BRB No. 10-0713 BLA

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| BILLY J. RICHARDSON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| SEA B MINING COMPANY | ) | |
| | ) | DATE ISSUED: 08/17/2011 |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5601) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim[1] filed

[1] The current claim is claimant's third. Claimant's second claim, filed on June 23, 1997, was denied on June 19, 1998, because claimant did not establish that he suffered from pneumoconiosis. Director's Exhibit 1. Claimant filed this claim on August 6, 2008. Director's Exhibit 3.

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). The administrative law judge credited claimant with thirty-four years of coal mine employment,[2] of which at least fifteen years were underground, and noted employer's concession that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge properly found that this claim is governed by the recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Decision and Order at 18.

Specifically, 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 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.SC. §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. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge invoked the rebuttable presumption of total disability due to pneumoconiosis.[3] Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement, through invocation of the presumption. *See* 20 C.F.R. §725.309(d). The administrative law judge further found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, and, therefore, she found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] In invoking the presumption, the administrative law judge noted that, in addition to employer's concession of total disability, the new evidence of record establishes that claimant has a totally disabling respiratory impairment. Decision and Order at 18.

On appeal, employer challenges the administrative law judge's application of the recent Section 1556 amendment to this case. Employer also asserts that, pursuant to 20 C.F.R. §725.309(d), the administrative law judge failed to determine whether claimant established a change in the applicable condition of entitlement. Employer further argues that, in finding that employer failed to rebut the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), the administrative law judge failed to consider all of the evidence of record, and erred in weighing the x-ray, computerized tomography (CT) scan, and medical opinion evidence, pursuant to 20 C.F.R. §§718.202(a), 718.204(c). The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments regarding the administrative law judge's application of Section 1556 to this case. The Director also urges the Board to reject employer's contentions, pursuant to Section 725.309(d), that the administrative law judge failed to determine whether claimant established a change in the applicable condition of entitlement, and erred in relying on the new evidence to find that employer did not rebut the presumption of total disability due to pneumoconiosis.[4]

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. If a miner files an application 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(d); *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(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Director's Exhibit 3. Consequently,

[4] We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established thirty-four years of coal mine employment, with at least fifteen years underground, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, established invocation of the Section 411(c)(4) presumption. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4, 18.

claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

We first address employer's challenges to the administrative law judge's application of Section 1556 to this case. Employer asserts that Section 1556, entitled "Equity for Certain Eligible Survivors," may not apply to living miners' claims. Employer's Brief at 9-10. Contrary to employer's assertion, the Board has held that the plain language of Section 1556(c) mandates the application of the amendments to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

Employer also contends that Section 1556 is "invalid and unconstitutional as being impermissibly retroactive." Employer's Brief at 12. Employer asserts that the administrative law judge's decision to allow the parties to submit one supplemental medical report addressing the new law does not overcome the retroactivity and due process problems, as the administrative law judge did not allow the parties "to develop new objective evidence on the existence of pneumoconiosis." Employer's Brief at 12. Thus, employer contends that this case must be remanded and the record reopened to allow employer to develop additional evidence addressing the new legal standard. Employer's Brief at 12. Employer's arguments lack merit.

Initially, we reject employer's contention that retroactive application of amended Section 411(c)(4) to claims filed after January 1, 2005 constitutes a due process violation. The argument employer makes is substantially similar to the one that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject it here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 24 BLR at 1-214; *Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Further, the record reflects that, before the administrative law judge, employer asked to submit new objective evidence addressing *total disability*, an element of entitlement employer conceded, and continues to concede. Employer's Closing Argument at 5; Employer's Notice of Supplemental Authority at 2. Because the administrative law judge has broad discretion in ruling on the admission of evidence, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-359 (1985), and we detect no abuse of discretion by the administrative law judge in declining to admit additional evidence relevant to an uncontested element of entitlement, we reject employer's assertion of error.

Employer further contends that retroactive application of amended Section 411(c)(4), coupled with the evidentiary limitations set forth at 20 C.F.R. §725.414, makes

it "virtually impossible" for an employer to rule out any connection between coal mine dust exposure and a claimant's respiratory impairment. Employer argues that retroactive application of amended Section 411(c)(4) therefore violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 11. As the Director asserts, however, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975), and employer has not explained how the recent amendments, or the evidentiary limitations, have prevented it from obtaining the requisite rebuttal evidence. Director's Brief at 3.

We also reject employer's assertion that the fifteen-year presumption of Section 411(c)(4) unduly emphasizes the length of a miner's coal mine dust exposure, contrary to case law holding that occupational dust exposure alone does not establish the existence of pneumoconiosis. Employer's Brief at 11, *citing Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Contrary to employer's analysis, the Section 411(c)(4) presumption is rebuttable, and, moreover, does not grant automatic entitlement to claimants based on their length of coal mine employment alone.

Finally, we deny employer's request that this case be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court, and the promulgation of regulations clarifying the ambiguous title of Section 1556. Employer's Brief at 10-11. Consequently, we affirm the administrative law judge's application of Section 1556 to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), based on the administrative law judge's unchallenged finding that claimant established more than fifteen years of qualifying coal mine employment, and employer's concession that claimant established the existence of a totally disabling respiratory impairment.

We next address employer's argument that the administrative law judge erred in failing to make a specific finding as to whether claimant established a change in the applicable condition of entitlement.[5] Employer's Brief at 20. In analyzing this subsequent claim, pursuant to 20 C.F.R. §725.309(d), the administrative law judge correctly found that, as claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis, claimant must now establish the existence of the

[5] Employer does not assert that claimant could not establish a change in the applicable condition of entitlement through invocation of the Section 411(c)(4) presumption.

disease in order to show a change in the applicable condition of entitlement. Decision and Order at 18. The administrative law judge further found that, as claimant filed his current claim after January 1, 2005, he has at least fifteen years of underground coal mine employment, and has established, through the new evidence, and employer's concession, the existence of a totally disabling respiratory impairment, claimant is presumed to have disabling pneumoconiosis, pursuant to Section 411(c)(4). Decision and Order at 18. Thus, contrary to employer's assertion, the administrative law judge implicitly found that claimant established a change in the applicable condition of entitlement through invocation of the Section 411(c)(4) presumption.

Employer further contends that, even assuming claimant established a change in the applicable condition of entitlement through invocation of the presumption, the administrative law judge erred in failing to consider all of the evidence of record, including that submitted with the prior claims, in finding that employer did not rebut the presumption by demonstrating either that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of coal mine employment.[6] Employer's Brief at 20. Employer asserts that consideration of the prior claims evidence is important, because four different administrative law judges concluded that the evidence in claimant's prior claims did not establish the existence of pneumoconiosis. Employer's Brief at 20.

Contrary to employer's assertion, the administrative law judge explicitly stated that she "based [her] analysis on the entire record," and she acknowledged that, in the prior claims, claimant was found to be totally disabled, but was found not to have established the existence of pneumoconiosis. Decision and Order at 2, 18. Moreover, in its brief, employer concedes that the prior claim evidence is not relevant to the issue of rebuttal under amended Section 411(c)(4).[7] Employer's Brief at 12. Further, employer

[6] Employer acknowledges that 20 C.F.R. §725.309 does not address its application to claims adjudicated pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer's Brief at 20. Employer asserts that, logically, an administrative law judge must first determine whether claimant met the preliminary requirements for invocation of the Section 411(c)(4) presumption; then, determine whether employer has established rebuttal with the newly developed evidence, and if not; then consider the rebuttal question anew by considering all evidence of record, including evidence from all prior claims. Employer's Brief at 20-21.

[7] Specifically, employer asserts that, by limiting employer to one supplemental medical report by a physician of record, addressing the new legal standard of amended Section 411(c)(4), the administrative law judge denied employer any meaningful opportunity to address and rebut the presumption of total disability due to pneumoconiosis. Employer's Brief at 12. Thus, employer contends, the administrative

has not explained how the prior administrative law judges' findings that claimant did not meet his burden to establish the existence of pneumoconiosis are relevant to the issue of whether employer met its burden to establish rebuttal pursuant to amended Section 411(c)(4). Thus, under the facts of this case, we find no reversible error in the administrative law judge's declination to discuss, in detail, the prior claim evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We next address employer's contention that the administrative law judge erred in weighing the analog and digital x-ray evidence, pursuant to 20 C.F.R. §§718.202(a)(1), 718.107, in finding that employer failed to establish that claimant does not have clinical pneumoconiosis.

The administrative law judge initially considered nine interpretations of three analog, or conventional, x-ray films dated March 6, 2007, September 23, 2008, and January 20, 2009. Based on the equal number of positive and negative readings by readers possessing equal radiological qualifications, the administrative law judge found that these x-ray films did not establish the presence of absence of clinical pneumoconiosis. Decision and Order at 19.

The administrative law judge then considered four interpretations of two digital x-rays dated December 16, 2008 and December 17, 2009.[8] The administrative law judge observed that the December 16, 2008 x-ray was read as positive for pneumoconiosis by Dr. Miller, a dually qualified, Board-certified radiologist and B reader, and as negative by Dr. Castle, a B reader. Decision and Order at 19; Claimant's Exhibit 4; Director's Exhibit 11. The administrative law judge concluded that this x-ray is positive for the existence of pneumoconiosis, based on Dr. Miller's superior radiological qualifications. Decision and Order at 18. The administrative law judge observed that the December 17, 2009 x-ray was read as positive for pneumoconiosis by Dr. Alexander, a Board-certified radiologist and B reader, and as negative by Dr. Fino, a B reader. Decision and Order at 19; Claimant's Exhibit 5; Employer's Exhibit 4. The administrative law judge concluded

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law judge should have allowed employer the opportunity to "submit new evidence addressing the presumption which would replace previously designated evidence *which did not address the presumption*." Employer's Brief at 12 (emphasis added).

[8] Because digital x-rays constitute "other medical evidence" to be admitted and considered under 20 C.F.R. §718.107, the administrative law judge properly considered the digital and analog x-ray readings separately. *See Webber v. Peabody Coal Co.*, 24 BLR 1-5, 1-7 (*en banc*), *aff'g on recon. Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132 -33 (*en banc*)(Boggs, J., concurring).

that this x-ray is positive for the existence of pneumoconiosis, based on Dr. Alexander's superior radiological qualifications. Based on the preponderance of positive x-rays, the administrative law judge found that the digital x-ray evidence was positive for the presence of clinical pneumoconiosis. Decision and Order at 19, 21.

Finally, the administrative law judge discussed the narrative interpretations of six x-rays contained in claimant's medical treatment records, taken from 2006 through 2008. Decision and Order at 19-20. The administrative law judge noted that, while none of these x-rays was read as positive for pneumoconiosis, the readings also did not reflect that claimant does not have pneumoconiosis. Thus, the administrative law judge concluded that the narrative x-ray readings did not establish the presence or absence of clinical pneumoconiosis. Decision and Order at 20.

Upon consideration of the x-ray evidence as a whole, the administrative law judge concluded that the analog and narrative x-rays were inconclusive for the existence of pneumoconiosis, and the digital x-rays were positive for pneumoconiosis. Consequently, the administrative law judge found that employer did not meet its burden to establish by a preponderance of the x-ray evidence that claimant does not have clinical pneumoconiosis, pursuant to Sections 718.202(a)(1), 718.107.

Employer initially contends that, in weighing the digital x-rays, submitted pursuant to 20 C.F.R. §718.107, the administrative law judge erred in according greater weight to the positive x-ray interpretations by Drs. Alexander and Miller, based on their superior radiological qualifications, without considering that in addition to being B readers, Drs. Fino and Castle are both Board-certified pulmonologists. Employer contends that, unlike 20 C.F.R. §718.202, governing the consideration of conventional x-rays, Section 718.107 does not require an administrative law judge to consider a physician's radiological credentials. Employer's Brief at 13-14; *see* 20 C.F.R. §718.202(a)(1). While Section 718.107 does not require consideration of a physician's radiological qualifications, it does not preclude their consideration. Consequently, we reject employer's assertion that the administrative law judge erred in according greater weight to the x-ray readers with superior radiological qualifications. Therefore, the administrative law judge reasonably determined that the positive digital x-ray readings by Drs. Alexander and Miller, who are dually-qualified as Board-certified radiologists and B readers, are entitled to the greatest weight. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Employer also argues that the administrative law judge erred in failing to consider the narrative x-ray interpretations contained in the miner's treatment records to be negative for the existence of pneumoconiosis. We disagree. In the absence of applicable quality standards, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge

in her role as fact-finder. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Thus, the administrative law judge was not required to draw a negative inference from the fact that the narrative interpretations in the treatment notes did not mention the presence or absence of pneumoconiosis. *See Marra*, 7 BLR at 1-218-19. Consequently, we reject employer's arguments pursuant to Sections 718.202(a), 718.107 and affirm the administrative law judge's finding that employer failed to establish, through x-ray evidence, that claimant does not have clinical pneumoconiosis.

Employer next asserts that the administrative law judge erred in finding that the CT scans are inconclusive for the existence of pneumoconiosis. Employer argues that Drs. Ramakrishnan, Knapp, and Robinette read ten separate CT scans as showing evidence of emphysema and a suspicious nodule, but made no mention of pneumoconiosis, and Dr. Castle specifically stated that two CT scans he reviewed showed "no evidence of pneumoconiosis." Employer's Brief at 14. Thus, employer contends, the administrative law judge should have concluded that the CT scans were negative for the existence of pneumoconiosis. Employer's Brief at 14-15. While employer's argument has merit, in part, employer has not demonstrated any reversible error by the administrative law judge.

The administrative law judge reasonably concluded that the CT scan readings by Drs. Ramakrishnan, Knapp, and Robinette are inconclusive for the existence of pneumoconiosis, as these physicians did not address the presence or absence of the disease. *See Marra*, 7 BLR at 1-218-19. Employer correctly asserts, however, that the administrative law judge failed to reconcile Dr. Castle's explicitly negative CT scan readings with her conclusion that the CT scans are inconclusive for the existence of clinical pneumoconiosis. As will be discussed, however, the administrative law judge also found that employer did not establish that claimant does not have legal pneumoconiosis, a finding that we affirm. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Thus, the administrative law judge's error in weighing the CT scan evidence relevant to clinical pneumoconiosis is harmless. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 23-24.

We next address employer's contention that the administrative law judge erred in her evaluation of the medical opinion evidence in finding that employer failed to establish that claimant does not have legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Forehand, Castle, and Fino. Dr. Forehand diagnosed legal pneumoconiosis, opining that claimant suffers from disabling obstructive lung disease caused by smoking and aggravated by coal mine dust exposure, and also has

hypoxemia, due to the scarring effects of coal mine dust exposure. Director's Exhibit 10. In contrast, Drs. Castle and Fino opined that claimant's disabling respiratory impairment is due to pulmonary emphysema and asthma, caused by smoking and heredity, with no contribution by coal mine dust exposure. Director's Exhibit 11; Employer's Exhibits 4-6, 8.

In evaluating the conflicting evidence, the administrative law judge found that Dr. Forehand's opinion was well-reasoned, and supported by objective medical evidence. Decision and Order at 23. Conversely, the administrative law judge found the opinions of Drs. Castle and Fino to be inadequately explained and unpersuasive. Decision and Order at 23-24. The administrative law judge, therefore, found that even if she were to disregard Dr. Forehand's opinion, employer failed to carry its burden to establish that claimant does not have pneumoconiosis. Decision and Order at 24.

Employer contends that the administrative law judge erred in finding Dr. Forehand's opinion to be well-reasoned. We disagree. The administrative law judge found that Dr. Forehand's conclusions were based on his objective test results, together with claimant's smoking and employment histories. The administrative law judge further found that Dr. Forehand's opinion, that the effects of coal mine dust exposure and cigarette smoking are additive, is consistent with the findings of the Department of Labor (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*], F.3d , 2011 WL 1366355 (3d Cir. 2011); Decision and Order at 22, *citing* 65 Fed. Reg. 79,940. Moreover, contrary to employer's argument, the administrative law judge considered that Dr. Forehand did not review the totality of the medical evidence of record, but permissibly concluded that this did not undermine his opinion. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 22-23; Employer's Brief at 15. Because the administrative law judge specifically found that Dr. Forehand set forth the rationale for his findings, based on his interpretation of the medical evidence of record, and explained why he concluded that claimant's lung disease was due to both smoking and coal mine dust exposure, consistent with the findings of the DOL, we affirm the administrative law judge's determination to credit Dr. Forehand's diagnosis of legal pneumoconiosis as "well-reasoned." *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Obush*, 24 BLR at 1-125-26.

Employer also contends that the administrative law judge erred in her consideration of Dr. Castle's opinion. Employer's contention lacks merit. The administrative law judge permissibly questioned Dr. Castle's opinion, that claimant's

disabling lung disease is due to bronchial asthma and tobacco smoke-induced emphysema, because Dr. Castle did not adequately explain how he eliminated claimant's thirty-four years of coal mine dust exposure as a contributing or aggravating factor in claimant's asthma or emphysema. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; Decision and Order at 23.

Substantial evidence also supports the administrative law judge's discounting of Dr. Fino's opinion. The administrative law judge correctly noted that Dr. Fino relied, in part, on a 2005 pulmonary function study that showed that claimant's obstruction was almost, if not completely, reversible after bronchodilator administration to conclude that coal mine dust exposure was not a cause of claimant's disabling obstructive impairment. Decision and Order at 23; Employer's Exhibit 4. The administrative law judge found, however, as was within her discretion, that while Dr. Fino acknowledged that later pulmonary function studies all showed severe obstruction with "some degree" of reversibility, Dr. Fino did not adequately explain why the irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004)(unpub.); Decision and Order at 23; Employer's Exhibit 4 at 22-23.

Employer also argues that it was error for the administrative law judge to rely on the preamble to the revised regulations in weighing the medical opinion evidence. Employer's Brief at 16-17. Contrary to employer's assertions, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is pneumoconiosis; rather, she permissibly consulted the preamble as an authoritative statement of medical principles accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *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.

Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to meet its burden to disprove the existence of legal pneumoconiosis through medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom., Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989) (unpub.); *Defore v. Alabama By-Products*, 12 BLR 1-27, 1-29 (1988).

We next address employer's argument that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment, and, thus, failed to rebut the Section 411(c)(4) presumption. Employer's Brief at 17. As set forth above, the administrative law judge rationally credited the well-reasoned and documented

opinion of Dr. Forehand, and permissibly discounted the opinions of Drs. Castle and Fino, to find that employer did not meet its burden to eliminate coal mine dust exposure as a contributing factor to claimant's disabling obstructive impairment. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis by showing that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Alexander*, 12 BLR at 1-47; *Defore*, 12 BLR at 1-29; Decision and Order at 24.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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

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