BRB No. 11-0785 BLA

PEGGY VANOVER (o/b/o JAMES VANOVER) Claimant-Respondent v. GREEN COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/29/2012 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (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-05102) of Administrative Law Judge John P. Sellers, III rendered on a miner's claim[1] filed on October 26, 2007, 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 accepted the parties' stipulation to thirty years of coal mine employment, and found that over fifteen years of the miner's coal mine employment occurred in conditions that were substantially similar to those in underground mining. Decision and Order at 3, 17-18. The administrative law judge also found that the miner had a totally disabling respiratory impairment.[2] *Id*. at 6-7, 8, 11, 15, 18. Accordingly, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Further, the administrative law judge found that, although employer established that the miner did not have clinical pneumoconiosis, the evidence failed to establish that the miner did not have legal pneumoconiosis or that his total disability was unrelated to coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

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[1] Claimant is the widow of the miner, James Vanover, who died on December 4, 2010. Decision and Order at 2 n.2. Claimant is pursuing the miner's claim on behalf of his estate.

[2] Employer stipulated that the miner was totally disabled from a respiratory or pulmonary standpoint. *See* 20 C.F.R. §718.204(b); Decision and Order at 6 n.5, 18; Hearing Tr. at 14.

[3] Section 1556 of Public Law No. 111-148, the Patient Protection and Affordable Care Act (PPACA), reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010). 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. If the presumption is successfully invoked, the burden of proof shifts to employer to rebut the presumption by affirmatively proving that the miner did not have pneumoconiosis, or that the miner's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011).

On appeal, employer contests the administrative law judge's findings that the evidence established invocation of the presumption at Section 411(c)(4), and that employer failed to successfully rebut the presumption. The Director, Office of Workers' Compensation Programs (the Director), and claimant respond in support of the award of benefits. By reply brief, employer reiterates its arguments, and asserts that "the legal errors here were dispositive so substantial evidence review is irrelevant."[4] Employer's Reply Brief at 6.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Amended Section 411(c)(4) Presumption - Comparable Surface Coal Mine Work:

Employer argues that the lack of a comparability standard for evaluating the nature of the coal mine work for purposes of the Section 411(c)(4) presumption violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Further, employer contests the administrative law judge's finding that the miner's coal mine employment constituted *qualifying coal mine employment* for invocation of the presumption at Section 411(c)(4).[6] Specifically, employer contends that the administrative law judge "conducted no analysis" of the miner's surface mine employment and "simply accepted [the

[4] As an initial matter, we reject employer's constitutional arguments regarding the PPACA, and its request to hold this case in abeyance. Subsequent to the administrative law judge's Decision and Order and employer's appeal, the United States Supreme Court has upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427819 (June 28, 2012).

[5] Because the miner's coal mine employment was in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

[6] *Qualifying coal mine employment* is defined as work in an underground mine or coal mine work in conditions substantially similar to conditions in an underground mine. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988).

miner's] testimony," which, in fact, "showed the lack of comparability." Employer's Brief at 17.

At the outset, the administrative law judge found that all of the miner's coal mine employment took place on the surface as a mechanic, maintenance supervisor, and tipple laborer.[7] Decision and Order at 17; Hearing Tr. at 18. The administrative law judge found that the miner "was continually exposed to heavy volumes of dust which arose and circulated around the heavy equipment he repaired" and that he "worked under dust-covered vehicles, sometimes in the pit, and used air tools that stirred up thick dust around his unprotected nose and mouth." Decision and Order at 18; Hearing Tr. at 15-17, 19-20. Further, the administrative law judge determined that the miner's tipple work involved "extremely dusty conditions that blackened his skin and caused him to expectorate for several days afterward." Decision and Order at 18; Hearing Tr. at 17-18. The administrative law judge found that the miner's testimony, that he was continually exposed to heavy concentrations of dust, was "quite similar" to the testimony of underground coal miners working at the face of the mine, and was consistent with "the typical testimony of underground coal miners, who likewise complain of breathing dusty air and emerging from the mines at the end of the day covered in a thick layer of dust…." Decision and Order at 18. The administrative law judge concluded, therefore, that the miner "clearly" met his burden of establishing the levels of dust that he was exposed to in his surface mining. *Id*. Consequently, the administrative law judge found that the miner's above-ground coal mine work was substantially similar, in terms of dust exposure, to the work performed by underground coal miners, and satisfied the comparability requirement for invocation of the Section 411(c)(4) presumption.

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required only to proffer sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Therefore, while a miner bears the burden of establishing comparability, he is "required only to produce sufficient evidence of the surface mining conditions under which he worked." *Leachman*, 855 F.2d at 512-13; *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987). However, a miner is not required

[7] The miner's testimony respecting the conditions of his surface coal mine employment is uncontradicted. Moreover, employer has not identified any unresolved evidentiary issues that would support its argument, that the administrative law judge "failed to resolve conflicts in the record" with respect to the miner's coal mine employment. Employer's Brief at 14, 17.

to demonstrate that the environmental conditions at the surface mine are similar to the "most dusty area of an underground mine." *McGinnis*, 10 BLR at 1-7. A miner's unrebutted testimony may support a finding of similarity. *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

We discern no error in the administrative law judge's analysis, and conclude that substantial evidence supports his factual determinations. At the outset, we reject employer's contention that "the absence of a standard of proof for testing comparability [of mining conditions] violates the APA." Employer's Brief at 14. As the Director submits, the administrative law judge properly considered relevant factors in determining whether the miner's working conditions were substantially similar to those of an underground mine, taking into consideration the nature of his coal dust exposure as a surface miner. *Leachman*, 855 F.2d at 512; Director's Brief at 5. In so doing, the administrative law judge rationally focused on the dispersion of coal dust in the air and work surroundings of the miner's employment in order to assess the level of dust inhaled in the course of his duties. Contrary to employer's assertion that the miner failed to establish where he worked, the miner testified that his coal mine employment included work at the tipple, in the pit, in the repair shop, and varying equipment locations. Decision and Order at 17-18; Hearing Tr. at 15-18.

Employer's next contention, that the credited testimony "shows the lack of comparability more than comparability since there is no wind to blow coal dust around underground," misapprehends the miner's testimony and the administrative law judge's findings. Employer's Brief at 17. The miner testified that his work entailed heavy dust exposure in the described locations, as well as in enclosed areas (e.g., in spaces under the equipment, or in the repair shop). Decision and Order at 17-18; Hearing Tr. at 15-16. Moreover, the administrative law judge reasonably found that thick dust arose and circulated around the heavy equipment, as well as under dust-covered vehicles, and in the pit, in the course of the miner's repair work. Decision and Order at 18; Hearing Tr. at 14-18. The administrative law judge rationally inferred that the miner's use of air tools also stirred up thick dust, resulting in "extremely dusty conditions." *Id*. Therefore, we agree with the Director that, based on the miner's uncontradicted testimony, the administrative law judge acted within his discretion in concluding that the miner was exposed to a sufficient amount of coal mine dust to establish the requisite similarity between his coal mine dust exposure in surface mining and the dust conditions in underground mining. *See Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *see also Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); Director's Response Brief at 5-6. The administrative law judge, therefore, reasonably inferred, from the miner's description of his working conditions, that his surface mine dust exposure was heavy and substantially similar to the conditions prevailing in underground mining. As the evidence relied upon provides sufficient specificity regarding the miner's dust exposure levels to support the administrative law judge's conclusion, and is fully explained, we affirm his finding that the miner had at least fifteen years of *qualifying coal mine employment. See Leachman*, 855 F.2d at 512; *see also*

Summers, 272 F.3d at 479, 22 BLR at 2-275; *Styka v. Jeddo-Highland Coal Co.*, BLR , BRB No. 11-0150 BLA (Feb. 27, 2012); *Wagahoff*, 10 BLR at 1-101.

Because the administrative law judge properly conducted the inquiry outlined in *Leachman*, and substantial evidence supports his findings, we reject employer's argument that the administrative law judge's coal mine employment finding failed to comply with the requirements of the APA. *Leachman*, 855 F.2d at 512. Consequently, as we affirm the administrative law judge's finding that the miner had fifteen years of *qualifying coal mine employment* and employer has stipulated that the miner had a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant is entitled to invocation of the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

II. Rebuttal of the Section 411(c)(4) Presumption:

Employer argues that the opinions of Drs. Repsher[8] and Fino[9] rebut the Section 411(c)(4) presumption. Specifically, employer challenges the administrative law judge's determination that the opinions of Drs. Repsher and Fino are "at odds" with the scientific views adopted by the Department of Labor (DOL) in the preamble to the amended regulations (the preamble). Decision and Order at 23, 25. Employer argues that, because the preamble was not subject to notice and rulemaking, consistency with the preamble is not a valid basis for evaluating a medical opinion. Employer contends, therefore, that the administrative law judge relied on "unknown criteria," and substituted his own views for those of the medical experts, in violation of the APA, in finding the presumption unrebutted. Employer's Brief at 18-20, 23; Employer's Reply Brief at 4, 6. Employer also contends that the administrative law judge "mischaracterized" the opinions of Drs. Fino and Repsher, who "recognized the additive risks" of coal dust exposure and smoking, but, nonetheless, validly conclude that the effects of coal mine dust were clinically insignificant in the miner. Employer's Brief at 19, 22, 23. In addition, employer argues that the administrative law judge erred in rejecting Dr. Fino's opinion because it was based on a view that a diagnosis of legal pneumoconiosis requires radiographic evidence of pneumoconiosis. Employer further argues that the

[8] Dr. Repsher conducted an evaluation of the miner on May 14, 2008 and reviewed additional medical records. He concluded that the miner did not have clinical or legal pneumoconiosis, and that his very severe chronic obstructive pulmonary disease was due to smoking and bronchial asthma, conditions unrelated to his coal mine employment. Director's Exhibit 14 at 3-6; Employer's Exhibit 9 at 11-12, 16.

[9] After reviewing the miner's medical records, Dr. Fino concluded that the miner did not have clinical or legal pneumoconiosis, and that his disabling lung impairment was due to smoking. Employer's Exhibits 4, 10 at 21.

administrative law judge improperly credited the opinions of Drs. Chavda, Simpao and Houser, despite their inability to differentiate between the respective effects of coal mine dust and smoking on the miner's condition. *Id*. at 18-19. Employer's arguments are without merit.

Employer bears the burden of establishing rebuttal of the Section 411(c)(4) presumption.[10] *See* 30 U.S.C. §921(c)(4); *Morrison v. Tennessee Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011). The preamble sets forth the DOL's resolution of questions of scientific fact relevant to the elements of entitlement that must be established in order to secure an award of benefits. Consequently, the extent to which a medical opinion accords with the preamble to the amended regulations is a valid criterion for an administrative law judge to consider in weighing an opinion. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). In order to assess the medical opinion evidence, the administrative law judge permissibly evaluates the medical rationales for consistency with the conclusions contained in the medical literature and scientific studies relied upon by the DOL in drafting the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a); 65 Fed. Reg. 79,920-77 (Dec. 20, 2000); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. Thus, contrary to employer's contention, the preamble does not constitute evidence outside the record, for which notice and rulemaking are required. *Id.*; *Maddeleni v. The Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135 (1990).

In this case, the administrative law judge properly determined, in light of the preamble, that the opinions of Drs. Repsher and Fino were unpersuasive because they expressed views that were contrary to the scientific principles accepted by the DOL. Decision and Order at 22-25. Dr. Repsher, who diagnosed severe obstructive pulmonary disease due solely to smoking, stated that the miner's loss of FEV_1 from his twenty-nine years of coal mine dust inhalation would be "*de minimus* compared to just living," and opined that the average loss of FEV_1 in miners is "so small" that it is "not-detectable."[11]

[10] The administrative law judge found that the evidence established the absence of clinical pneumoconiosis. Decision and Order at 21. Therefore, employer's remaining burden, in order to rebut the Section 411 (c)(4) presumption in this case, is to affirmatively establish that the miner did not suffer from legal pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9.

[11] Dr. Repsher opined that, "to an overwhelming statistical probability" any individually measurable loss in FEV_1 in an individual coal miner such as the miner, would be due to smoking or some cause other than legal pneumoconiosis. Employer's Exhibit 9 at 16-17; Director's Exhibit 14 at 4, 6.

Id. at 22, 23-24; Employer's Exhibit 9 at 12-13, 16; Director's Exhibit 14 at 6. The administrative law judge found:

> Dr. Repsher assumes that the statistical probability of any miner actually developing clinically significant obstruction due to coal dust is so small that if the miner has significant loss of lung function and also has a history of cigarette smoking, or asthma, or, for that matter, any other condition which could explain his loss of lung function, then Dr. Repsher will necessarily conclude that the miner's coal dust exposure has had either no effect or a *de minimus* effect on his loss of lung function.

Decision and Order at 23. Based on the foregoing, the administrative law judge rationally concluded that Dr. Repsher's view was contrary to the DOL's determinations regarding coal dust exposure and obstructive lung disease. Decision and Order at 25; Employer's Exhibit 4 at 5-7. The administrative law judge's finding was rational because the DOL, in promulgating the revised definition of pneumoconiosis at 20 C.F.R. §718.201(a), found that there was a consensus among medical experts that coal dust-induced chronic obstructive pulmonary disease is clinically significant, and as the regulations provide that a qualifying FEV_1 value may establish a disabling coal dust-related respiratory impairment. *See* Fed. Reg. at 79,940 (Dec. 20, 2000); *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7. Consequently, the administrative law judge properly assessed the credibility of the opinions of Drs. Repsher and Fino in light of their consistency with principles set forth in the preamble.

We also reject employer's assertion that the administrative law judge relied upon a presumption that pneumoconiosis is *always* latent and progressive, and utilized the preamble as an "authoritative finding of fact…" to discredit Dr. Repsher's opinion. *See* Employer's Reply Brief at 4; Employer's Brief at 21; Decision and Order at 23-24. Dr. Repsher remarked that in "most" miners the loss of lung function would reverse within six to twelve months following cessation of exposure. Decision and Order at 22-24; Director's Exhibit 14 at 4, 6; Employer's Exhibit 9 at 16-17. The administrative law judge correctly recognized that this view conflicts with the scientific view adopted by the DOL, that pneumoconiosis "may lie dormant and progress, even after the cessation of exposure" and that, consequently, "a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period of time." 65 Fed. Reg. at 79,971; Decision and Order at 24; *see* 20 C.F.R. §718.201(c); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(en banc); *Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004)(en banc). Therefore, the administrative law judge's finding that Dr. Repsher's opinion was deficient on this basis was rational, and is affirmed.

Next, we reject employer's contention that the administrative law judge mischaracterized the medical opinion of Dr. Repsher. The administrative law judge

found that, although Dr. Repsher acknowledged that coal dust exposure and smoking could be additive factors, the physician "clarified" his statement by saying that "the additive effect from coal mine dust" would be "de minimus." Decision and Order at 22; Employer's Exhibit 9 at 19, 23. The DOL has approved scientific evidence demonstrating that both coal mine dust-induced and cigarette smoke-induced obstructive impairments occur through similar mechanisms, and that coal dust and smoking have additive effects. *See* 65 Fed. Reg. at 79,940-43; *Obush*, 24 BLR at 1-125-26; *see also Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7. The administrative law judge, therefore, permissibly inferred that Dr. Repsher believes that coal dust can cause only a minimal loss of lung function, which is incompatible with the DOL position that coal dust exposure can cause a clinically significant obstructive impairment, and produces an additive effect. Decision and Order at 23; Employer's Exhibit 9 at 18-19; *see* 65 Fed. Reg. at 79,942; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR at 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 Fed. Appx. 757 (6th Cir. Nov. 29, 2007)(unpub.); *Obush*, 24 BLR at 1-125-26. As this inference is rational, and rests within the fact-finder's discretion, employer's argument is unavailing.

Further, the administrative law judge permissibly determined that Dr. Repsher's express reliance on statistical probabilities detracted from the weight due to his opinion regarding the cause of the miner's disabling respiratory impairment. Decision and Order at 22, 23; Employer's Exhibit 9 at 16-17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-149 (1989)(en banc).

Similarly, the administrative law judge acted within his discretion in according less weight to Dr. Fino's diagnosis of a severe obstructive respiratory impairment related to smoking. Decision and Order at 24-25, 27; Employer's Exhibits 4 at 9-10, 10 at 16. Dr. Fino believed that coal dust causes only a clinically insignificant FEV_1 reduction in the average miner, and that, therefore, the miner's twenty-nine years of surface mining failed to produce a "clinically significant" loss in FEV_1 on pulmonary function study testing. Employer's Exhibits 4 at 5, 10 at 20.[12] The administrative law judge, therefore, rationally found Dr. Fino's view "not persuasive and contrary to" the DOL's determinations regarding coal dust exposure and lung disease. Decision and Order at 11-13, 25; *see* 65 Fed. Reg. at 79,940; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7.

In addition, Dr. Fino's statement that "it is very helpful to estimate the amount of clinical pneumoconiosis in order to assess the contribution to the clinical emphysema from coal mine dust inhalation" belies employer's argument that Dr. Fino did not require x-ray evidence to diagnose legal pneumoconiosis. *See* Employer's Brief at 23;

[12] Dr. Fino stated: "I don't believe that this man has an above-average loss of FEV-1 due to coal dust." Employer's Exhibit 10 at 20.

Employer's Exhibit 4 at 5. Contrary to employer's assertion that the medical opinion was mischaracterized, the administrative law judge rationally found that Dr. Fino's statement was inconsistent with the DOL findings that medical studies show that severe obstruction may occur in miners, regardless of the presence of clinical pneumoconiosis. 65 Fed. Reg. at 79,943; Decision and Order at 24-25.

Furthermore, the administrative law judge concluded that the erroneous view shared by Drs. Repsher and Fino, that the miner's years of coal mine employment were insufficient to cause a clinically significant loss in FEV_1 on pulmonary function study testing, was a "primary" basis of their opinions regarding the cause of the miner's disabling respiratory impairment. Decision and Order at 22, 25. The administrative law judge properly considered that, in rendering their opinions, Drs. Repsher and Fino referenced studies indicating a lesser incidence of occupationally-related lung diseases for surface miners than for underground miners, thereby encompassing a view that is inconsistent with his finding that, in this case, the miner's working conditions were substantially similar to those of underground miners. *See* Decision and Order at 25; Employer's Exhibits 4 at 6, 9, 9 at 14, 10 at 6, 11, 14-15, 20. In so doing, the administrative law judge properly assessed the significance of the physicians' erroneous views upon their overall medical diagnoses in this case. *See Greene v. King James Coal Mining*, Inc., 575 F.3d 628, 24 BLR 2-199 (6th Cir. 2009). Consequently, the administrative law judge rationally found that their opinions were contrary to the DOL's determinations regarding coal dust exposure and obstructive lung disease, and, therefore, were "not persuasive." Decision and Order at 11-13, 25; *see* Fed. Reg. at 79,940; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-292 n.7.

Finally, the administrative law judge permissibly discounted the opinions of Drs. Repsher and Fino, that the miner's disabling respiratory impairment is unrelated to coal mine employment, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order at 27; s*ee Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom*., *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co*., 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

In light of the statements made by Drs. Repsher and Fino, the administrative law judge permissibly found that their opinions were inconsistent with the tenets of the Act, and contrary to his own evaluation of the evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *see also Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7. A determination of whether a medical expert adequately explains how the underlying documentation and generalized information derived from medical literature or scientific studies supports the medical conclusions the doctor reached regarding a particular miner

rests within the discretion of the fact-finder. In this case, employer has failed to demonstrate that the administrative law judge's credibility determinations are not supported by substantial evidence. We, therefore, affirm the administrative law judge's determination to discredit the opinions of Drs. Repsher and Fino. *See Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155. Thus, we reject employer's assertion that the administrative law judge improperly or selectively evaluated the evidence in violation of the APA. *Obush*, 24 BLR at 125-26; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge permissibly discounted the opinions of Drs. Repsher and Fino to find that employer did not meet its burden of establishing the absence of legal pneumoconiosis, or eliminating coal mine dust exposure as a contributing factor in the miner's disabling respiratory impairment. Decision and Order at 22-24, 27; 20 C.F.R §718.201; *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988). Employer's assertions of error to the contrary amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Clark*, 12 BLR at 1-152; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge properly discredited the two opinions supportive of employer's burden, we affirm his finding that the evidence was insufficient to rebut the presumption of total disability due to pneumoconiosis afforded by Section 411(c)(4) in this case.[13] Because substantial evidence supports the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), we affirm his award of benefits.

[13] Consequently, we need not address employer's remaining contentions regarding the administrative law judge's weighing of the opinions of Drs. Chavda, Simpao and Houser. Moreover, contrary to employer's arguments, a physician is not required to apportion the relative contributions of smoking and coal dust exposure to a miner's chronic obstructive pulmonary impairment, in order to comport with the premises underlying the regulations. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Gross v. Dominion Coal Corp*., 23 BLR 1-18, 1-18-19 (2003).

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