U.S. Department of Labor

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

BRB No. 14-0387 BLA

GERALDINE CLEVENGER (Widow of DONALD L. CLEVENGER) Claimant-Respondent v. E F & B COAL COMPANY and AMERICAN BUSINESS & MERCANTILE Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2015 DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits in a Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Award of Benefits in a Survivor's Claim[1] (2011-BLA-05679) of Administrative Law Judge Larry S. Merck, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). The administrative law judge credited the miner with 17.75 years of underground coal mine employment. Based on the filing date of the survivor's claim, and his determinations that claimant established that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis, set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner was totally disabled, and that claimant was entitled to invocation of the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting that substantial evidence supports the administrative law judge's finding of total disability. The Director

[1] Claimant is the surviving spouse of the miner, who died on February 3, 2010. Director's Exhibits 2, 10. Claimant filed her survivor's claim on March 30, 2010. Director's Exhibit 2. The miner had filed a claim on October 21, 1986, that was finally denied on March 14, 2003. Decision and Order at 4. Consequently, claimant is not entitled to automatic survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

[2] Amended Section 411(c)(4) of the Act applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the miner worked at least fifteen years in underground coal mine employment, or in coal mine employment in conditions that were substantially similar to those of an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

also urges affirmance of the administrative law judge's findings on rebuttal. Employer has filed reply briefs with respect to the arguments of claimant and the Director.[3]

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.[4] 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 - Total Disability

The administrative law judge determined, pursuant to 20 C.F.R. §718.204(b)(1), (2)(i) and (ii), that the evidence was insufficient to establish that the miner had complicated pneumoconiosis, and that the pulmonary function tests and arterial blood-gas studies[5] were non-qualifying for total disability.[6] Decision and Order at 7-8, 29. Because there is no evidence in the record indicating that the miner had cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant could not establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 8 n.6. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the miner was totally disabled, based on Dr. Bush's opinion, considered in conjunction with claimant's Affidavit of the Miner's Condition. *Id*. at 15-17. The administrative law judge specifically determined that the opinions of Drs. Tuteur, Crouch, Caffrey and DeLara were entitled to little weight on the issue of total disability because they did not answer "the question of whether the miner's pulmonary or respiratory impairment would have prevented him from performing his last coal mining job." *Id*. at 16-17. Weighing

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner worked 17.75 years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Decision and Order at 4.

[5] The parties designated two pulmonary function tests dated March 7, 1992 and February 1, 1993, and one arterial blood-gas study dated April 28, 1994. Decision and Order at 8.

[6] A "qualifying" pulmonary function test or arterial blood-gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718,

all of the evidence together at 20 C.F.R. §718.204(b), the administrative law judge gave controlling weight to Dr. Bush's opinion over the non-qualifying pulmonary function tests and arterial blood-gas studies and, thus, he found that claimant satisfied her burden to establish that the miner was totally disabled.

Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), employer argues that the administrative law judge erred in failing to render a specific finding as to the physical demands of the miner's usual coal mine employment. Employer argues that because the record contains "no proof of those demands" a finding of total disability is precluded. Employer's Brief In Support of Petition for Review at 15. Employer also contends that the administrative law judge erred in relying on Dr. Bush's opinion because it is equivocal and not sufficiently documented. Employer's assertions of error have merit, in part.

In preparing his initial report dated November 17, 2011, Dr. Bush reviewed the miner's death certificate, the autopsy report by Dr. Dennis, and eleven autopsy slides pertaining to the miner's lungs. Decision and Order at 11; Employer's Exhibit 10. Based on his review of the slides, Dr. Bush described the miner's lungs as showing diffuse fibrosis, "parenchymal remodeling," minimal to mild coal workers' pneumoconiosis, minimal focal emphysema, and centrilobular emphysema, ranging from mild to moderately severe, but "not preferentially associated to dust pigment deposits." Employer's Exhibit 10. Dr. Bush initially described the miner as suffering from a "respiratory or pulmonary impairment," but he did not identify the degree of that impairment. *Id.*

Dr. Bush was later deposed on October 18, 2012, and testified that the miner's lungs showed significant fibrosis. Employer's Exhibit 23 at 32. The administrative law judge noted that prior to the deposition, employer's counsel had Dr. Bush review documents that counsel identified as "director's exhibits and Employer's Exhibit[s] 1 through 19." Decision and Order at 12, *quoting* Employer's Exhibit 23 at 29. The administrative law judge further noted that, prior to rendering an addendum report on March 21, 2013, Dr. Bush indicated that he had been provided with additional documents by employer. Decision and Order at 13. Although Dr. Bush did not specifically identify all of the records, he stated:

> My review of the information submitted with your recent letter indicates a hiatus of about 10 years between the last medical record of 1995 and those occurring from 2006 until death. Clinical evaluations of earlier records resulted in some examiners concluding that *disabling disease* resulted from

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Appendices B and C, respectively. A "non-qualifying" test or study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

> coal dust exposure, but others disagree, pointing out the *significant lung injury* from heavy cigarette smoking.

Id., *quoting* Employer's Exhibit 29 at 2 (emphasis added). Dr. Bush reported that the miner "*appears to have been totally disabled as a result of lung disease* not related to coal dust exposure: idiopathic pulmonary fibrosis. The description of the changes in the histologic slides in my original report document[s] the presence of idiopathic fibrosis . . . ." Decision and Order at 13, *quoting* Employer's Exhibit 29 at 1 (emphasis added).

In considering the weight to accord Dr. Bush's opinion, the administrative law judge observed that Dr. Bush's statement regarding the miner's disability was "somewhat equivocal," but he found that Dr. Bush based his conclusion that the miner had significant lung disease prior to his death "on the substantial amount of medical evidence he considered," and ultimately gave Dr. Bush's opinion "full probative weight" in finding that the miner was totally disabled. Decision and Order at 16. Based on the evidence reviewed by Dr. Bush, we reject employer's assertion that his opinion is insufficiently documented. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc). Furthermore, contrary to employer's contention, the administrative law judge's finding that Dr. Bush's opinion was "somewhat equivocal" did not foreclose the administrative law judge from giving it probative weight. Decision and Order at 16; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999) (the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier of fact).

However, we agree that the administrative law judge erred in failing to properly discuss the exertional requirements of the miner's usual coal mine work, in conjunction with Dr. Bush's opinion, prior to finding that the miner was totally disabled. *Cornett*, 227 F.3d at 577, 22 BLR at 2-123. Under the regulations, a miner is considered to be totally disabled if he or she has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his or her usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). The administrative law judge is required to determine the exertional requirements of claimant's usual coal mine work and then consider them in conjunction with the medical reports assessing disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett*, 227 F.3d at 576; 22 BLR at 2-121. The miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment in order that the administrative law judge may compare the physical demands with each physician's assessment of impairment or disability and reach a conclusion regarding whether the miner was totally disabled prior to his death. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

In this case, although the administrative law judge noted that the miner's last coal job was "repairing miner, buggy, and any equipment that went down," he did not make a specific finding as to the physical demands of the miner's usual coal mine work, e.g., mild, moderate or heavy labor. Decision and Order at 2, *citing* Living Miner's Claim. The administrative law judge discredited the opinions of Drs. Tuteur, Crouch, Caffrey and De Lara on the issue of total disability because they did not consider the exertional requirements of the miner's usual coal mine work,[7] but he did not also address whether Dr. Bush had knowledge of the miner's usual coal mine work in rendering his opinion on total disability. Because the administrative law judge did not perform the analysis required by 20 C.F.R. §718.204(b)(1), and his treatment of the medical opinions was inconsistent, we vacate his finding that claimant establish total disability based on Dr. Bush's opinion at 20 C.F.R. §718.204(b)(2)(iv). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We further vacate the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption and remand the case for further consideration of whether the miner had a totally disabling respiratory or pulmonary impairment that prevented him from performing his usual coal mine work.[8]

[7] Dr. Tuteur reviewed the medical record evidence and prepared a report dated January 12, 2012, in which he noted that the miner "worked both underground repairing machinery and above ground at the tipple." Employer's Exhibit 18 at 2-3. Dr. Tuteur opined that the miner's death was due to his lung disease and stated that the miner "was totally disabled at the time of death" and "[a]lmost certainly he had some degree of pulmonary impairment prior to his death." Employer's Exhibit 27 at 4. During his deposition, Dr. Tuteur indicated that the miner had simple coal workers' pneumoconiosis and "an extensive interstitial fibrotic process, with severe emphysema." Employer's Exhibit 22 at 32. Dr. Crouch reviewed the miner's death certificate, autopsy slides, and the autopsy report of Dr. Dennis. Dr. Crouch diagnosed severe emphysema associated with significant fibrosis, airway remodeling, dilatation and mild coal workers' pneumoconiosis. Employer's Exhibit 8 at 1. Although she opined that the miner's coal workers' pneumoconiosis was too mild to have caused respiratory impairment or disability, she did not address whether the miner was totally disabled prior to his death as a result of his emphysema. *Id*. at 1-2. Dr. Caffrey reviewed the miner's autopsy slides and other medical records, and opined that the miner had "significant pulmonary disease" but did not address whether the miner was totally disabled. Employer's Exhibit 20 at 5. Dr. De Lara reviewed the miner's autopsy slides and diagnosed chronic lung disease and severe hypoxia. Claimant's Exhibit 1.

[8] Contrary to employer's assertion, the administrative law judge rationally considered claimant's Affidavit and observed that "prior to his death, [the miner] . . . had to use prescribed oxygen and a wheelchair to aid his mobility; [and] eventually, [the miner] was 'bedfast' because of his shortness of breath and oxygen dependency."

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

In the interest of judicial economy, we will address employer's remaining arguments in this appeal, as they pertain to rebuttal. Upon invocation of the amended Section 411(c)(4) presumption that a miner's death was due to pneumoconiosis, the regulations provide that the party opposing entitlement may establish rebuttal with affirmative proof that the miner did not have both clinical and legal pneumoconiosis, or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined at 20 C.F.R. §718.201." 20 C.F.R. §718.305(d)(2). The administrative law judge found that employer failed to disprove that the miner had clinical pneumoconiosis because a preponderance of the autopsy evidence showed that the miner had coal workers' pneumoconiosis.[9] Decision and Order at 24. Citing the regulatory definition of legal pneumoconiosis under 20 C.F.R. §718.201 and the preamble to the 2001 revised regulations, the administrative law judge rejected the opinions of Drs. Bush, Crouch and Tuteur, that the miner did not have legal pneumoconiosis, and further found that their opinions failed to establish that no part of the miner's death was caused by pneumoconiosis. *Id*. at 25-29.

Initially, we reject employer's argument that the administrative law judge erred in utilizing the preamble to the 2001 regulations in evaluating the credibility of the medical opinions on rebuttal. An administrative law judge may evaluate expert opinions in conjunction with the discussion by Department of Labor (DOL) of medical science in the preamble, and may consult the preamble as a statement of scientific research accepted by the DOL. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'g Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Regarding the administrative law judge's specific credibility findings, we also reject employer's assertion that the administrative law judge erred in his treatment of Dr.

Decision and Order at 17-18, *quoting* Director's Exhibit 11; *Clark*, 12 BLR at 1-153. Thus, on remand, the administrative law judge has discretion to rely on claimant's Affidavit and the miner's testimony, in conjunction with the medical evidence, to determine if the miner was totally disabled. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002).

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 24.

Bush's opinion. The administrative law judge correctly found that Dr. Bush opined that the miner did not have legal pneumoconiosis based on the following pathology evidence: "[f]ocal dust emphysema associated with the coal worker micronodules is minimal. The centrilobular emphysema is not preferentially associated with the dust pigment deposits and does not suggest a causal relation to the limited dust deposits in the lung." Decision and Order at 26, quoting Employer's Exhibit 10 at 3-4. The administrative law judge properly noted that, during his deposition, when asked to identify the cause of the miner's centrilobular emphysema, Dr. Bush stated:

> [T]he most significant negative conclusion regarding a causal relation has to do with the amount of dust in the lungs. The amount of dust is very small in the lung slides that we have to examine. In the actual literature and the assertion that centrilobular emphysema is caused by dust exposure in the absence of medical pneumoconiosis, it points out that the lungs that are studied and are considered to show this are heavily pigmented with coal dust.

Decision and Order at 26, *quoting* Employer's Exhibit 23 at 42-43. The record reflects that Dr. Bush defined *medical pneumoconiosis* as "the pathologic changes resulting from coal dust exposure which caused histologic changes in the lungs, specifically, dust deposits and fibrosis with structural changes in the tissue which could focally impair lung function." Employer's Exhibit 10 at 4. He further explained that: "*Legal pneumoconiosis* refers to the fibrotic reaction of the lung tissue resulting from particulate deposits as noted, in addition to sequelae from inhaled materials that might significantly relate to or substantially aggravate impairment from dust exposure." *Id.* (emphasis added).

In rejecting Dr. Bush's opinion, the administrative law judge observed that "a miner can be found to have legal pneumoconiosis, even in the absence of clinical pneumoconiosis"[10] and that in the preamble, "the Department of Labor favorably cited a study, which finds that 'exposure to coal mine dust can cause chronic airflow limitation . . . and emphysema . . . and this may occur independently of CWP [clinical

[10] "Legal pneumoconiosis" includes "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). Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pneumoconiosis].'" Decision and Order at 26, *quoting* 65 Fed. Reg. 79,939-43 (Dec. 20, 2000) (addition of "[clinical pneumoconiosis]" made by the administrative law judge). The administrative law judge further noted that the Board "has found it proper to discredit a physician's opinion based on the notion that emphysema caused by coal dust does not occur absent clinical pneumoconiosis." Decision and Order at 26 *citing Kirkling v. Peabody Coal Co.*, BRB No. 06-0712 BLA (June 29, 2007) (unpub.); *R.G.* [*Gilliam*] *v. Arch Coal Co.*, BRB No. 08-0369 BLA (Feb. 25, 2009) (unpub.).

Employer asserts that the administrative law judge mischaracterized Dr. Bush's opinion. According to employer, Dr. Bush merely acknowledged a debate among the scientific community as to whether centrilobular emphysema is related to coal dust exposure and did not state that he would not diagnose legal pneumoconiosis absent evidence of clinical pneumoconiosis. Employer distinguishes *Kirkling* and *Gilliam*, because the administrative law judge in those cases discredited doctors that explicitly stated that they would not diagnose a coal dust-related emphysema without x-ray or CT scan evidence of clinical pneumoconiosis. In response, the Director urges the Board to affirm the administrative law judge's rejection of Dr. Bush's opinion because Dr. Bush's discussion of why heavy dust deposition in the lungs is required in order to diagnose centrilobular emphysema is "confusing" and he fails to affirmatively establish that the miner did not have legal pneumoconiosis by explaining why coal dust exposure was not a contributing or aggravating factor in the miner's impairment. Director's Letter Brief at 3.

We consider employer's argument with regard to Dr. Bush's opinion to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The persuasiveness of a medical opinion is a matter for the administrative law judge to decide. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Taking into consideration Dr. Bush's report and testimony, and the definitions he provided to support his conclusion that claimant's centrilobular emphysema was not causally related to coal dust exposure, we conclude the administrative law judge acted within his discretion in giving Dr. Bush's opinion little weight. *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. We specifically affirm, as supported by substantial evidence, the administrative law judge's finding that Dr. Bush did not adequately address whether the miner suffered from legal pneumoconiosis, as defined by regulation at 20 C.F.R. §718.201(a)(2).[11] *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

[11] Employer correctly asserts that the administrative law judge mischaracterized Dr. Bush's opinion to be that "focal emphysema is the only emphysema caused by coal

With respect to Dr. Crouch's opinion, the administrative law judge found that she diagnosed the miner as having suffered from emphysema due to smoking and unrelated to coal dust exposure. Decision and Order at 27. Dr. Crouch explained her opinion as follows: "Emphysema can occur in the setting of coal workers' pneumoconiosis; however, the poor concordance between *the amount and distribution of coal dust* and the severity and distribution of emphysema implicates cigarette smoking as the primary etiology." Employer's Exhibit 8 at 1-2 (emphasis added). The administrative law judge, however, found that Dr. Crouch's "analysis conflates the issues of clinical pneumoconiosis and legal pneumoconiosis." Decision and Order at 27. We affirm the administrative law judge's decision to assign less weight to Dr. Crouch's opinion, as the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), "does not necessarily involve the [amount and distribution of the] deposition of coal dust in the lungs." Decision and Order at 27; *see Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Rowe*, 710 F. 2d 255, 5 BLR at 2-103.

Additionally, there is no merit in employer's assertion that the administrative law judge improperly rejected Dr. Tuteur's opinion. The administrative law judge observed correctly that Dr. Tuteur gave the following explanation in his report as to why the miner did not have legal pneumoconiosis:

> [The] Miner *did not have airflow obstruction* and did not exhibit a clinical picture of chronic obstructive pulmonary disease. It is well recognized that he did have some areas of emphysema pathologically and with reasonable medical certainty, these physiologically inert areas were caused by the inhalation of cigarette smoke now documented to be as high as four packages per day.

Decision and Order at 25, *quoting* Employer's Exhibit 27 at 4 (emphasis added). The administrative law judge rationally determined that Dr. Tuteur's opinion is inconsistent with the regulatory definition of legal pneumoconiosis which "can involve an obstructive impairment, a *restrictive* impairment, or both." Decision and Order at 25 (emphasis added), *citing* 20 C.F.R. §718.202(a)(2); 65 Fed. Reg. 79,937-39 (Dec. 20, 2000). Moreover, the administrative law judge permissibly determined that Dr. Tuteur's opinion was not well-reasoned based, in part, on his failure to adequately explain why the miner's emphysema, which Dr. Tuteur diagnosed based on the pathology evidence, was due

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dust exposure." Decision and Order at 26; Employer's Brief in Support of Petition for Review at 18. However, we consider this error to be harmless, as the administrative law judge permissibly rejected Dr. Bush's opinion based on his discussion of centrilobular emphysema. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

entirely to smoking and "was not significantly related to or substantially aggravated by the miner's many years of underground coal mine employment."[12] Decision and Order at 25; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Because the administrative law judge acted within his discretion in giving little weight to the opinions of Drs. Bush, Crouch, Tuteur and Caffrey[13] regarding whether the miner's respiratory disease was significantly related to, or substantially aggravated by, the miner's coal dust exposure, we affirm the administrative law judge's finding that employer failed to affirmatively disprove the existence of legal pneumoconiosis and did not establish rebuttal at 20 C.F.R. §718.305(d)(2)(i). *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Additionally, with regard to the second method of rebuttal at 20 C.F.R. §718.305(d)(2)(ii), as we have affirmed the administrative law judge's determination that the opinions of Drs. Tuteur, Bush, Crouch, and Caffrey are insufficient to disprove that the miner had legal pneumoconiosis, we also affirm the administrative law judge's rational finding that their opinions are insufficient to affirmatively establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.[14]

[12] It is not necessary that we address employer's argument that the administrative law judge erred in finding that Dr. Tuteur expressed views that conflict with the position of the Department of Labor regarding the progressive and latent nature of pneumoconiosis, *see* 20 C.F.R. 718.201(c), as the administrative law judge provided an alternate and valid reason for rejecting Dr. Tuteur's opinion, which we have affirmed. *Kozele,* 6 BLR 1-at 1-382 n.4; Decision and Order at 25.

[13] Dr. Caffrey indicated that he was unable to "state with absolute certainty whether [the miner] had legal pneumoconiosis or not." Director's Exhibit 20. The administrative law judge gave little weight Dr. Caffrey's opinion, and we affirm his credibility determination, as it is not challenged by employer. *See Skrack*, 6 BLR at 1-711.

[14] We reject employer's assertion that, for purposes of rebuttal, it is required to show only that pneumoconiosis was not a "substantially contributing" cause of the miner's death. Employer's Brief in Support of Petition for Review at 22-23, *citing Arch on the Green v. Groves*, 761 F.3d 594, 25 BLR 2-615 25 BLR 2-615 (6th Cir. 2014). The administrative law judge applied the correct rebuttal standard, as set forth by regulation, and properly considered whether employer's evidence was sufficient to prove that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.

Ogle, 737 F.3d at 1074, 25 BLR at 2-452; *Ramage*, 737 F.3d at 1062, 25 BLR at 2-474; *Skukan v. Consolidation Coal Co*., 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); Decision and Order at 28, 30.

III. Remand Instructions

On remand, the administrative law judge must identify the miner's usual coal mine work and the physical demands of that job. The administrative law judge must then address medical opinions that are phrased in terms of total disability, provide a medical assessment of physical abilities and/or identify exertional limitations, and make a finding as to whether the miner was totally disabled. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996). A description of physical limitations in performing routine tasks may be sufficient to allow the adjudicator to infer a finding of total disability. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988). As necessary, the administrative law judge may also take judicial notice of the *Dictionary of Occupational Titles* in determining total disability. *See generally Ondecko v. Director, OWCP*, 14 BLR 1-2 (1989).

If the administrative law judge finds the medical opinion evidence is sufficient to establish that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must then weigh all of the evidence together to determine if claimant satisfied her burden to show that the miner had a totally disabling respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). If claimant establishes total disability, the administrative law judge may conclude that she has invoked the amended Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Based on our holdings *supra*, the administrative law judge may then reinstate his finding that employer failed to rebut the presumption, and reinstate the award of benefits.

See 20 C.F.R. §718.305(d)(2)(ii); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits in a Survivor's Claim is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

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RYAN GILLIGAN
Administrative Appeals Judge

BOGGS, concurring and dissenting:

I concur with my colleagues that the administrative law judge erred in failing to identify the exertional requirements of the miner's usual coal mine work, and in failing to consider those requirements in conjunction with the medical opinion evidence. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996). Thus, I concur in the decision to vacate the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption and to remand the case for further consideration of whether claimant satisfied her burden to establish that the miner had a totally disabling respiratory or pulmonary impairment which would have precluded him from performing his usual coal mine work. *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

As to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge acted within his discretion in finding that Dr. Crouch's statement, that emphysema can occur "in the setting of clinical pneumoconiosis," conflates the issues of the existence of clinical and legal pneumoconiosis. Decision and Order at 27. The administrative law judge also permissibly discredited Dr. Tuteur's opinion, that claimant does not have legal pneumoconiosis, on the ground that Dr. Tuteur did not adequately address whether coal dust exposure was a significant aggravating factor in the miner's

respiratory impairment. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order at 25. Thus, I concur in the majority's decision to affirm the administrative law judge's findings that the opinions of Drs. Crouch and Tuteur are insufficient to satisfy employer's burden to disprove that the miner had legal pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

I would hold, however, that the administrative law judge erred in his treatment of Dr. Bush's opinion. The administrative law judge observed that Dr. Bush opined that the miner did not have legal pneumoconiosis because "[f]ocal dust emphysema associated with the coal worker micronodules is minimal. The centrilobular emphysema is not preferentially associated with the dust pigment deposits and does not suggest a causal relation to the limited dust deposits in the lung." Decision and Order at 26, *quoting* Employer's Exhibit 10 at 3-4. The administrative law judge also noted that, during his deposition, Dr. Bush gave the following testimony regarding why he excluded coal dust exposure as a causative factor for the miner's centrilobular emphysema;

> [T]he most significant negative conclusion regarding a causal relation has to do with the amount of dust in the lungs. The amount of dust is very small in the lung slides that we have to examine. In the actual literature and the assertion that centrilobular emphysema is caused by dust exposure in the absence of medical pneumoconiosis, it points out that the lungs that are studied and are considered to show this are heavily pigmented with coal dust. That's not the case in [the miner].

Decision and Order at 26, *quoting* Employer's Exhibit 23 at 42-43.

The administrative law judge rejected Dr. Bush's opinion on the ground that "the Department of Labor and the Board have made clear that a miner can be found to have legal pneumoconiosis, even in the absence of clinical pneumoconiosis." Decision and Order at 26. The administrative law judge considered Dr. Bush's opinion to be inconsistent with the position of the Department of Labor in the preamble to the 2001 regulations that "exposure to coal mine dust can cause chronic airflow limitation . . . and emphysema . . . and this may occur independently of CWP [clinical pneumoconiosis]." *Id.*, *citing* 65 Fed. Reg. at 79,939 (Dec. 20, 2000) (addition of "clinical pneumoconiosis" made by the administrative law judge). The administrative law judge relied on two unpublished decisions by the Board as supporting his decision to discredit Dr. Bush's opinion "based on the notion that emphysema caused by coal dust exposure does not occur absent clinical pneumoconiosis." *Id.*, *citing Kirkling v. Peabody Coal Co.*, BRB No. 06-0712 BLA (June 29, 2007) (unpub.) and *R.G.* [*Gilliam*] v. *Arch Coal Co.*, BRB

No. 08-0369 BLA (Feb. 25, 2009) (unpub.). Additionally, the administrative law judge described Dr. Bush's rationale as being that "focal emphysema is the only type of emphysema caused by coal dust exposure," contrary to the scientific findings relied upon by the Department of Labor in the preamble to the 2001 revised regulations. Decision and Order at 26, *citing* Employer's Exhibit 10 at 3-4.

Contrary to the administrative law judge's analysis and findings, Dr. Bush did not exclude a diagnosis of legal pneumoconiosis in this case based on the absence of clinical pneumoconiosis,[15] nor did he contend that the miner did not have legal pneumoconiosis on the basis that focal emphysema is the only emphysema associated with coal dust exposure. Indeed, the portion of Dr. Bush's testimony quoted by the administrative law judge clearly shows that Dr. Bush considered whether there was centrilobular emphysema in this case caused by dust exposure in the absence of medical (i.e. clinical) pneumoconiosis. Employer's Exhibit 23 at 43. In his deposition testimony of October 18, 2012, Dr. Bush explained that the literature linking centrilobular emphysema causally with coal dust exposure does so when lungs are "heavily pigmented with coal dust" and that's not the case in [the miner]." *Id*. Dr. Bush's explanation is consistent with the science cited in the preamble, and found credible by the Department of Labor, indicating that centrilobular emphysema occurs in relationship to the respirable dust content found in the lungs. *See* 65 Fed. Reg. 79,942 (Dec. 20, 2000). His reliance on pathology findings of anthracotic pigmentation in order to diagnose centrilobular emphysema related to coal dust exposure is not a requirement that there be clinical pneumoconiosis, as the regulations state clearly that pathology findings of anthracotic pigmentation do not constitute clinical pneumoconiosis. 20 C.F.R. §718.202(a)(2).

Moreover, the administrative law judge's reliance on *Kirkling*, BRB No. 06-0712 BLA and *Gilliam*, BRB No. 08-0369 BLA, is misplaced, as those cases involved a physician's reliance on the absence of radiological findings on either a CT scan or x-ray as a basis for excluding a diagnosis of legal pneumoconiosis. Dr. Bush, however, did not exclude legal pneumoconiosis on the ground that there was no CT scan or x-ray evidence for clinical pneumoconiosis.

Thus, like my colleagues, I would vacate the award of benefits and remand the case for the administrative law judge to reconsider whether claimant has established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and whether claimant is entitled to invocation of the amended Section 411(c)(4) presumption. Further, to the extent that the administrative law judge mischaracterized Dr. Bush's opinion and did not give it proper consideration, I would

[15] In fact, Dr. Bush found clinical pneumoconiosis in this case. Employer's Exhibit 10.

vacate his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and, as necessary, I would direct the administrative law judge to reconsider whether employer has established rebuttal of the amended Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(2), by disproving the existence of pneumoconiosis or by establishing that no part of the miner's death was due to pneumoconiosis as defined in 20 C.F.R. 718.201.[16] *See* 20 C.F.R. §718.305(d)(2)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting).

JUDITH S. BOGGS
Administrative Appeals Judge

[16] The Director, Office of Workers' Compensation Programs, suggests that Dr. Bush's testimony is otherwise unpersuasive; however, that is a determination to be made by the administrative law judge, and not the Board. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).