BRB No. 14-0072 BLA

LINDSEY N. YOCUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NESCO, INCORPORATED	)	DATE ISSUED: 08/27/2014
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-6042) of Administrative Law Judge Drew A. Swank rendered on a claim filed on October 4, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment, and found that the evidence, as a whole, established that claimant is totally disabled.[1] The administrative law judge therefore found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption because it failed to disprove the existence of legal pneumoconiosis,[3] although it disproved the existence of clinical pneumoconiosis.[4] In addition, the administrative law judge found

[1] Because employer concedes that claimant suffers from a totally disabling respiratory disability, the administrative law judge's finding of total disability is affirmed. Employer's Brief at 8; *see* Decision and Order at 3-4, 11-14 & n.8. We also affirm the administrative law judge's finding that employer established the absence of clinical pneumoconiosis as it is unchallenged on appeal. Decision and Order at 14, 18; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] In 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). Both underground coal mine employment and surface coal mine employment in conditions that are substantially similar to those in an underground mine constitute "qualifying" coal mine employment pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).

[3] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[4] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition

that the presumption was not rebutted because it failed to establish that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4)(2012). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant has sufficient qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. Additionally, employer asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer did not rebut the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment for purposes of invoking the amended Section 411(c)(4) presumption.

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.[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).

Invocation of the Amended Section 411(c)(4) Presumption: Qualifying Coal Mine Employment

In order to invoke the presumption at amended Section 411(c)(4), claimant must establish at least fifteen years of "employment in one or more underground coal mines," or "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4)(2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). In this case, the parties stipulated to 22.64 years of coal mine employment, and the administrative law

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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).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 6; Director's Response at 2; Director's Exhibit 4.

judge found that claimant "was employed in one or more above-ground coal mines for well over the statutorily-relevant fifteen years," and that claimant's "above-ground mining experience is sufficiently analogous to under-ground coal mining for purposes of [invocation]." Decision and Order at 3-4, 11.

Employer argues, however, that claimant's testimony "provides absolutely no basis" for the administrative law judge's conclusion that claimant's surface mining jobs were performed in conditions substantially similar to those of an underground mine. Employer's Brief at 8. Employer asserts that claimant "did not describe *any* coal dust exposure," and "alleged exposure to only limestone, sandstone, and soapstone, *i.e.*, overburden" and "overburden dust." *Id*. at 5-7. Further, employer asserts that claimant's "minimal descriptions of his dust exposure" failed to "indicate the frequency of the exposure, the duration, or the amount." *Id*. at 7-8. In particular, employer maintains that claimant's depiction of "dirty" and "dusty" work conditions was insufficiently detailed to provide a "quantitative description of the dust and dirt that would allow for a comparison." *Id*. at 5-7. Lastly, employer asserts that the administrative law judge failed to provide "further discussion regarding any of the particulars of claimant's testimony" or "a basis for his finding of comparability." *Id*. at 8.

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 to proffer only sufficient evidence of dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co*. [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *see also Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 876 (3d Cir. 1986)("The term 'substantially similar conditions' refers to conditions in which a worker inhales a similar quantity of dust from the coal mine environment as do miners."). Claimant is not required to directly compare his work environment to conditions underground, but can establish similarity by proferring "sufficient evidence of the surface mining conditions in which he worked." *Leachman*, 855 F.2d at 512. It is then the function of the administrative law judge, based on his expertise and knowledge of the industry, "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Id*. A claimant's unrefuted testimony is sufficient to support a finding of substantial similarity. *Summers*, 272 F.3d at 480, 22 BLR at 2-726.

In this case, all of claimant's coal mine employment took place above ground, at surface strip mines. Hearing Transcript at 12; Director's Response at 2; Decision and Order at 4. Claimant indicated that his first nineteen years of coal mine employment were spent working in open cabs as a dozer operator and an end loader operator, removing the overburden to get to the coal. *Id*. at 12. Claimant described this work as a

dusty, dirty job involving limestone, sandstone and soapstone dusts. *Id.* at 12-13. He described his next three years of coal mining as an equipment operator scraping rock overburden off the earth, as the "same type of work," a "dusty" job. *Id*. He testified that his last four years of coal mine employment as an operator and working foreman involved operating heavy equipment, scraping the overburden, and "auguring" and "cutting" during the entire work shift. *Id*. at 15. He stated that although some of the equipment had closed cabs, "they weren't real good closed cabs," and dust still got inside.[6] *Id*. He described his dust exposure as "continuous," and stated that his winter duties included cleaning the tracks daily with a shovel.[7] *Id*. at 16.

Exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment. *See Phillips*, 794 F.2d at 876; *Garrett v. Cowin & Co., Inc*., 16 BLR 1-77 (1990). Thus, as the Director explained, the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal. Director's Response at 2; *Pershina v. Consolidation Coal Co*., 14 BLR 1-55, 1-57 (1990). Rather, the terms "coal mine dust" and "coal dust" are interchangeable, and refer to "the various dusts around a coal mine," which include, among other substances, limestone and sandstone. *Id.* Thus, employer's first argument, that claimant's dust exposure involving "overburden," comprised of sandstone, limestone and soapstone, cannot be considered coal mine dust exposure for purposes of invocation of the Section 411(c)(4) presumption, is rejected as meritless. *Id*.; *see* Employer's Brief at 5-7.

We also reject employer's argument that claimant's testimony "provides absolutely no basis" for a comparability finding. Employer's Brief at 8. Referencing

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[6] On his employment history form, claimant listed the following: "Run dozer, loader, rock truck, and was working foreman on the job," and indicated "exposure to dust" in each of his coal mine jobs. *See* Director's Exhibits 4, 5 at 1; Decision and Order at 5, 11; *see also* Employer's Exhibit 7 at 2.

[7] Dr. Jaworski recorded claimant's work as "foreman, bulldozer and rock truck operator," noting additionally that claimant "wore respiratory protection only when drilling." Director's Exhibit 12 at 11.

Similarly, Dr. Saludes recorded claimant's statements that he "worked in an open cab without any air conditioning," and "would be covered in dust at the end of the day. He did not wear any mask or breathing protection up until the 1990's where he would just use a paper mask when he was doing drilling." Dr. Saludes also recorded that in claimant's work for Nesco, as a heavy equipment operator and foreman, he ran "heavy equipment and also was exposed to significant dust." Claimant's Exhibit 1 at 1-2.

claimant's hearing testimony, as well as the "evidence contained in the record describing [c]laimant's work," the administrative law judge found that claimant's above-ground mining experience is sufficiently analogous to under ground mining for purposes of invoking the presumption. Decision and Order at 5, 11; *see also* Director's Response at 2. The administrative law judge rationally relied upon claimant's uncontradicted testimony and the additional relevant evidence of record, together with his own understanding of the coal mining industry, to conclude that the conditions of claimant's surface coal mine employment were substantially similar to those in underground coal mining. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Summers*, 272 F.3d at 480, 22 BLR at 2-276; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Leachman*, 855 F.2d at 512; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). Accordingly, because the administrative law judge acted within his discretion in rendering his finding regarding the comparability of the conditions between claimant's surface coal mine employment and underground coal mine employment, and substantial evidence of record supports that finding, we agree with the Director that employer's arguments are meritless. *See Leachman*, 855 F.2d at 512. Therefore, we affirm the administrative law judge's determination that claimant established that at least fifteen years of his employment in surface mines took place in conditions substantially similar to those in underground coal mine employment, and that he satisfied his burden to prove at least fifteen years of qualifying coal mine employment. *See* 30 U.S.C. §921(c)(4)(2012). Further, as employer has conceded that claimant also established that he is totally disabled, we affirm the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4)(2012); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). Employer argues that Dr. Fino's opinion is sufficiently well-reasoned to establish rebuttal under both methods of rebuttal and was improperly discounted.[8]

[8] Specifically, employer asserts that Dr. Fino validly attributed claimant's pulmonary condition solely to smoking based on claimant's above-ground coal mining

With respect to the issue of legal pneumoconiosis,[9] the administrative law judge considered the opinions of Drs. Mudry,[10] Jaworski, Saludes, and Fino. Drs. Mudry, Jaworski and Saludes each attributed claimant's obstructive abnormality to cigarette smoking and coal dust exposure, and Dr. Saludes explicitly diagnosed legal pneumoconiosis. Decision and Order at 16-17; Director's Exhibits 11, 12; Claimant's Exhibit 1. In contrast, Dr. Fino attributed claimant's disability to severe pulmonary emphysema exclusively due to smoking, with no contribution or causality from his coal mine employment. Employer's Exhibit 7 at 14-15; Decision and Order at 17; Employer's Brief at 10, 12-13, 15. The administrative law judge found that Dr. Fino gave two rationales for his opinion. First, Dr. Fino opined that emphysema "can be caused by smoking or 'high contents of coal mine dust in the lungs - which is something that would be unexpected from above-ground work.'"[11] Decision and Order at 17; Employer's Exhibit 7 at 14. Second, Dr. Fino indicated that "by looking at [c]laimant's chest x-rays, he was able to determine that there was insufficient 'evidence of coal content in the lungs that could result in pulmonary impairment.'"[12] Decision and Order at 17-18.

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site work, the extent of "coal content" in his lungs, and Dr. Fino's view that "silicosis does not cause emphysema." Employer's Brief at 11-13.

[9] Employer must affirmatively disprove the existence of clinical *and* legal pneumoconiosis to rebut the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4)(2012); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

[10] The administrative law judge mistakenly refers to Dr. Mudry as Dr. Mundy. *See* Director's Exhibit 11 at 1; Decision and Order at 16, 18.

[11] Dr. Fino excluded a diagnosis of legal pneumoconiosis, based on the comparatively lower risks associated with working in a surface mine, contrary to the administrative law judge's finding that claimant's coal dust exposure was substantially similar to that of an underground miner. *See* Decision and Order at 5, 11; Employer's Exhibit 7 at 15.

[12] Dr. Fino indicated that, in considering whether to diagnose legal pneumoconiosis, and in assessing whether legal pneumoconiosis "is a clinically significant contributing factor in a patient's impairment and disability. . . the more coal a miner has in the lungs, the more likely it is for that miner to have disease." Dr. Fino also relied on medical articles purporting to "contribute to the body of knowledge which says

Assessing the reliability of a medical opinion is a credibility matter within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998). The administrative law judge found that Dr. Fino's statements, regarding the possibility of lesser dust exposure levels generally for surface miners, than for underground miners, denoted "an epidemiological or probability based approach to determining the etiology of an impairment or disorder." Decision and Order at 7-8. An expert opinion that relies on generalities, rather than the specifics of a particular claimant's condition, however, may be assigned less weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge properly found that Dr. Fino's opinion "tells us nothing *about this particular claimant*." Decision and Order at 17-18. The administrative law judge therefore properly discounted Dr. Fino's opinion on this basis. *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Next, the administrative law judge found that Dr. Fino's conclusion, that there was insufficient "evidence of coal content in [claimant's] lungs that could result in pulmonary impairment," was not persuasive in excluding the existence of legal pneumoconiosis. Decision and Order at 18. The administrative law judge's determination is rational as the regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis, and the regulations provide that the presence of legal pneumoconiosis is not necessarily based on the degree of dust retention in the lungs.[13] *See* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Thus, the administrative law judge properly concluded that Dr. Fino's opinion was undercut by his reliance on the absence of evidence of clinical pneumoconiosis in order to exclude coal

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that the amount of emphysema due to coal mine dust is related to coal dust changes within the lung tissue such as clinical pneumoconiosis," and "that emphysema in coal workers is causally related to lung coal content." He stressed that: "obviously, the key is to determine the lung coal content," and concluded "[i]t is the coal content within the lung that causes the emphysema." Employer's Exhibit 7 at 10, 13-15.

[13] Employer acknowledges that Dr. Fino "relied on the evidence of coal content in this claimant's lungs, including an analysis or discussion of the type of exposure the claimant experienced with his surface mining," to conclude that claimant does not have legal pneumoconiosis. Employer's Brief at 17-18.

dust exposure as a cause of claimant's COPD/emphysema. The administrative law judge found that Dr. Fino's view is contrary to the scientific literature upon which the Department of Labor relied in amending the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2).[14] Moreover, substantial evidence supports the administrative law judge's determination that Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, was unpersuasive because he relied on factors relevant to a diagnosis of clinical pneumoconiosis, rather than to a diagnosis of legal pneumoconiosis. Employer's Brief at 16-18; Employer's Exhibit 7. Thus, employer's argument, that "the fact that claimant's work was all above ground" and "Dr. Fino's explanations regarding coal dust burden in the lungs" should have been credited in establishing the absence of legal pneumoconiosis, is meritless. Employer's Brief at 13. The administrative law judge's finding, that employer failed to rebut the presumption at amended Section 411(c)(4) by disproving the existence of legal pneumoconiosis is, therefore, affirmed.

With regard to the issue of whether employer rebutted the presumption by establishing that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment, the administrative law judge properly found that Dr. Fino's opinion, "that smoking alone is responsible for [c]laimant's pulmonary impairments," is "unpersuasive" for the same reasons previously identified with regard to the issue of legal pneumoconiosis. Decision and Order at 18. Because the administrative law judge did not find Dr. Fino's opinion credible on the issue of legal pneumoconiosis, he could not credit Dr. Fino's disability causation opinion, absent "specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not rest upon [his] disagreement with the [administrative law judge's] finding…." *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *see also Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013). The administrative law judge provided permissible reasons for discrediting the opinion of Dr. Fino on the issue of legal pneumoconiosis. Consequently, we affirm his finding that Dr. Fino's opinion failed to rebut the presumption by disproving disability causation. *See* 30 U.S.C. §921(c)(4)(2012); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. Because the opinion

[14] The Department of Labor has declined to endorse the view that coal dust exposure does not cause or contribute to the existence of emphysema, and has adopted the view of the medical community that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

of Dr. Fino is the only opinion supportive of a finding that claimant's disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment, the administrative law judge rationally concluded that employer failed to meet its burden to establish rebuttal.[15] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *see also Blakley*, 54 F.3d at 1320, 19 BLR at 2-203. Consequently, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4)(2012); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J., concurring).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[15] Because the administrative law judge rationally discredited the only medical opinion sufficient to support employer's burden on rebuttal, we need not consider employer's arguments concerning the reliability of the opinions of Drs. Jaworski, Mudry, and Saludes. *See* Employer's Brief at 12-16; Decision and Order at 16-17, 18; Director's Exhibits 10-12; Claimant's Exhibit 1; Employer's Exhibit 1. As employer bears the burden on rebuttal, the sufficiency of claimant's evidence is not at issue. Thus, the administrative law judge's determination that "none of the medical opinions are very persuasive" fails to aid employer on rebuttal. Decision and Order at 18; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J., concurring); *see also Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.