U.S. Department of Labor

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

BRB No. 20-0170 BLA

LAWRENCE L. GROVES Claimant-Respondent v. ARCH ON THE GREEN, INCORPORATED and BITUMINOUS CASUALTY CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/20/2021 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (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 Jonathan C. Calianos's Decision and Order Awarding Benefits (2016-BLA-05653) rendered on a claim filed on May 1, 2006 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification in a subsequent claim[1] and is before the Benefits Review Board for the third time.[2]

In its last decision, the Board affirmed Administrative Law Judge Daniel F. Solomon's finding that Claimant established the existence of pneumoconiosis and therefore established a change in an applicable condition of entitlement. *Groves v. Arch on the Green Inc.*, BRB No. 12-0170 BLA, slip op. at 6-7 (Dec. 21, 2012) (unpub.). The Board also affirmed his finding that Claimant established total disability due to pneumoconiosis and therefore affirmed the award of benefits. *Id.*

Pursuant to Employer's appeal, the United States Court of Appeals for the Sixth Circuit vacated Judge Solomon's finding that Claimant established total disability due to pneumoconiosis, holding he applied an incorrect standard in finding disability causation. *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 600-01 (6th Cir. 2014). Thus, the Sixth Circuit remanded this case for further proceedings. *Id.*

On November 6, 2014, subsequent to the Sixth Circuit's remand, Claimant requested modification, and the case was remanded to the district director on December 29, 2014. Director's Exhibits 47, 48. On May 19, 2016, the case was referred to the Office of Administrative Law Judges for a formal hearing and was assigned to Judge Calianos (the administrative law judge). Prior to the hearing, Employer sought to depose

[1] On January 25, 2000, Administrative Law Judge Rudolf L. Jansen denied Claimant's initial claim for benefits, filed on September 9, 1998, because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1 at 2, 8.

[2] The Board set forth the complete procedural history of this case in its last decision. *Groves v. Arch on the Green Inc.*, BRB No. 12-0170 BLA (Dec. 21, 2012) (unpub.).

Department of Labor (DOL) employees concerning the continuing validity of the scientific premises set forth in the preamble to the 2001 revisions to the black lung regulations. The Director, Office of Workers' Compensation Programs (the Director), moved for a protective order to prevent the depositions, which the administrative law judge granted.

In the Decision and Order Awarding Benefits dated January 8, 2020, which is the subject of this appeal, the administrative law judge credited Claimant with sixteen 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,[3] 30 U.S.C. §921(c)(4) (2018), and thereby established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer contends this appeal should be held in abeyance pending resolution of challenges to the constitutionality of the Section 411(c)(4) presumption. It further argues the administrative law judge deprived it of due process by refusing to allow it to depose a DOL official regarding the scientific bases for the preamble to the 2001 regulatory revisions while relying on the preamble to find it did not rebut the Section 411(c)(4) presumption. On the merits, Employer argues the administrative law judge improperly invoked the presumption based on erroneous findings that Claimant had at least fifteen years of qualifying coal mine employment and is totally disabled. Employer also asserts the administrative law judge erred in finding its experts relied on premises that conflict with the preamble. In the alternative, it contends that, even if Claimant is entitled

[3] Section 411(c)(4) 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 coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] If 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). Because Claimant failed to establish the existence of pneumoconiosis in his prior claim, he had to submit new evidence establishing this element to obtain review of his current claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1 at 4.

to benefits, the administrative law judge erred in determining the benefits commencement date.

Claimant responds, urging affirmance of the award of benefits. The Director responds, contending the administrative law judge rationally found Claimant established at least fifteen years of surface coal mine employment in conditions substantially similar to those underground and did not deprive Employer of due process. The Director further urges the Board to reject Employer's request to hold this case in abeyance. Employer reiterates its contentions in its reply brief.

The 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.[5] 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).

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

Employer requests that the Board hold this appeal in abeyance pending a final resolution to constitutional challenges to the Affordable Care Act (ACA), which revived the Section 411(c)(4) presumption. Employer's Brief at 14 n.2; *see* Pub. L. No. 111-148, §1556 (2010). As Employer indicates, the United States Supreme Court is considering whether the ACA requirement for individuals to obtain health insurance is unconstitutional and, if so, whether the remainder of the law must also be struck down as inseverable from that provision.[6] *Texas v. California*, U.S. , No. 19-1019, argued Nov. 10, 2020. The United States Supreme Court previously upheld the constitutionality of the ACA in *Nat'l*

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 4, 7.

[6] The United States Court of Appeals for the Fifth Circuit previously held the health insurance requirement unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019), *cert. granted sub nom. Texas v. California*, U.S. , 140 S. Ct. 1262 (2020). Separately, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative as a law. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), cert. denied, 568 U.S. 816 (2012).

Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012), however, and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *aff'd sub nom. W.Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We thus deny Employer's motion to hold this case in abeyance**.**

Denial of Employer's Request to Depose DOL Officials

Prior to the hearing on Claimant's request for modification, Employer submitted a Notice of Rule 30(b)(6) Deposition to DOL indicating it intended to compel the testimony of a DOL employee "qualified and knowledgeable to testify concerning the scientific validity of . . . facts and medical conclusions set forth in the preamble[]" to the revised regulations. Employer's August 26, 2016 Notice of Rule 30(b)(6) Deposition to DOL. The Director filed a Motion for Protective Order to prevent Employer from deposing any DOL employees. Director's Aug. 31, 2016 Motion for Protective Order. Employer responded, urging the administrative law judge to deny the Director's request. Employer's Sept. 14, 2016 Opposition to Motion for a Protective Order. In an Order dated September 30, 2016, the administrative law judge granted the Director's request, adopting and incorporating by reference Administrative Law Judge Timothy McGrath's March 17, 2016 Order Granting Motion for Protective Order in *Thomas v. Cedar Ridge Inc.*, 2015-BLA-05443 (Judge McGrath's Order). Sept. 30, 2016 Order Granting Request for Protective Order and Quashing Deposition. The administrative law judge adopted Judge McGrath's reasoning: courts have consistently upheld the validity of the 2001 regulatory revisions and have determined administrative law judges may rely on the preamble in weighing medical evidence; a deposition of a DOL employee was unnecessary because the scientific bases for the regulations are contained in the preamble; and interested parties are free to provide more recent medical studies and evidence to challenge the scientific bases for the regulations. *Id., citing* Judge McGrath's Order.

Employer argues it was deprived of due process because the administrative law judge denied its request to depose a DOL official regarding the scientific basis for the preamble, then relied on the preamble in evaluating the medical opinion evidence. Decision and Order at 18-19. We disagree.

Due process requires that Employer be given the opportunity to mount a meaningful defense. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000). As the administrative law judge concluded, the medical studies and literature that serve as the bases for the scientific findings contained in the 2001 regulatory revisions are set forth in the preamble itself. Sept. 30, 2016 Order Granting Request for Protective Order and Quashing Deposition, *citing* Judge McGrath's Order. Thus, Employer had access to the DOL's conclusions regarding the medical studies that it found most credible and was fully

aware that administrative law judges may consult those scientific findings when analyzing medical opinion evidence.[7] *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801 (6th Cir. 2012).

Moreover, as the administrative law judge noted, Employer was free to develop and submit evidence responding to the scientific findings in the preamble and attempt to show they are no longer valid or relevant to this case. *Id.* Employer submitted such evidence in the form of an opinion from Dr. Rosenberg who, citing to medical literature, criticized the scientific findings in the preamble concerning the relationship of the FEV1/FVC ratio, as determined from pulmonary function testing, to coal mine dust exposure. Employer's Exhibit 27 at 3-5. The administrative law judge permissibly concluded that neither Dr. Rosenberg's opinion nor the medical literature he cited is of the type and quality to invalidate the scientific findings contained in the preamble.[8] Decision and Order at 66; *see Sterling*, 762 F.3d at 492.

Because Employer was afforded and took advantage of the opportunity to submit evidence challenging the scientific findings contained in the preamble, it has failed to demonstrate how it was deprived of due process. *See Holdman*, 202 F.3d at 883-84; *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999).

[7] We similarly reject Employer's assertion that the administrative law judge violated its due process rights by relying on the preamble without providing it notice of his intent to do so. Employer's Brief at 19. The Sixth Circuit has explicitly held that the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011).

[8] Further, while Employer generally asserts on appeal that Dr. Rosenberg cited studies in support of his opinion, it fails to identify how these studies are more reliable than the studies that the DOL found credible or to otherwise demonstrate error in the administrative law judge's rejection of Dr. Rosenberg's opinion regarding the significance of the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013); Employer's Brief at 17.

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 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); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Sterling*, 762 F.3d at 489-90.

The administrative law judge noted the parties stipulated Claimant worked in strip mining for sixteen years, and summarized Claimant's hearing testimony and statements to Dr. Simpao about the working conditions of his employment. Decision and Order at 16-17. Claimant testified he operated end loaders, used dozers for restoration, and hauled coal. October 29, 2008 Hearing Transcript at 25. According to Claimant, only some of the equipment he used had cabs, and dust still got in even when it had cabs. *Id.* at 11. He had to take a bath after he left work because his face was covered in dust, and he coughed up yellow and black material at night. *Id.* at 12. He also reported to Dr. Simpao that his working conditions were "extremely dusty." Director's Exhibit 11 at 2. The administrative law judge credited Claimant's testimony and found he "satisfied his burden to prove that the conditions of his sixteen years in surface mining with Employer were substantially similar to those in underground mining." Decision and Order at 17.

Employer does not challenge the administrative law judge's finding that Claimant had sixteen years of surface coal mine employment. Decision and Order at 11. We therefore affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer instead argues the administrative law judge erred in finding Claimant's testimony established he performed his surface coal mine employment in conditions "substantially similar" to those in an underground coal mine. Employer's Brief at 13-16. It asserts he did not establish that his exposure was "regular" or that it was "comparable to underground mining." *Id.*at 15. Contrary to Employer's argument, Claimant is 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). Rather, substantial similarity is established "if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(a)(2). The administrative law judge found Claimant's uncontested testimony detailing the working conditions of his job was credible, and permissibly relied on it to find he was regularly exposed to coal mine dust for sixteen 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 17-18. As it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established sixteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[9]

Section 411(c)(4) Presumption – 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 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 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 Claimant established total disability based on the arterial blood gas studies and medical opinions. 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 22, 54-55.

Employer raises no specific challenge to the administrative law judge's finding that Claimant is totally disabled from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). Rather, Employer asserts the administrative law judge improperly shifted the burden to Employer to demonstrate Claimant is not totally disabled from performing non-coal mine work of similar physical demands available in the area where he lives. Employer's Brief at 12-13.

Contrary to Employer's contention, once a claimant establishes he is unable to perform his usual coal mine work, a prima facie case for total disability exists, and the party opposing entitlement bears the burden of going forward with evidence to prove the claimant is capable of performing "gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those" of his previous coal mine work. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-86-87 (1988) (declining to

[9] Based on "further reflection of the evidence initially submitted," Decision and Order at 18, the administrative law judge permissibly reached a different conclusion than Judge Solomon did previously, thereby indicating Claimant established a mistake in a determination of fact in the prior decision. *See O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001).

interpret the regulation as requiring more restrictive criteria than the criteria under the Social Security Act, as mandated by Section 402(f)(1) of the Act, 30 U.S.C. §902(f)(1));[10] 20 C.F.R. §718.204(b)(2). The administrative law judge accurately found Employer presented no evidence to satisfy its burden. Decision and Order at 55.

Because Employer raises no specific allegation of error with regard to the administrative law judge's weighing of the arterial blood gas studies and medical opinions, we affirm his finding this evidence established total disability. 20 C.F.R. §718.204(b)(2)(ii), (iv). We also affirm his finding that the evidence overall established total respiratory disability at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198. Consequently, we affirm the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[11] or "no part of

[10] In *Taylor*, a case that also arose within the jurisdiction of the Sixth Circuit, the Board held that if the former 20 C.F.R. §718.204(c) (1980) were interpreted as requiring claimants to prove not only an inability to perform their usual coal mine work, but also the inability to perform comparable gainful work, it would impose a burden of proof on the claimant that various Courts of Appeals, including the Sixth Circuit, had not imposed on claimants under Section 223(d) of the Social Security Act. *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-86-87 (1988)(citing collected cases). Because the Black Lung Benefits Act prohibits the Secretary of Labor from defining total disability with more restrictive criteria than those imposed under Section 223(d) of the Social Security Act, *see* 30 U.S.C. §902(f), the Board declined to interpret the regulation in such a manner. Thus, the Board held that, under 20 C.F.R. Part 718, once a claimant has established an inability to perform his usual coal mine employment, a prima facie case for total disability exists. Thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove the claimant is able to perform comparable and gainful employment. *Taylor*, 12 BLR at 1-87.

[11] "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

[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); *see Island Creek Coal Co. v. Young*, 947 F.3d 399, 405 (6th Cir. 2020); *W. Va. CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015). The administrative law judge found Employer did not establish rebuttal by either method.[12]

Existence of 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*, 25 BLR at 1-159. 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." *Young*, 947 F.3d at 405. "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 Groves*, 761 F.3d at 600.

Employer relies on the opinions of Drs. Broudy, Dahhan, and Rosenberg, who opined Claimant's totally disabling respiratory impairment is due to cigarette smoking and is unrelated to coal mine dust exposure. Decision and Order at 64-67; Director's Exhibit 56; Employer's Exhibits 1, 3, 6, 11, 15, 18-21, 25. The administrative law judge found their opinions insufficiently reasoned and unpersuasive, and thus did not carry Employer's burden to prove Claimant does not have legal pneumoconiosis. Decision and Order at 65-67.

Employer contends the administrative law judge misapplied, and placed undue reliance on, the preamble in discounting the opinions of Drs. Broudy, Dahhan, and Rosenberg, thereby rendering the presumption irrebuttable. Employer's Brief at 16-24. We disagree.

Contrary to Employer's argument, the administrative law judge permissibly evaluated the opinions of Drs. Broudy, Rosenberg, and Dahhan in conjunction with the

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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).

[12] The administrative law judge found Employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 64.

DOL's discussion of the prevailing medical science set forth in the preamble. *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Employer's Brief at 16-24. Moreover, his references to the preamble did not, as employer maintains, convert the Section 411(c)(4) rebuttable presumption into an irrebuttable presumption, or deny employer a fair adjudication; rather, he properly evaluated whether these physicians satisfied Employer's burden by credibly explaining their opinions that Claimant does not have legal pneumoconiosis.[13] *See Sterling*, 762 F.3d at 491; *Adams*, 694 F.3d at 801-02.

The administrative law judge observed that Drs. Broudy and Rosenberg opined the reduction in Claimant's FEV1/FVC ratio on pulmonary function testing eliminates coal mine dust as a possible cause of Claimant's impairment because, they explained, coal mine dust exposure causes a parallel reduction in the FEV1 and FVC, whereas smoking causes a reduction in the FEV1/FVC ratio. *Id.*; Director's Exhibit 56; Employer's Exhibits 1, 3, 11, 15, 19, 21, 24, 26-27. The administrative law judge permissibly discredited this rationale as inconsistent with the preamble, which recognizes that "coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio." Decision and Order at 65- 66; *see Sterling*, 20 F.3d at 491; *Adams*, 694 F.3d at 801; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

In addition, the administrative law judge noted Dr. Broudy excluded coal dust as a contributor to Claimant's impairment based on his view that it would be "extremely rare" for a coal miner to develop respiratory difficulties if he did not also have complicated pneumoconiosis, a history of cigarette smoking, or some other non-occupationally related lung disease. Decision and Order at 65; Employer's Exhibit 15. The administrative law judge permissibly rejected Dr. Broudy's reasoning because it does not account for the additive nature of smoking and coal mine dust exposure or explain why Claimant's coal mine dust exposure did not contribute to his impairment along with his smoking history. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-74 (4th Cir. 2017); *Energy West*

[13] We also reject Employer's contention that the administrative law judge improperly "rel[ied] on the preamble rather than the regulation." Employer's Brief at 21. Contrary to Employer's argument, the administrative law judge did not utilize the preamble as a legal rule, but permissibly consulted it as a statement of medical findings that the DOL accepted when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Adams*, 695 F.3d at 801-02; *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, 1260-61 (10th Cir. 2015); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 16 (4th Cir. 2012).

Mining Co. v. Estate of Blackburn, 857 F.3d 817, 828-29 (10th Cir. 2017); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,940; Decision and Order at 65.

The administrative law judge also noted Drs. Rosenberg and Dahhan attributed Claimant's emphysema entirely to smoking. Decision and Order at 66. Dr. Rosenberg diagnosed Claimant with diffuse emphysema, which he opined is consistent with cigarette smoking and not coal mine dust exposure. Director's Exhibit 56. Dr. Dahhan diagnosed Claimant with bullous emphysema, which he opined is a form of emphysema that would not be caused by coal mine dust exposure. Employer's Exhibit 6. The administrative law judge permissibly discredited their opinions because neither physician adequately addressed the possibility that Claimant's history of coal mine dust exposure could aggravate his emphysema. *See Young*, 947 F.3d at 405; *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488-89 (6th Cir. 2012); *Jericol Mining Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Crisp*, 866 F.2d at 185; 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 66.

Lastly, the administrative law judge observed Dr. Rosenberg opined Claimant's impairment is likely unrelated to coal mine dust exposure because the medical literature demonstrates there is rarely a latency period of thirty years between the cessation of coal mine dust exposure and the onset of legal pneumoconiosis. *See* Decision and Order at 67; Employer's Exhibits 24, 27, 56. The administrative law judge permissibly rejected this reasoning because pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," and Dr. Rosenberg did not explain why Claimant could not be "one of the rare cases."[14] Decision and Order at 67, *quoting* 20 C.F.R. §718.201(c).

[14] Employer also alleges the administrative law judge erred in rejecting Dr. Rosenberg's opinion based on the presence of anthracotic pigment in Claimant's lymph nodes, which Employer asserts "is not a finding of pneumoconiosis." Employer's Brief at 27. To the contrary, the administrative law judge did not rely on the existence of anthracotic pigment alone to discredit Dr. Rosenberg's opinion; he permissibly found the opinions of Drs. Broudy and Rasmussen, that the biopsy evidence showed significant coal dust deposition in the lungs, undermined Dr. Rosenberg's opinion "to the extent it rests on a mild or minimal dust deposition in the lungs." Decision and Order at 66-67; Claimant's Exhibit 8; Employer's Exhibits 15, 56.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Napier*, 301 F.3d at 713-714; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Broudy, Rosenberg, and Dahhan, the only opinions supportive of a finding that Claimant does not have legal pneumoconiosis, we affirm his finding that Employer failed to disprove the existence of the disease.[15] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005). Therefore, we affirm his finding that Employer failed to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 68.

Disability Causation

The administrative law judge next addressed whether Employer established "no part of the [M]iner'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 opinions of Drs. Broudy, Rosenberg, and Dahhan because they did not diagnose legal pneumoconiosis, contrary to his determination that Employer failed to disprove Claimant has the disease. *See 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 68. We therefore affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(2)(ii).

Commencement Date of Benefits

Finally, Employer challenges the administrative law judge's determination that the date for commencement of Claimant's benefits is May 2006, asserting he erred by not finding the onset date to be either September 2011, the date of the earliest qualifying blood gas study, or November 2014, the month Claimant requested modification. Employer's Brief at 28. We disagree.

[15] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Broudy, Rosenberg, and Dahhan, we need not address Employer's arguments regarding the opinions of Drs. Simpao, Chavda, Rasmussen and Sood that Claimant has legal pneumoconiosis because they cannot aid Employer in rebutting the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 25-27.

Where, as here, modification is based on the correction of a mistake in a determination of fact, Claimant is entitled to benefits from the date he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes he was not disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). The administrative law judge found Claimant established a mistake of fact, indicating "after further reflection on the evidence initially submitted," he disagreed with Judge Solomon's conclusion that Claimant's surface coal mine employment did not occur in conditions substantially similar to those in an underground coal mine, and thus, contrary to Judge Solomon's finding, Claimant was entitled to invoke the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-56 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001); *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 557 (4th Cir. 2013); 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 18. Thus, benefits are payable from the date Claimant first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim. 20 C.F.R. §725.503(d)(1); *see Edmiston*, 14 BLR at 1-69; *Owens*, 14 BLR at 1-50.

The administrative law judge found the medical evidence did not establish when Claimant became totally disabled due to pneumoconiosis. Decision and Order at 69. Contrary to Employer's contention, the onset date is not established by the date of the first objective test of record indicating total disability, as such medical evidence shows only that Claimant became totally disabled at some time prior to that date.[16] *See Owens*, 14 BLR at 1-50; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that Claimant was not totally disabled due to pneumoconiosis at any time after the filing date of his claim. Substantial evidence thus supports the administrative law judge's finding that the medical evidence does not reflect when Claimant became totally disabled due to pneumoconiosis. Therefore, we affirm the administrative law judge's application of 20 C.F.R. §725.503(d)(1) to award benefits beginning in the month in which Claimant filed his current subsequent claim.

[16] Moreover, in addition to the blood gas testing, the administrative law judge also determined the medical opinion evidence, including Dr. Simpao's May 2006 opinion, established total disability. Decision and Order at 54-55. Employer does not challenge this finding, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), and provides no rationale to explain why the later blood gas testing should be determinative in establishing the onset date.

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