pulmonary impairment" or address whether Claimant is totally disabled in light of this test.[11] Decision and Order at 14; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Thus we affirm, as supported by substantial evidence, the administrative law judge's determination that the medical opinion evidence does not undermine the pulmonary function study evidence supporting a finding of total disability. Decision and Order at 15. Because there is no evidence undermining the qualifying March 17, 2016 pulmonary function study, we further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability, 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232, and his determination that Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 15.

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 Claimant has neither legal nor clinical pneumoconiosis, 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.[12]

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 Co.*, 25 BLR 1-149, 159 (2015)

[11] Employer argues that, contrary to the administrative law judge's finding, Dr. Dahhan did address the qualifying March 17, 2016 study and found it invalid. Employer's Brief at 9. As discussed above, however, Dr. Dahhan did not independently invalidate the study. He reviewed Dr. Rosenberg's opinion that the post-bronchodilator portion of the study is invalid, Employer's Exhibit 6 at 12, and the administrative law judge found Dr. Rosenberg's opinion unpersuasive. Decision and Order at 13. Moreover, no physician invalidated the qualifying pre-bronchodilator results from this study.

[12] The administrative law judge found Employer disproved clinical pneumoconiosis. Decision and Order at 17.

(Boggs, J., concurring and dissenting). The Sixth Circuit holds Employer can "disprove the existence of legal pneumoconiosis by showing that [the miner's] coal mine employment did not contribute, in part, to his alleged pneumoconiosis." *Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020). "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." *Id*. at 407, *citing Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600 (6th Cir. 2014).

The administrative law judge weighed the medical opinions of Drs. Rosenberg and Dahhan. Decision and Order at 18-20. Dr. Rosenberg opined Claimant does not have legal pneumoconiosis, but has a restrictive ventilatory impairment due to obesity and unrelated to coal mine dust exposure. Director's Exhibit 18; Employer's Exhibits 1, 4, 7. Dr. Dahhan opined Claimant does not have legal pneumoconiosis because there are "no objective findings to indicate any functional pulmonary impairment and/or disability." Director's Exhibit 17 at 4; *see* Employer's Exhibits 2, 6. The administrative law judge found their opinions unpersuasive as he concluded they did not adequately explain the basis for excluding legal pneumoconiosis. Decision and Order at 18-20. He also found Dr. Rosenberg's opinion inconsistent with the Act and the regulations. *Id.*

Employer argues the administrative law judge applied an incorrect legal standard because he required Drs. Rosenberg and Dahhan to completely "rule out" coal mine dust exposure as a cause of Claimant's respiratory impairment. Employer's Brief at 13. We disagree. The administrative law judge correctly set forth the standard for Employer to rebut the presumption of legal pneumoconiosis before weighing the medical opinions. Decision and Order at 18. He indicated Employer must establish the "absence of any respiratory or pulmonary impairment arising out of coal mine employment, including [any] chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to or [substantially] aggravated by dust exposure in coal mine employment." *Id*.; *see* 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). In discounting the opinions of Drs. Rosenberg and Dahhan, the administrative law judge did not require the physicians to rule out any contribution from coal mine dust exposure to Claimant's impairment or reject their opinions because they did not meet a particular rebuttal standard. Rather, as discussed below, the administrative law judge found their explanations for why Claimant does not have legal pneumoconiosis unpersuasive.

Dr. Rosenberg excluded legal pneumoconiosis because Claimant's restrictive ventilatory impairment improved by over twenty-percent after the administration of bronchodilators. Director's Exhibit 18 at 6. He explained the impairment is not legal pneumoconiosis because "[c]oal mine dust exposure would be expected to cause a fixed impairment" that does not respond to bronchodilators. *Id*. He further explained the portion of the restrictive impairment that did "not normalize" after the administration of bronchodilators is an "underlying extrinsic restriction" related to Claimant's "obesity and

unrelated to coal mine dust exposure." *Id*. The administrative law judge permissibly found Dr. Rosenberg "did not provide an adequate rationale for his conclusion that coal dust exposure" did not cause or contribute to Claimant's post-bronchodilator "residual, fixed impairment." *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185.

Further, Dr. Rosenberg opined that, "if [Claimant] had 'intrinsic' restriction related to parenchymal lung disease severe enough to cause disabling impairment, one would expect worsening gas exchange in association with exercise. Such is not the case with respect to [Claimant]." Director's Exhibit 4. Thus he opined the restriction is due to obesity and not clinical pneumoconiosis. *Id*. In his deposition, Dr. Rosenberg explained that any "intrinsic" restrictive pulmonary impairment would be caused by clinical pneumoconiosis. Employer's Exhibit 7 at 13-14. Based on the absence of a gas exchange impairment with exercise in Claimant's blood gas study results, Dr. Rosenberg reiterated Claimant's restrictive impairment is not due to clinical pneumoconiosis. *Id*. He stated Claimant cannot have legal pneumoconiosis "causing restriction. There is just no physiological mechanism for that." *Id*.

As the administrative law judge noted, the regulations provide that clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, and the absence of clinical pneumoconiosis does not preclude the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1), (2); Decision and Order at 20. Moreover, the definition of legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any *chronic restrictive or obstructive pulmonary disease* arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). Insofar as it was Employer's burden to rebut the presumption of legal pneumoconiosis, the administrative law judge permissibly found Dr. Rosenberg did not adequately explain why coal mine dust exposure did not contribute to, or aggravate, Claimant's restrictive impairment. *See Young*, 947 F.3d at 405; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012); *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 18-20.

Dr. Dahhan opined in his initial report that there is no evidence of a respiratory or pulmonary impairment on Claimant's objective testing. Director's Exhibit 17. He testified in his deposition, however, that if he assumed Dr. Rosenberg's March 17, 2016 pulmonary function study is valid, the study is still not "consistent with [an impairment] caused by [the] inhalation of coal [mine] dust." Employer's Exhibit 6 at 11-12. Dr. Dahhan specifically compared the results of the March 3, 2016 pulmonary function study with the March 17, 2016 study, and explained any impairment would "not be expected to demonstrate such fluctuation in its severity from a duration of less than two weeks" *Id*. The administrative law judge permissibly found Dr. Dahhan's opinion unpersuasive because he "speculated about the cause of a disability he did not believe existed" when

opining "Claimant's significant history of coal mine dust exposure did not contribute to Claimant's respiratory impairment." Decision and Order at 19; *see Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185. The administrative law judge also permissibly found Dr. Dahhan did not adequately explain why coal mine dust exposure did not contribute to, or aggravate, Claimant's restrictive impairment. *Young*, 947 F.3d at 405; *Napier*, 301 F.3d at 713-14; *Crisp*, 866 F.2d at 185; Decision and Order at 18-20.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding Employer did not disprove the existence of legal pneumoconiosis and his determination that it did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer established "no part of the miner'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 permissibly discredited the disability causation opinions of Drs. Rosenberg and Dahhan because neither diagnosed legal pneumoconiosis, contrary to his finding Employer failed to disprove Claimant has the disease.[14] *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 20-21. We therefore affirm the administrative law judge's finding Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii) and the award of benefits.

Commencement Date for Benefits

The date for the commencement of benefits is the month in which Claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date is not ascertainable, benefits commence the month the claim was filed, unless evidence the administrative law judge credits establishes Claimant was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

[13] Dr. Ajjarapu diagnosed legal pneumoconiosis. Director's Exhibit 11. The administrative law judge correctly found her opinion does not aid Employer on rebuttal. Decision and Order at 18-19. Thus we need not address Employer's argument that the administrative law judge erred in finding her opinion reasoned and documented. *Larioni*, 6 BLR at 1-1278; Employer's Brief at 12-13.

[14] In addressing whether pneumoconiosis caused Claimant's disability, neither Dr. Rosenberg nor Dr. Dahhan set forth an explanation independent of their conclusions that Claimant does not have legal pneumoconiosis. Director's Exhibits 17, 18.

The administrative law judge summarily awarded benefits commencing December 2014, the month in which Claimant filed his subsequent claim. Decision and Order at 24. Employer maintains that the earliest date benefits can commence is March 2016 based on the administrative law judge's crediting of the March 17, 2016 pulmonary function study as establishing total disability. Employer's Brief at 14.

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 Claimant 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 December 2014, 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 Claimant 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 Administrative Procedure Act.[15]

[15] The Administrative Procedure Act (APA) provides every adjudicatory decision must include "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).

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.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge