U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0349 BLA

VADIS FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL	)	
	)	
and	)	
	)	
SECURITY INSURANCE OF HARTFORD	)	DATE ISSUED: 04/27/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-5470) of Administrative Law Judge Richard M. Clark awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on July 13, 2011.[1]

In his decision, the administrative law judge initially found that this claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge credited claimant with seventeen and one-half years of underground coal mine employment,[2] and found that the new x-ray and medical opinion evidence established the existence of clinical pneumoconiosis[3] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge further found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on the findings of seventeen and one-half years of underground coal mine employment and total disability, the administrative law judge found that claimant invoked the rebuttable presumption at Section 411(c)(4) of the Act that he is totally disabled due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). The

[1] Claimant filed two prior claims. Director's Exhibits 1-3. His first claim, filed on October 16, 1995, was denied on March 11, 1996, because claimant did not establish any element of entitlement. Director's Exhibit 1 at 2, 3. His second claim, filed on May 9, 2003, was withdrawn on December 16, 2003, and thus is considered "not to have been filed." 20 C.F.R. §725.306(b); Employer's Exhibit 4 at 7-9.

[2] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] "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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling

administrative law judge found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that this claim was timely filed. Employer also argues that the administrative law judge erred in finding seventeen and one-half years of underground coal mine employment and total disability established and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer lastly argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

Timeliness of Claim

Employer initially contends that the administrative law judge erred in finding that claimant's claim was timely filed. Employer's Brief at 6-10. Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the presumption of timeliness, employer must show by a preponderance of the evidence that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the

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respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new medical evidence established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013).

In support of its burden to rebut the presumption of timeliness, employer submitted the June 26, 2003 medical report of Dr. Rasmussen, who examined claimant on behalf of the Department of Labor in claimant's withdrawn claim.[6] Employer's Exhibit 4. Dr. Rasmussen diagnosed clinical pneumoconiosis based on a positive x-ray reading and claimant's coal mine employment history. Employer's Exhibit 4 at 63. Dr. Rasmussen also diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. *Id*. Dr. Rasmussen opined that claimant did not have the pulmonary capacity to perform his last coal mine job, with its requirement for heavy manual labor. *Id*. Dr. Rasmussen further opined that claimant's coal mine dust exposure was a "significant cause of his impaired lung function." *Id*. Along with Dr. Rasmussen's report, employer submitted a copy of the October 30, 2003 Schedule for the Submission of Additional Evidence (SSAE) issued by the district director, which contained a summary of the medical evidence, including Dr. Rasmussen's report, and which indicated that a copy of all the evidence developed was enclosed.[7] Employer's Exhibit 4 at 22. The SSAE further indicated that the SSAE and its enclosures were served on the listed parties, including claimant, by certified mail. *Id.*; *see* 20 C.F.R. §725.410(c). Employer also submitted a copy of the certified mail return receipt that was signed by claimant on November 10, 2003. Employer's Exhibit 4 at 13.

The administrative law judge found that Dr. Rasmussen's 2003 opinion was not sufficient to trigger the statute of limitations because it was not a reasoned medical

[6] Employer obtained a copy of the record of claimant's withdrawn claim from the Director, Office of Workers' Compensation Programs, via a request for the production of documents. Employer's Exhibit 4 at 1-6. Employer designated this 160-page exhibit as Employer's Exhibit 4, and it was admitted into the record, without objection, at the hearing. Tr. at 9-10.

[7] The district director indicated in the Schedule for the Submission of Additional Evidence the "preliminary analysis that the claimant would not be entitled to benefits if we issued a decision at this time." Employer's Exhibit 4 at 18. Besides the results of Dr. Rasmussen's examination of claimant on June 26, 2003, the record of claimant's withdrawn claim included Dr. Broudy's July 10, 2003 medical report, wherein Dr. Broudy diagnosed claimant with clinical pneumoconiosis and chronic asthmatic bronchitis, and opined that claimant was not totally disabled. Employer's Exhibit 4 at 35, 38.

determination of total disability due to pneumoconiosis. Specifically, the administrative law judge found that Dr. Rasmussen "did not explain why, despite the fact that [claimant's] pulmonary function and arterial blood gas studies did not produce qualifying values, [claimant] could not return to his previous coal mine work, or how his 'minimal' impairment prevented him from doing so." Decision and Order at 5-6. The administrative law judge further found that even if Dr. Rasmussen's report was reasoned, there was "no evidence in the record to suggest that such a finding was actually communicated to [claimant], despite the [e]mployer's claim that Dr. Rasmussen's diagnosis 'was communicated to [claimant] and his attorney.'" *Id.* at 6. The administrative law judge noted that claimant testified by deposition in his withdrawn claim that Dr. Sheers with the Veterans Administration told him that he had black lung in 2003, and that claimant later testified in a 2011 deposition that no doctor had ever told him that he was totally disabled due to pneumoconiosis. *Id.* at 7. Thus, the administrative law judge concluded that "the only *actual* evidence in the record, the testimony from [claimant], reflects that no physician communicated to [claimant] a medical determination that he was totally disabled due to pneumoconiosis." *Id.*

Employer argues that the administrative law judge erred in finding this claim timely filed based on his determinations that Dr. Rasmussen's opinion of total disability due to pneumoconiosis was not reasoned, and that Dr. Rasmussen's opinion was never actually communicated to claimant. Employer's Brief at 6-10. Employer argues further that the administrative law judge erred in finding that there was no evidence to suggest that claimant actually received the medical determination of total disability due to pneumoconiosis by Dr. Rasmussen. Employer notes that the record contains a copy of the certified mail return receipt signed by claimant, indicating that he received the October 30, 2003 SSAE, which included both a summary of Dr. Rasmussen's June 26, 2003 report and a copy of all the evidence that was developed. Employer's contentions have merit.

In *Brigance*, the United States Court of Appeals for the Sixth Circuit rejected the requirement that a physician's medical determination of total disability due to pneumoconiosis be reasoned in order to trigger the statute of limitations. *Brigance*, 718 F.3d at 594, 25 BLR at 2-282. Thus, the administrative law judge erred in finding that Dr. Rasmussen's opinion could not trigger the statute of limitations because it was not reasoned. *Id.* Moreover, substantial evidence does not support the administrative law judge's finding that there was no evidence relevant to whether Dr. Rasmussen's 2003 opinion was communicated to claimant. The record contains a certified mail return receipt card signed by claimant, attached to the SSAE, which contained a summary of Dr. Rasmussen's 2003 report, and which indicated that a copy of all the evidence developed was served on the parties. Employer's Exhibit 4 at 13, 22.

Because the administrative law judge did not apply the proper standard and did not consider all of the relevant evidence, we must vacate his finding that employer did not rebut the presumption that this claim was timely filed. We remand this case for the administrative law judge to reconsider the timeliness issue under the standard enunciated in *Brigance*, taking into account all of the relevant evidence submitted. On remand, the administrative law judge must determine whether Dr. Rasmussen's 2003 report constitutes a "medical determination of total disability due to pneumoconiosis which [was] communicated to" claimant more than three years before he filed his current claim. 20 C.F.R. §725.308(a); *see Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282; *see also W.C.* [*Cook*] *v. Benham Coal, Inc.*, 24 BLR 1-50 (2008)(Boggs, J., concurring); Employer's Exhibit 4 at 13, 20. The administrative law judge should keep in mind that the "terminology used in the medical determination must be such that the miner was aware, or in the exercise of reasonable diligence, should have been aware that he was totally disabled due to pneumoconiosis arising out of coal mine employment." *Adkins v. Donaldson Mine Co*., 19 BLR 1-34, 1-41 (1993). On remand, the administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act (APA).[8] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge determines that Dr. Rasmussen's report satisfies the terms of 20 C.F.R. §725.308(a) and, therefore, that employer has rebutted the presumption that claimant's subsequent claim was timely filed, the administrative law judge must then determine whether claimant has shown that "extraordinary circumstances" exist to toll the time limit. *See* 20 C.F.R. §725.308(c). If employer rebuts the presumption of timely filing and claimant does not show extraordinary circumstances, entitlement to benefits is precluded and the administrative law judge need not reach the remaining issues in this case. *See Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282.

Although we have vacated the administrative law judge's award of benefits and are remanding this case to the administrative law judge for further consideration at 20 C.F.R. §725.308, in the interest of judicial economy, and to avoid any repetition of error on remand, we will address employer's allegations of error with respect to the administrative law judge's findings regarding invocation and rebuttal of the Section 411(c)(4) presumption.

[8] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), 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).

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

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment. Employer's Brief at 10-15. Specifically, employer argues that the administrative law judge erred in crediting claimant with two and one-half years of coal mine employment between 1968 and 1970. Further, employer disputes the administrative law judge's calculation of the amount of coal mine employment claimant had for the years 1975-1979, 1982-1984, and 1988 and 1989. Additionally, employer contends that the administrative law judge erred in crediting claimant with a full year of coal mine employment in 1991, when the record contains evidence that claimant's coal mine employment ended in July of that year. Employer asserts that claimant has established, at most, thirteen to 14.44 years of coal mine employment.[9] As we will set forth below, employer's arguments have merit, in part.

Claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Claimant alleged approximately eighteen years of coal mine employment between 1968 and 1991. The administrative law judge found that claimant established seventeen and one-half years of coal mine employment. Because the administrative law judge used different computation methods for different periods of claimant's work history, we will

[9] Employer does not challenge the administrative law judge's findings that claimant had a total of ten years of coal mine employment during the years 1971-1974, 1980 and 1981, 1985-1987, and 1990. Additionally, a review of employer's brief reveals no challenge to the administrative law judge's determination to credit claimant with one quarter of coal mine employment in 1970 with Jamie Coal Company, based on claimant's reported earnings in the fourth quarter of that year. Further, employer does not challenge the finding that all of claimant's coal mine employment was underground. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

summarize the administrative law judge's overall analysis of the length of coal mine employment issue.

In addressing the length of claimant's coal mine employment, the administrative law judge considered claimant's employment history forms, claimant's testimony regarding his coal mine employment history, claimant's Social Security Administration (SSA) earnings records, and claimant's W-2 forms. Decision and Order at 7-8. The administrative law judge considered that claimant's SSA earnings records indicated periods of coal mine employment with multiple employers from 1970 to 1991. Analyzing the quarterly earnings listed on the SSA records for the years 1970 through 1977, the administrative law judge identified the number of quarters in each year in which claimant earned at least $50.00 from coal mine employment, and credited him with a total of twenty-three quarters, or five and three-quarter years, of coal mine employment for this period.

For the years 1978 through 1991, when claimant's reported earnings were not broken down by quarters, the administrative law judge divided claimant's earnings in coal mine employment by the average yearly earnings in coal mine employment set forth in a Bureau of Labor Statistics (BLS) table set forth in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* (*BLBA Procedure Manual*), to determine the number of quarters claimant worked.[10] *Id*. at 9. Using that formula, the administrative law judge credited claimant with thirty-four quarters of coal mine employment for the years 1980-1982 and 1984-1991. For the years 1978, 1979, and 1983, because claimant's reported earnings in coal mine employment did not equal at least twenty-five percent of the average yearly earnings in the BLS table, the administrative law judge instead used a formula that the SSA employs for determining quarters of employment based on reported earnings for years after 1977.[11] Using that method, the administrative law judge credited claimant with another two quarters of coal mine employment, one in 1978 and one in 1983, giving claimant a total of thirty-six quarters, or nine years of coal mine employment, for 1978 through 1991.

[10] The Bureau of Labor Statistics table cited by the administrative law judge is referenced in 20 C.F.R. §725.101(a)(32)(iii), which sets forth an optional formula for calculating the length of coal mine employment using a miner's earnings.

[11] The formula the administrative law judge used for the years 1978, 1979, and 1983 is set forth at 20 C.F.R. §404.143 and Appendix to Subpart B of 20 C.F.R. Part 404. On appeal, employer does not challenge the administrative law judge's decision to apply this formula. *See Skrack*, 6 BLR at 1-711.

Thus, based on claimant's SSA earnings records, the administrative law judge credited claimant with a total of fifty-nine quarters, or fourteen and three-quarter years of coal mine employment, from 1970 through 1991.

The administrative law judge next considered claimant's testimony regarding a period of alleged coal mine employment not reflected in his SSA earnings records. Claimant testified that he worked for Flat Gap Coal Company (Flat Gap Coal) for approximately two and one-half to three years between 1968 and 1970, and that he was paid in cash. Finding that claimant's testimony was consistent with other documentary evidence[12] and was not contradicted by any evidence in the record, the administrative law judge credited claimant with at least two and one-half years of coal mine employment with Flat Gap Coal. Decision and Order at 10, 11. The administrative law judge credited claimant with a total of "at least seventeen and a half years" of underground coal mine employment.[13] Decision and Order at 11.

We will first address the arguments from employer that we conclude have merit. Employer contends that the administrative law judge erred in crediting claimant with two and one-half years of coal mine employment with Flat Gap Coal from 1968 to 1970, without considering that claimant's SSA earnings records conflict with claimant's testimony as to his employment. Specifically, employer notes that claimant's earnings records reflect significant earnings in non-coal mine employment for most quarters during those years, and argues that it is therefore unlikely that claimant was able to work for Flat Top Coal for a substantial amount of time during the same period.[14] *Id*. at 12-13. We agree with employer that the administrative law judge erred in crediting claimant

[12] Specifically, the administrative law judge cited statements claimant made on his Mine Foreman certification, and on his employment history forms. Director's Exhibits 4, 9.

[13] In fact, the periods of coal mine employment credited to claimant by the administrative law judge total 17.25 years.

[14] Employer notes that claimant's SSA earnings records reflect that in 1968, claimant had earnings in every quarter in non-coal mine employment and that his earnings of $3,236.32 in non-coal mine employment were only slightly less than a miner's average yearly income of $3,801.25. *Id*. Employer notes that in 1969, claimant's SSA earnings records reflect earnings in non-coal mine employment for the first two quarters of 1969 but no other earnings for that year. *Id*. at 13. Additionally, employer notes that in 1970, claimant's SSA earnings records reflect income in non-coal mine employment for three quarters. *Id*.

with at least two and one-half years with Flat Gap Coal from 1968 to 1970 without resolving the apparent conflict between claimant's testimony and the SSA records showing earnings from non-coal mine employment in most quarters of those years. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017); Director's Exhibit 8 at 2-4. Thus, we vacate the administrative law judge's finding that claimant had at least two and one-half years of coal mine employment with Flat Gap Coal.

Employer argues further that the administrative law judge erred in crediting claimant with a full year of coal mine employment in 1991, when the specific ending date of his coal mine employment was in July of that year. This argument has merit. Claimant indicated on his claim forms and testified by deposition that his coal mine employment ended on July 17, 1991. Director's Exhibits 3 at 1; 17 at 38. Thus, substantial evidence does not support a finding of one year of coal mine employment in 1991.[15]

In view of our resolution of the two foregoing arguments, at least three years of underground coal mine employment that was credited to claimant must be reconsidered, leaving claimant with less than fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. We must therefore vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and instruct the administrative law judge to reconsider, on remand, whether claimant has established at least fifteen years of qualifying coal mine employment.

Employer's remaining challenges to the administrative law judge's length of coal mine employment determination, however, lack merit. Employer's contention that the administrative law judge erred in crediting claimant with one quarter of coal mine employment in 1975 lacks merit, as the Board has held that it is reasonable to credit a claimant with coal mine employment for every quarter in which he earned at least $50.00 for coal mine employment occurring before 1978.[16] *See Tackett*, 6 BLR 1-839, 1-841 (1984). Additionally, employer's contention that claimant had no coal mine employment in 1976 lacks merit. Substantial evidence supports the administrative law judge's finding

[15] Employer states that claimant should have been credited with .58 of a year of coal mine employment for 1991. Employer's Brief at 15.

[16] The record reflects that claimant earned $955.13 in the first quarter of 1978 with Pioneer Coal Company. Director's Exhibit 8 at 5.

that claimant earned at least $50.00 in coal mine employment in each of the last two quarters of 1976.[17] Director's Exhibit 8 at 5.

Employer's argument that the administrative law judge erred in crediting claimant with a full year of coal mine employment in 1977, when claimant should have been credited with only .75 of a year, mischaracterizes the administrative law judge's decision. Employer's Brief at 14. The administrative law judge, in fact, credited claimant with three quarters of coal mine employment in 1977, with River Processing, Incorporated. Decision and Order at 8; Director's Exhibit 8 at 5.

Employer also contends that, based on the average annual earnings for coal miners in 1978-1979, 1982-84, and 1988-89, claimant should have been credited with only .05 year for 1978, .01 year for 1979, .44 year for 1982, .14 year for 1983, .67 year for 1984, .46 year for 1988, and .45 year for 1989, based on the coal mining average yearly earnings for those years. Employer's Brief at 14-15. As discussed, *infra*, employer presents no reason to disturb the administrative law judge's length of coal mine employment finding for those years.

As an initial matter, as we noted earlier, *supra* n.10, for the years 1978, 1979, and 1983, employer has not challenged the administrative law judge's calculation method in which he found two quarters of coal mine employment established. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). With respect to the years 1982-1984 and 1988, we see no error in the administrative law judge's crediting of claimant with the amount of coal mine employment that he calculated based on Exhibit 610 of the *BLBA Procedure Manual*. *See Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA (Oct. 5, 2016)(pub.). Indeed, we note that, for several of the years in question, employer's calculations would result in more coal mine employment than the administrative law judge found established.[18] Further, for 1989, employer fails to include all of claimant's earnings from coal mine employment in that year, and this omission explains the difference between the administrative law judge's calculation and employer's calculation. Decision and Order at 9; Director's Exhibit 8 at 7, 8; Employer's Brief at 15.

[17] The record reflects that claimant earned $240.00 and $1,232.74, respectively, in the last two quarters of 1976 with Kentucky House Coal, Incorporated. Director's Exhibit 8 at 5; Director's Exhibit 17 at 14.

[18] Employer calculates slightly more coal mine employment for claimant than the administrative law judge did in 1982, 1984, and 1988. *Compare* Decision and Order at 9 *with* Employer's Brief at 14-15.

In sum, we affirm the administrative law judge's findings to the extent of 13.75 years of underground coal mine employment.[19] We vacate the administrative law judge's findings that claimant had two and one-half years of coal mine employment with Flat Top Coal in 1968-70, and that he had one year of coal mine employment in 1991, and remand this case to the administrative law judge for reconsideration of whether claimant has established at least fifteen years of qualifying coal mine employment.

Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies. The July 10, 2003 and September 8, 2003 pulmonary function studies were qualifying[20] before the administration of bronchodilators, and non-qualifying after the administration of bronchodilators. Employer's Exhibits 3 at 25; 4 at 39. The May 9, 2006 and August 6, 2011 pulmonary function studies yielded qualifying pre-bronchodilator values, and did not include post-bronchodilator values. Director's Exhibit 12 at 14; Employer's Exhibit 3 at 24. The remaining pulmonary function studies, performed on May 4, 2012 and June 12, 2012, were qualifying both before and after the administration of bronchodilators. Employer's Exhibit 1 at 22; Claimant's Exhibit 1. Relying on the four most recent qualifying pulmonary function studies administered in 2006, 2011, and 2012, the administrative law judge found that, "absent contrary probative evidence, these results establish that [claimant] has a totally disabling respiratory impairment." Decision and Order at 21.

Employer acknowledges that "all of the claimant's 2011 and 2012 pulmonary function studies qualify for a . . . finding of total disability," but argues that since claimant's respiratory "capacity improves with the administration of bronchodilators," claimant "should not be considered totally disabled." Employer's Brief at 17. Employer, however, does not explain how the administrative law judge would draw a conclusion of non-disability on that basis, given that claimant's values in the referenced studies remain qualifying after the administration of a bronchodilator. Therefore, we reject employer's allegation of error and affirm the administrative law judge's otherwise unchallenged

[19] Further, employer concedes that claimant had at least one-half of a year of coal mine employment in 1991. Employer's Brief at 15.

[20] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study yields values that exceed those in the tables. 20 C.F.R. §718.204(b)(2)(i), (ii).

finding that the more recent pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered that all the blood gas studies, performed only at rest, were non-qualifying. Director's Exhibit 12 at 21; Employer's Exhibit 1 at 34; Claimant's Exhibit 1. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the recent medical opinions of Drs. Baker, Rasmussen, and Rosenberg, all of whom stated that claimant has a totally disabling respiratory or pulmonary impairment. Director's Exhibit 12 at 26, 27; Employer's Exhibits 1 at 5, 9; 5 at 3, 9; Claimant's Exhibit 1 at 3.

Weighing all of the evidence together, the administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) based on the pulmonary function study evidence and the medical reports of Drs. Baker, Rasmussen, and Rosenberg. Decision and Order at 21. Employer argues that, since claimant's blood gas studies were non-qualifying, and blood gas studies are "less effort depend[e]nt" than are pulmonary function studies, claimant's non-qualifying blood gas studies "should have been relied upon." Employer's Brief at 17. This argument lacks merit. The administrative law judge rationally found that the non-qualifying blood gas study results do not conflict with the qualifying pulmonary function study results, because the two tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); Decision and Order at 21 n.14. Therefore, we affirm the administrative law judge's finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[21]

[21] Employer argues that because the administrative law judge erred in finding total disability established, he erred in finding a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer's Brief at 19. Employer overlooks that claimant's first claim was denied for failure to establish any element of entitlement, and we have already affirmed the administrative law judge's unchallenged finding that the new evidence established the existence of clinical pneumoconiosis, thereby establishing a change in an applicable condition of entitlement. *See* nn. 1 & 5, *supra*. Moreover, as we have affirmed the administrative law judge's finding that the more recent medical evidence established that claimant is totally disabled, on that additional basis claimant has 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 the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal[22] nor clinical pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), or by establishing that "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). The administrative law judge found that employer failed to rebut the presumption by either method.

The administrative law judge first found that employer did not establish that claimant has neither clinical[23] nor legal pneumoconiosis. In considering whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinion of Dr. Rosenberg. In his reports, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but suffers from a disabling obstructive impairment that is due solely to smoking. Employer's Exhibits 1, 5. The administrative law judge discounted Dr. Rosenberg's opinion because he found Dr. Rosenberg's reasoning for concluding that claimant's respiratory or pulmonary impairment was not due to coal mine dust exposure to be unpersuasive. Decision and Order at 24-26.

Dr. Rosenberg relied, in part, on the fact that claimant has a disproportionately reduced FEV1/FVC ratio. Employer's Exhibits 1 at 5-9; 5 at 4-9. The administrative law judge discounted this aspect of Dr. Rosenberg's opinion as inconsistent with the position of the Department of Labor (DOL) that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); 20 C.F.R. §718.204(b)(2)(i)(C); Decision and Order at 24-25. Employer argues that Dr. Rosenberg "cited a . . . more recent study than the studies relied upon by the Department of Labor in the preamble to the" 2001 regulatory revisions. Employer's Brief at 17. Contrary to employer's contention, the administrative law judge "was entitled to consider the DOL's position and to discredit Dr. Rosenberg's [opinion] because it was inconsistent with the DOL position set forth in the

[22] "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).

[23] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

preamble to the applicable regulation."[24] *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012).

The administrative law judge next considered that Dr. Rosenberg relied on claimant's "significantly reduced diffusion capacity" to support his opinion that claimant does not have legal pneumoconiosis. Decision and Order at 25. The administrative law judge accurately noted that Dr. Rosenberg considered this type of respiratory impairment to be representative of a diffuse form of emphysema related to smoking and not coal mine dust exposure. *Id*. The administrative law judge found the doctor's rationale insufficient to disprove legal pneumoconiosis, because "simply stating that [claimant's] reduced diffusing capacity 'is consistent with' a type of emphysema that is related to smoking history and not coal dust exposure, does not adequately explain why [claimant's] emphysema, in particular, was not at all aggravated by [claimant's] significant history of coal dust exposure." *Id*.; *see* 20 C.F.R. §718.201(b). Additionally, the administrative law judge found that Dr. Rosenberg did not adequately explain why claimant's response to bronchodilators was inconsistent with a pulmonary disease related to coal mine dust exposure, or why coal mine dust exposure did not cause the irreversible, fixed portion of claimant's obstructive impairment.

Employer summarizes Dr. Rosenberg's opinion, including the two aspects of the doctor's reasoning mentioned in the preceding paragraph, Employer's Brief at 18-19, but employer makes no particular argument regarding the administrative law judge's credibility determinations, which were permissible and which are supported by substantial evidence. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). As the administrative law judge permissibly discounted Dr. Rosenberg's opinion, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis.

[24] In its brief, employer does not dispute the substance of the Department of Labor's position in the preamble, nor has employer submitted "the type and quality of evidence that would invalidate the [Department of Labor's] position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92, 25 BLR 2-633, 2-645 (6th Cir. 2014)(internal quotation marks omitted).

The administrative law judge next addressed whether employer established rebuttal by proving that "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). The administrative law judge permissibly found that the same reasons for which he discredited Dr. Rosenberg's opinion that claimant does not suffer from legal pneumoconiosis also undercut the doctor's opinion that no part of claimant's disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-73 (6th Cir. 2013); Decision and Order at 26. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(2)(ii).

In summary, on remand, the administrative law judge must reconsider whether the evidence establishes that a diagnosis of total disability due to pneumoconiosis was communicated to claimant more than three years prior to his filing of this subsequent claim. If the administrative law judge determines that employer has rebutted the presumption that claimant's subsequent claim was timely, entitlement to benefits is precluded. If the administrative law judge finds that the claim was timely filed, then the administrative law judge must reconsider whether claimant established at least fifteen years of underground coal mine employment. If claimant establishes at least

fifteen years of underground coal mine employment, he will be entitled to benefits, as we have affirmed the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that employer did not rebut the Section 411(c)(4) presumption. If claimant does not establish at least fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has established entitlement under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge