BRB No. 11-0518 BLA

FREDERICK D. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WAYCO LIMITED PARTNERSHIP, NO. 1, C/O ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 04/19/2012
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins & Allen), Salyersville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (09-BLA-5073) of Administrative Law Judge Joseph E. Kane rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). This case involves a claim filed on January 8, 2008.

In considering the claim, the administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[1] 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked for more than fifteen years in surface mining, where he was exposed to coal dust in conditions substantially similar to those of an underground coal mine,[2] and that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. However, the administrative law judge found that employer rebutted the presumption by establishing that claimant does not have pneumoconiosis. Accordingly, the administrative law judge denied benefits.

[1] In an April 9, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4) of the Act, and of its potential applicability to this case. The administrative law judge allowed for the submission of position statements, as well as the submission of additional evidence, to respond to the change in law. The parties, including the Director, Office of Workers' Compensation Programs (the Director), submitted position statements. Claimant did not submit any additional evidence. Employer, however, filed a supplemental report by Dr. Hippensteel, which the administrative law judge admitted into evidence. Decision and Order at 2; Employer's Exhibit 9.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Decision and Order at 7-8; Director's Exhibit 3. The Board will, therefore, apply the law of the United States Court of Appeals for the Sixth Circuit to this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

On appeal, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board. Claimant has also filed a reply brief, reiterating his arguments in this appeal.

The Board's scope of review is defined by statute. The Board must affirm the findings of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with applicable law. 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).

At the outset, we affirm the administrative law judge's uncontested findings of at least fifteen years of qualifying coal mine employment, total respiratory disability pursuant to 20 C.F.R. §718.204(b) and, consequently, invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10, 11-12. On rebuttal of the Section 411(c)(4) presumption, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, BLR (6th Cir. 2011). In this case, the administrative law judge found that employer established the first method of rebuttal by disproving the existence of both clinical and legal pneumoconiosis.[4]

[3] Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge credited the two most recent pulmonary function studies of October 2008 and September 2009, which produced qualifying values, both before and after the administration of bronchodilators, over the non-qualifying study of February 2008. Additionally, the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. § 718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(i) and Appendix B to Part 718; 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 11-12.

[4] "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).

As no party challenges the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis, that finding is affirmed. *Skrack*, 6 BLR at 1-711; Claimant's Brief at 9, 10-14; Decision and Order at 15. Claimant challenges, however, the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis, asserting that the administrative law judge erred in his consideration of the medical opinion evidence of record. In particular, claimant argues that the credited opinions of Drs. Broudy and Hippensteel are inconsistent with the Act. Claimant also contends that the administrative law judge's decision does not comply with the requirements of the Administrative Procedure Act (APA).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In evaluating the issue of whether employer rebutted the presumption of legal pneumoconiosis pursuant to Section 411(c)(4), the administrative law judge considered the opinions of Drs. Ranavaya, Broudy, Hippensteel and Ammisetty. Dr. Ranavaya opined that claimant's obstruction is unrelated to coal mining and is most probably due to his smoking history. Decision and Order at 15. Dr. Broudy diagnosed obstructive airways disease due to cigarette smoking, while Dr. Hippensteel diagnosed obstructive impairment, bronchial inflammation and emphysema, each due to smoking. Decision and Order at 6-7; Employer's Exhibits 1-5. Dr. Ammisetty diagnosed obstructive lung disease and legal pneumoconiosis. Decision and Order at 7; Claimant's Exhibit 1.

The administrative law judge found that Dr. Ranavaya, who is not a pulmonologist and holds no special certifications, provided an equivocal opinion that was insufficiently reasoned to establish rebuttal. Decision and Order at 5-6, 14-15; Director's Exhibit 10. As no party challenges the administrative law judge's bases for according less weight to the opinion of Dr. Ranavaya, this finding is affirmed. *Skrack*, 6 BLR at 1-711; *see* Employer's Brief at 4; Claimant's Brief at 8, 15.

The administrative law judge then assigned greatest weight to the opinions of Drs. Broudy and Hippensteel, based on his finding that they "provided more detailed opinions that smoking caused claimant's obstructive lung disease." Decision and Order at 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).

[5] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Addressing Dr. Broudy's opinion, the administrative law judge found that Dr. Broudy stated:

> I believe the impairment is far more likely to be due to cigarette smoking because cigarette smoking tends to cause more severe impairment in a smaller percentage of miners who smoke, whereas coal dust may cause a very slight decrease in a much larger percentage of miners.

Id. at 16; Employer's Exhibit 2. Additionally, the administrative law judge noted that Dr. Broudy opined that "smoking caused the obstruction based on claimant's continued exposure to cigarette smoke and hyperinflated lungs, which are typical of smoke-induced obstructive lung disease." Decision and Order at 15; Director's Exhibit 2. Considering these statements, the administrative law judge accepted Dr. Broudy's opinion that "impairment due to coal dust is usually a restrictive or mixed type of impairment, which is not the case here," and credited Dr. Broudy's opinion, based on his "[superior] qualifications and detailed reasoning."[6] Decision and Order at 16.

Next, the administrative law judge found that Dr. Hippensteel opined that "claimant has ongoing respiratory issues and impairments related to his ongoing cigarette smoking, which is heavier than what he has admitted to at times and is not related to coal dust exposure." *Id*.; Employer's Exhibit 5. The administrative law judge found that Dr. Hippensteel "did not provide any specific reasons for attributing the etiology to smoking" but, nonetheless, found his opinion persuasive, based on the physician's professional qualifications and longstanding pulmonary practice.[7] *Id*.

In contrast to the opinions of Drs. Broudy and Hippensteel, the administrative law judge found that Dr. Ammisetty's diagnosis of legal pneumoconiosis was based solely on claimant's symptoms.[8] The administrative law judge, therefore, concluded that the opinion was insufficiently reasoned or documented and merited "little probative weight." Decision and Order at 7, 16-17; Claimant's Exhibit 1.

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[6] Dr. Broudy is Board-certified in internal medicine and pulmonary medicine. Decision and Order at 6; Employer's Exhibit 1.

[7] Dr. Hippensteel is Board-certified in internal medicine and pulmonary disease. Decision and Order at 6; Employer's Exhibits 3, 4.

[8] The administrative law judge does not discuss Dr. Ammisetty's qualifications, the record shows that he is Board-certified in Pulmonary Medicine and Occupational Pulmonary Medicine. Decision and Order at 7; Claimant's Exhibit 1.

Weighing these medical opinions, the administrative law judge found that employer disproved the existence of legal pneumoconiosis, based on the opinions of Drs. Broudy and Hippensteel and, accordingly, successfully rebutted the presumption at Section 411(c)(4). Decision and Order at 17.

In assigning probative weight and resolving conflicts in the medical opinion evidence, it is proper for the administrative law judge to consider whether an opinion is based on medical science that the Department of Labor (DOL) has determined to be in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature. *Crockett Collieries, Inc. v. Director, OWCP* [*Barrett*], 487 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *accord Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *Director, OWCP, v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Further, in promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), the DOL reviewed the medical literature on this issue and found that there was a consensus among medical experts that coal dust-induced chronic obstructive pulmonary disease (COPD) is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. 65 Fed. Reg. 79,938, 79,943 (Dec. 20, 2000).

For the reasons which follow, we agree with claimant that the administrative law judge failed to examine the medical opinions of the credited physicians for consistency with the findings of the DOL, as set forth in the preamble to the revised regulations. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

First, the administrative law judge did not consider whether Dr. Broudy's view, that "coal dust may cause a very slight decrease" in functionality, indicated that Dr. Broudy may have improperly excluded coal dust exposure as a causal factor of claimant's obstructive impairment, based on a belief that the degree of obstruction caused by coal dust exposure is clinically insignificant. *See* Employer's Exhibit 2 at 6.

The administrative law judge did not address the significance of Dr. Broudy's reliance upon the obstructive nature of claimant's pulmonary impairment to exclude coal dust exposure as a cause of his obstructive pulmonary disease. Employer's Exhibits 1, 2. The decision before us does not reconcile this aspect of Dr. Broudy's opinion with the provision of the regulations defining legal pneumoconiosis as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The administrative law judge must, therefore, determine whether, and to what extent, Dr. Broudy's opinion comports with regulatory guidance at 20 C.F.R. §§718.201 and 718.202, and the relevant scientific views accepted by the DOL.

Furthermore, Dr. Broudy's opinion, that claimant does not suffer from legal pneumoconiosis, appears to rely, in part, on his finding that "there is no evidence of pneumoconiosis on the chest x-rays." Employer's Exhibits 1 at 5, 2 at 4, 6. A medical opinion that is partly based on a view that legal pneumoconiosis is typically proportionate to the amount of dust retention in the lungs, and/or should be manifested by an abnormal chest x-ray, may be deemed to improperly rule out coal dust exposure as a significant factor in a miner's impairment, based on the degree of clinical pneumoconiosis that is present. Such a view is inconsistent with the DOL's recognition that coal dust can contribute significantly to a miner's obstructive lung disease, independent of clinical pneumoconiosis.[9] 65 Fed. Reg. 79,940 (Dec. 20, 2000)(indicating that "[m]ost evidence to date indicates that exposure to coal mine dust can cause chronic airflow limitation [ ], and this may occur independently of CWP [clinical pneumoconiosis.]"); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Obush*, 24 BLR at 1-125-26. Therefore, the administrative law judge also erred in failing to consider whether Dr. Broudy improperly focused on the absence of clinical pneumoconiosis when he concluded that the "primary" cause of the impairment was smoking, and that coal dust exposure played no significant role.[10] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Finally, the administrative law judge did not consider the significance of Dr. Broudy's failure to address whether coal mine dust exposure could have been "an aggravating factor" in claimant's pulmonary impairment. *See* Employer's Exhibits 1, 2, 4 at 5-6; 20 C.F.R. §718.201(a)(2), (b); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483. As the definition of legal pneumoconiosis may include a respiratory impairment

[9] Although a fibrotic reaction of lung tissue caused by coal dust exposure is generally associated with the existence of clinical pneumoconiosis, x-ray evidence of fibrosis is not required for a finding of legal pneumoconiosis under 20 C.F.R. §718.201(a)(2). *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000).

[10] A medical opinion that imposes a need for x-ray evidence of nodulation or dust retention cannot be reconciled with either the definition of legal pneumoconiosis or the terms of 20 C.F.R. §718.202(a)(4), which provide that "[a] determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, *notwithstanding a negative X-ray*, finds that the miner suffers or suffered from pneumoconiosis *as defined in* [*20 C.F.R.*] *§718.201*." 20 C.F.R. §718.202(a)(4) (emphasis added).

"substantially aggravated" by coal dust exposure, a medical opinion that fails to directly address the concept of aggravation of a respiratory or pulmonary condition by coal dust, that is set forth in 20 C.F.R. §718.201(b), may be found unreasoned. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *see also Martin*, 400 F.3d at 306-08, 23 BLR at 2-284-87. Moreover, because "the miner is not required to demonstrate that coal dust was the *only* cause of his current respiratory problems," but need show only that his lung disease was "significantly related to, or substantially aggravated by coal mine dust exposure," the administrative law judge should have determined whether Dr. Broudy's emphasis on claimant's current smoking detracted from the reliability of his opinion on the issue of legal pneumoconiosis. *See Summers*, 272 F.3d at 483, 22 BLR at 2-281; *accord Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *see also Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). The fact that a miner is currently smoking does not, necessarily, indicate that he may not also have developed a significant impairment from previous coal dust exposure, or that his previous coal mine employment did not play a contributory or aggravating role in his pulmonary disability. *See* 65 Fed. Reg. 79,940, 79,972 (Dec. 20, 2000). The administrative law judge did not evaluate whether Dr. Broudy's reliance on the "ongoing" nature of claimant's cigarette smoking adequately comports with the view of the DOL that pneumoconiosis may be latent and progressive, and that coal dust and cigarette smoking have additive effects. *Id.*; 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). Accordingly, we vacate the administrative law judge's decision to credit the opinion of Dr. Broudy that claimant does not have legal pneumoconiosis, and remand the case for the administrative law judge to reconsider Dr. Broudy's opinion in light of the relevant law.

We are also unable to affirm the administrative law judge's assignment of probative weight to the opinion of Dr. Hippensteel. Initially, we agree with claimant that the administrative law judge did not adequately examine the reasoning underlying the opinion. The determination of whether a medical opinion is reasoned and documented is for the administrative law judge, as fact finder, to decide. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. However, that determination "requires the fact finder to examine the validity of the reasoning of a medical opinion," and to explain his credibility determinations. *Id.* The administrative law judge's evaluative rationale must be explained in a manner consistent with the requirements of the APA. Consequently, the administrative law judge's finding that Dr. Hippensteel "did not provide any specific reasons for attributing the etiology [of the impairment] to smoking," provides inadequate support for his determination that Dr. Hippensteel rendered a credible and reasoned opinion on the determinative issue in this case, *i.e.*, rebuttal of the existence of legal pneumoconiosis. Decision and Order at 16, 17; *see Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Because the administrative law judge has not properly evaluated whether Dr.

Hippensteel's opinion is credible, his cursory explanation for according the opinion substantial weight does not satisfy the requirements of the APA.[11] *See Wojtowicz*, 12 BLR at 1-165.

Additionally, as with Dr. Broudy's opinion, the administrative law judge failed to examine the specifics of Dr. Hippensteel's opinion for consistency with the scientific views accepted by the DOL. In crediting Dr. Hippensteel's opinion, that claimant did not have legal pneumoconiosis, the administrative law judge noted that Dr. Hippensteel opined that claimant was a current smoker, without addressing whether claimant's coal dust exposure played an aggravating role or had an additive effect on his respiratory impairment. In excluding legal pneumoconiosis as a cause of claimant's respiratory impairment, Dr. Hippensteel opined that variability on pulmonary function testing, rather than a consistently fixed, irreversible impairment, indicates a smoking etiology. Employer's Exhibits 3 at 4. However, where pulmonary function studies demonstrate the existence of a partially reversible impairment attributable to smoking, there can also be a coexisting, fixed impairment that is related to coal dust exposure.[12] *Barrett*, 487 F.3d at 356, 23 BLR at 2-483.

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[11] In so holding, we recognize that the administrative law judge may accord greater weight to the opinions of doctors who possess superior professional qualifications, by virtue of their status as Board-certified pulmonologists and internists. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We emphasize, however, that qualifications alone do not provide a basis for giving greater weight to a particular physician's opinion; that opinion must also be adequately reasoned and documented. *See Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-18-19 (2003). Further, although the administrative law judge accorded greater weight to the opinions of Drs. Broudy and Hippensteel because of their qualifications as Board-certified pulmonologists and internists, he did not consider the qualifications of Dr. Ammisetty, who also appears to be a Board-certified pulmonologist. *See* Claimant's Exhibit 1; Decision and Order 6-7. On remand, therefore, the administrative law judge must, in weighing the medical opinion evidence, consider the qualifications of all the physicians. *See Dillon*, 11 BLR at 114.

[12] Thus, the administrative law judge did not consider whether, in light of the qualifying pulmonary function studies, Drs. Broudy and Hippensteel adequately explained why pneumoconiosis was not a contributing cause of the impairment that remained post-bronchodilator. Employer's Exhibit 1 at 3-4; Decision and Order at 11; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). The Sixth Circuit has stressed that findings of partial reversibility and some variability in pulmonary function test results do not necessarily preclude the presence of legal pneumoconiosis, especially where, as here, the record

Further, Dr. Hippensteel explained that, when pulmonary disease occurs, it is "well correlated with the degree of dust deposition found radiographically[,] … and which is not observable in this case."[13] Employer's Exhibit 3 at 4. Such a statement, however, as previously discussed, may be inconsistent with the prevailing scientific views accepted by the DOL, and may, consequently, affect the credibility and probative weight due Dr. Hippensteel's opinion. *See* 65 Fed. Reg. 79,940 (Dec. 20, 2000), *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.

Additionally, Dr. Hippensteel rejected Dr. Ranavaya's finding of a moderate restrictive impairment, partly because Dr. Hippensteel stated that he "really need[s]" lung volume testing to "clarify" the significance of values obtained on pulmonary function testing. Employer's Exhibit 5 at 12, 13. However, lung volumes are not part of the testing enumerated by the statute and regulations, and there is no finding that the record contains evidence relative to the reliability of the use of lung volumes in order to evaluate coal dust exposure as a causative factor in claimant's respiratory condition. The administrative law judge should have addressed this matter in determining whether the opinion of Dr. Hippensteel was persuasive as to the etiology of claimant's respiratory condition. *See* 20 C.F.R. §§718.103, 718.107; *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(en banc)(Boggs, J., concurring), *aff'd* 24 BLR 1-1 (2007)(en banc); *Harris v. Old Ben Coal Co*., 23 BLR 1-98 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting), *aff'd* 24 BLR 1-13 (2007)(en banc)(McGranery and Hall, JJ., concurring and dissenting). Consequently, for the above reasons, we vacate the administrative law judge's decision to credit the opinion of Dr. Hippensteel, that claimant did not have legal pneumoconiosis, and remand the case for further consideration of Dr. Hippensteel's opinion.

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contains consistently poor pulmonary function test results. *See* Employer's Exhibits 2 at 2, 5, 3 at 4-5; *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004).

[13] It is for the administrative law judge to assess the entirety of Dr. Hippensteel's reports and deposition testimony, in order to determine whether his acknowledgement of "instances" of legal pneumoconiosis absent radiographic evidence of dust deposition on x-ray, accords with the scientific views adopted by the Department of Labor (DOL) or, conversely, constitutes an improper view that legal pneumoconiosis does not occur in the absence of clinical pneumoconiosis. *See* Employer's Exhibit 3 at 4-5; 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-22; *see also Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005).

In light of the foregoing, we also cannot affirm the administrative law judge's decision to discount Dr. Ammisetty's opinion on the issue of Section 411(c)(4) rebuttal. Dr. Ammisetty reported, in pertinent part:

> 1. Severe obstructive lung disease: FEV_1 1.30/44%.
> 2. Chronic bronchitis.
> 3. Bronchial asthma.
> 4. Legal pneumoconiosis (symptoms of cough, shortness of air, productive sputum).
>
> In summary, [claimant] worked in the coalmines [sic] for many years as [an] electrician and [was] exposed to significant coal dust. [He] has symptoms of cough, short of air dyspnea with exertion that has been getting worse for [the] last few years. [He] shows significantly decreased breath sounds with scattered wheezing in all the lung fields. Investigation shows, chest x-ray no pneumoconiosis. [Arterial blood gases], room air shows hypoxia and exercise blood gases also show hypoxia (pO_2 75).
>
> This pleasant gentleman has legal pneumoconiosis.

Claimant's Exhibit 1 at 2.

The administrative law judge discounted Dr. Ammisetty's finding of legal pneumoconiosis because it was based solely on subjective symptoms. Decision and Order at 7, 16; Claimant's Exhibit 1. However, Dr. Ammisetty also "conducted obstructive testing and obtained physical findings," as part of claimant's DOL sponsored pulmonary evaluation. Decision and Order at 7, 16. It is unclear whether the administrative law judge considered that Dr. Ammisetty repeated his finding of legal pneumoconiosis at the conclusion of his remarks regarding the objective testing he conducted. The administrative law judge must, therefore, determine, considering the whole opinion, whether Dr. Ammisetty's finding of legal pneumoconiosis was based solely on claimant's subjective complaints. *See Clark*, 12 BLR at 1-155. Accordingly, we vacate the administrative law judge's decision rejecting Dr. Ammisetty's opinion that claimant had legal pneumoconiosis, and remand the case for further consideration of Dr. Ammisetty's opinion.[14]

[14] On remand, the administrative law judge should also reconsider the effect of Dr. Hippensteel's statement, on which he relied, that the symptoms referenced by Dr. Ammisetty "could relate to bronchial asthma, which has no relationship to coal mine dust exposure," Decision and Order at 16; Employer's Exhibits 3 at 7, 4 at 5, as the administrative law judge's reliance on Dr. Hippensteel's view, that coal mine dust has no relationship to bronchial asthma, is inconsistent with the scientific precepts accepted by

Finally, in the context of Section 411(c)(4) rebuttal, "it is not enough to simply show that the medical evidence does not include a well documented opinion of pneumoconiosis[,]" rather, "[r]ebuttal requires an affirmative showing that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work. *Morrison*, 644 F.3d at 479, BLR at 2- . The administrative law judge must, therefore, address any conflicts between the medical opinion evidence and the scientific views accepted by DOL in determining whether or not the opinions support a finding of legal pneumoconiosis.

In conclusion, therefore, we vacate the administrative law judge's credibility findings with respect to the opinions of Drs. Broudy, Hippensteel and Ammisetty on the issue of legal pneumoconiosis, and his finding that employer established rebuttal of the Section 411(c)(4) presumption. Accordingly, we remand this case to the administrative law judge for further consideration of the medical evidence.

On remand, the administrative law judge should address whether the rationales expressed by the medical experts accord with the language of the regulations, and the scientific premises accepted by the DOL, including the concepts of aggravation and the cumulative effects of coal dust exposure and smoking pursuant to C.F.R. §718.201 and 65 Fed. Reg. 79,940 *et seq*. (Dec. 20, 2000). 30 U.S.C. §921(c)(4); s*ee Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Further, in weighing the medical evidence, the administrative law judge should bear in mind employer's burden of proof on rebuttal of the Section 411(c)(4) presumption, as explained in *Morrison*, and should provide full and detailed findings and conclusions in accordance with the requirements of the APA. 30 U.S.C §921(c)(4); *Morrison*, 644 F.3d at 479-80, BLR at 2- .

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the DOL in the preamble to the revised regulations. *See* 65 Fed. Reg. 79,920, 79,939, 79,944 (Dec. 20, 2000)(recognizing that the "term [COPD] includes ... chronic bronchitis, emphysema and asthma" and that coal mine dust exposure can cause obstructive lung disease); *Obush*, 24 BLR at 1-125-26.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge