U.S. Department of Labor

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

BRB No. 15-0094 BLA

WILLIAM O. BONAR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
QUARTO MINING COMPANY	)	DATE ISSUED: 12/23/2015
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

William O. Bonar, Moundsville, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5698) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on May 12, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act).[1] The administrative law judge credited claimant with at least eighteen years of coal mine employment, fifteen or more years of which were underground, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725.[2] The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and, therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found, therefore, that claimant was entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). In addition, the administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits as of May 2010, the month in which claimant filed his subsequent claim.

On appeal, employer contends that claimant is not entitled to invocation of the presumption at Section 411(c)(4), arguing that the administrative law judge failed to properly evaluate the medical opinion evidence in finding total disability established at 20 C.F.R. §718.204(b)(2). Employer also challenges the administrative law judge's determination that employer failed to rebut the presumption. Employer contends that the administrative law judge did not apply the appropriate legal standard on rebuttal, and that he erred in weighing the evidence relevant to the issues of pneumoconiosis and disability causation. Finally, employer contends that the administrative law judge's determination of the date for the commencement of benefits is not supported by the record or consistent

[1] Claimant's previous claim, filed on September 5, 1990, was denied by the district director on January 4, 1991, because claimant failed to establish any of the elements of entitlement. Claimant took no further action on the claim. Decision and Order at 2; Director's Exhibit 1.

[2] On July 8, 2014, the administrative law judge issued an Order Granting Request for Decision on the Record and Cancelling Hearing, wherein he noted that claimant requested that a decision be made based upon the evidence in the file and also stated that he was unable to obtain counsel. Decision and Order at 2.

[3] Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment, he or she is entitled to a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1).

with law. Claimant filed a letter in response to employer's appeal.[4] The Director, Office of Workers' Compensation Programs, has filed a letter stating that he is not responding to employer's appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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. Application of the Section 411(c)(4) Presumption

Employer contends that the rebuttal provisions of Section 411(c)(4) of the Act apply only to claims against the "Secretary," and do not apply to claims brought against a responsible operator. Employer's Brief at 4 n.1, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's challenge to the application of the rebuttal provisions set forth in Section 411(c)(4), as implemented by 20 C.F.R. §718.305(d), to responsible operators is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Accordingly, we reject employer's contention for the reasons set forth in that decision, and affirm the administrative law judge's application of the rebuttal provisions of Section 411(c)(4) in this case. *See Owens*, 25 BLR at 1-4; *see also Usery*, 428 U.S. at 37-38, 3 BLR at 2-58-59.

[4] In his letter to the Board dated March 22, 2015, claimant stated that he is not represented by counsel. There was no response from claimant subsequent to the filing of employer's Petition for Review and Supporting Brief.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years of coal mine employment, with at least fifteen of those years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 29.

[6] Claimant's History of Coal Mine Employment forms and Social Security Administration Statement of Earnings reflect that claimant's last coal mine employment was in Ohio, rather than West Virginia, as the administrative law judge found. Director's Exhibits 1, 5; *see* Decision and Order at 2 n.1, 2. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

II. Invocation of the Section 411(c)(4) Presumption – Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the most recent newly submitted pulmonary function study was sufficient to establish total respiratory disability, because it produced qualifying values prior to the application of a bronchodilator, while the two earlier pulmonary function studies produced nonqualifying values both pre-bronchodilator and post-bronchodilator. Decision and Order at 23; Director's Exhibit 13; Employer's Exhibits 9, 10. In considering the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge referenced his finding regarding the pulmonary function study evidence, and fully credited Dr. Fino's diagnosis of a totally disabling respiratory impairment because it was based, in part, on the most recent qualifying pulmonary function study. Decision and Order at 19. With respect to Dr. Lenkey's opinion, that claimant is totally disabled by a respiratory impairment, the administrative law judge indicated, "[Dr. Lenkey] stated that if the x-ray that he reviewed were negative, a diagnosis of total disability would have been 'more challenging.' Given that I find the x-ray evidence negative, I give Dr. Lenkey's opinion slightly less weight." Decision and Order at 24, *quoting* Director's Exhibit 13. The administrative law judge discredited Dr. Basheda's contrary opinion because it was based on a determination that claimant would not be disabled if he took bronchodilator medication. Decision and Order at 24; Employer's Exhibit 1.

The administrative law judge concluded, "[w]hile I give Dr. Lenkey's opinion less weight, I find Dr. Fino's opinion well-documented and reasoned. In addition, I give little weight to Dr. Basheda's opinion. As a result, I find the claimant has established total disability on the basis of medical opinion evidence." Decision and Order at 25. He further found that the evidence supportive of a finding of total disability outweighed the contrary probative evidence, and determined that claimant established total disability under 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and invocation of the Section 411(c)(4) presumption. *Id*. at 17, 25, 29.

Employer contends that, when considering whether the medical opinion evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), the

[7] The administrative law judge determined that the newly submitted blood gas studies do not support a finding of total disability under 20 C.F.R. §718.204(b)(2)(ii), as all three of the tests produced nonqualifying values. Decision and Order at 23; Director's Exhibit 13; Employer's Exhibits 1, 10. The administrative law judge also found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure. Decision and Order at 23.

administrative law judge erred by "not wholly discrediting" Dr. Lenkey's opinion diagnosing claimant with a totally disabling pulmonary impairment, rather than giving his opinion "slightly less weight." Employer's Brief at 8; *see* Decision and Order at 24. Employer further maintains that the administrative law judge erred in discrediting Dr. Basheda's opinion, that claimant does not have a totally disabling respiratory or pulmonary impairment, asserting that it is well-reasoned and documented. In addition, employer alleges that the administrative law judge did not adequately explain his findings.

Employer's contentions do not have merit. Contrary to employer's argument, the administrative law judge rationally found that Dr. Basheda's opinion had little probative value on the issue of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). In making disability determinations, the question is whether a miner is able to perform his job, not whether he is able to perform his job after he takes medication. *See* 20 C.F.R. §718.204(b)(1); 45 Fed. Reg. 13,682 (Feb. 29, 1980) (Although the use of a bronchodilator does not provide an adequate assessment of the miner's disability, it may aid in determining the presence or absence of pneumoconiosis). Thus, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Basheda's opinion had little probative weight on the issue of total disability because he failed to address whether claimant could perform his prior coal mine employment without the use of a bronchodilator. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The administrative law judge also rationally found that Dr. Fino's diagnosis of a totally disabling respiratory impairment was "well-documented and reasoned," as it was based on the most recent pulmonary function study of record, which produced qualifying pre-bronchodilator values, and blood gas studies showing a drop in oxygen saturation on exertion. Decision and Order at 24; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002). In light of the administrative law judge's permissible crediting of Dr. Fino's opinion, we consider any error in the administrative law judge's decision to give "less weight" to Dr. Lenkey's diagnosis of total respiratory disability to be harmless. Decision and Order at 24; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, we reject employer's argument that the administrative law judge did not sufficiently explain the basis for his finding of total respiratory disability, and affirm his finding that the new evidence was sufficient to establish total respiratory disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).[8] We also affirm the administrative law judge's determination that all of the

[8] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative

relevant evidence, when considered together, established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5, 16; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc). In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 17-18, 28-30.

III. Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to affirmatively establish that claimant does not suffer from clinical pneumoconiosis and legal pneumoconiosis, or that "no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis, as defined in §718.201." 20 C.F.R. §718.305(d)(1); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

A. The Presumed Existence of Pneumoconiosis

The administrative law judge first considered whether claimant satisfied his burden of proof to demonstrate a change in an applicable condition of entitlement by establishing the existence of pneumoconiosis or total disability, before determining whether claimant invoked the Section 411(c)(4) presumption. *See* Decision and Order at 14-16. Notwithstanding the stated purpose of his analysis, the administrative law judge properly made findings as to whether employer could disprove the existence of

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law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any of the elements of entitlement. Decision and Order at 16; Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement.

pneumoconiosis, as defined in 20 C.F.R. §718.201, when considering the evidence under 20 C.F.R. §718.202(a)(4). *Id*. at 17-22.

The administrative law judge determined that employer "rebutted clinical pneumoconiosis" pursuant to 20 C.F.R. §718.202(a)(1), (4), based on the x-ray and medical opinion evidence. Decision and Order at 19-20. Regarding the presumed existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of employer's experts, Drs. Basheda and Fino. *Id*. at 20-21. Based on his examination of claimant on December 29, 2010, Dr. Basheda diagnosed an obstructive impairment due to chronic obstructive pulmonary disease (COPD), with possible superimposed bronchial asthma. Employer's Exhibit 1. He also observed that claimant's x-ray was negative for pneumoconiosis and identified cigarette smoking as the sole cause of claimant's COPD. *Id*. Dr. Basheda stated:

> This conclusion can be reached by the findings of the variable airway obstruction with improvement over time on pulmonary function testing as well as a clinical history of wheezing. The findings of variable and improving pulmonary function after leaving the coal mines as well as wheezing on physical examination are consistent with tobacco-induced COPD or bronchial asthma.

Id. During his subsequent deposition, Dr. Basheda testified that, although a CT scan of claimant's chest showed no signs of pneumoconiosis, there was evidence of bullous emphysema, which is "a classic radiographic finding that we see with tobacco-induced COPD." Employer's Exhibit 17 at 25. The administrative law judge reviewed Dr. Basheda's opinion in detail and determined: "Dr. Basheda relied on opinions contrary to the preamble. The [Department of Labor (DOL)] has adopted the view that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and cannot be disentangled. As such, I give Dr. Basheda's opinion with respect to legal pneumoconiosis little weight." Decision and Order at 21, *citing Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012).

Dr. Fino examined claimant and diagnosed an obstructive impairment attributable to moderate emphysema, caused by cigarette smoking. Employer's Exhibit 10. He determined that coal dust exposure did not play a role in claimant's obstructive impairment because "[i]f a person develops obstruction due to coal mine dust inhalation, the obstruction occurs early on," not twenty years later. *Id*. At his deposition, Dr. Fino reported that Dr. Shipley's diagnosis of centrilobular emphysema, based on a CT scan,

supported his diagnosis. Employer's Exhibit 16 at 16-17. The administrative law judge reviewed Dr. Fino's opinion in its entirety, and stated:

> Dr. Fino diagnosed emphysema. Like Dr. Basheda, he opined that claimant's emphysema is entirely tobacco-induced. His opinion is based upon science contrary to the preamble and I give his opinion with respect to legal pneumoconiosis little weight accordingly.

Decision and Order at 21-22; *see* Employer's Exhibits 2, 7. When addressing Dr. Fino's opinion in the context of total disability causation, the administrative law judge further determined that Dr. Fino's exclusion of coal dust exposure as a causal factor in claimant's obstructive impairment conflicts with the definition of pneumoconiosis set forth in 20 C.F.R. §718.201. Decision and Order at 29. In light of his decision to discredit the opinions of Drs. Basheda and Fino, the administrative law judge concluded that employer failed to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *Id*. at 22.

Employer contends that the administrative law judge erred in referencing the preamble to the 2001 regulatory revisions when discrediting the opinions of Drs. Basheda and Fino. Employer also maintains that the administrative law judge improperly relied on the decision of the United States Court of Appeals for the Fourth Circuit in *Cochran* to conclude that "dust-related emphysema and smoking-induced emphysema are indistinguishable." Employer's Brief at 16.

Employer asserts correctly that neither the DOL, nor the Fourth Circuit in *Cochran*, has stated that coal dust-induced emphysema and smoke-induced emphysema "cannot be disentangled." Decision and Order at 21. Although the DOL has acknowledged that impairment from smoking and coal dust exposure "occur through similar mechanisms," whether a particular miner's emphysema arose out of dust exposure in coal mine employment must be determined on a case-by-case basis, in light of the administrative law judge's consideration of the evidence of record. 65 Fed. Reg. 79,938 (Dec. 20, 2000). Multiple circuit court have recognized the DOL's position as consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 861, 23 BLR 2-124, 2-159 (D.C. Cir. 2002), *aff'g in part and rev'g*

[9] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

in part Nat'l Mining Ass'n v. Chao, 160 F. Supp.2d 47 (D.D.C. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). In *Cochran*, the Fourth Circuit affirmed the administrative law judge's credibility determinations, noting that the administrative law judge properly considered the rationales of the physicians and did not automatically reject medical opinions because the physicians' conclusions did not align with the scientific findings in the preamble. *Cochran*, 718 F.3d at 324, 25 BLR at 2-264. Thus, we agree with employer that the administrative law judge erred in misstating the findings of DOL and the holding in *Cochran*, and erred in discrediting employer's physicians, based on his erroneous interpretation of the preamble.

Despite the administrative law judge's error, remand for reconsideration of Dr. Fino's opinion is not necessary because the administrative law judge provided a valid alternative basis for discrediting Dr. Fino's exclusion of coal dust exposure as a contributing cause of claimant's COPD, that is not dependent on the administrative law judge's mischaracterization of the preamble. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). The administrative law judge rationally determined that Dr. Fino's reliance on the fact that claimant has an obstructive impairment that did not develop until approximately twenty years after his coal mine employment ended, is inconsistent with the DOL's recognition in the preamble that pneumoconiosis includes restrictive and obstructive impairments, and is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(a)(2), (c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); Decision and Order at 29. Accordingly, we affirm the administrative law judge's finding that Dr. Fino's opinion is insufficient to establish that claimant does not have legal pneumoconiosis.

We further hold, however, that there is merit in employer's argument that the administrative law judge did not provide a permissible rationale for discrediting Dr. Basheda's opinion ruling out the existence of legal pneumoconiosis. As employer contends, the administrative law judge relied on his erroneous belief that the DOL, and the circuit courts, have accepted the view that emphysema caused by coal dust exposure cannot be distinguished from emphysema caused by cigarette smoking. Decision and Order at 21. Accordingly, we must vacate the administrative law judge's findings that Dr. Basheda's opinion is insufficient to rebut the presumed fact of legal pneumoconiosis, and that employer failed to satisfy its burden of proof under 20 C.F.R. §718.305(d)(1)(i)(A). On remand, the administrative law judge must reconsider Dr. Basheda's opinion in its entirety and render a finding as to whether his conclusion, that claimant's emphysema is entirely unrelated to coal dust exposure, is adequately reasoned

and documented. In performing this task, the administrative law judge should address the extent to which Dr. Basheda explained why the miner's coal dust exposure could not have also caused, or aggravated, the emphysema in addition to his smoking. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168. The administrative law judge also may reconsider the extent to which the premises underlying Dr. Basheda's opinion are consistent with the scientific principles set forth in the preamble. *See Cochran*, 718 F.3d at 324, 25 BLR at 2-264; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000).

B. Total Disability Causation

When considering rebuttal of the presumed fact of total disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge discredited the opinions of Drs. Basheda and Fino, that pneumoconiosis did not cause claimant's total respiratory disability, because they ruled out the existence of legal pneumoconiosis, contrary to his finding pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 29. Based on our affirmance of the administrative law judge's discrediting of Dr. Fino's opinion on legal pneumoconiosis, we continue to affirm his determination that Dr. Fino's opinion is insufficient to establish that claimant's total respiratory disability is not due to pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Nevertheless, because we have vacated the administrative law judge's rejection of Dr. Basheda's opinion on legal pneumoconiosis, we must also vacate his finding that employer failed to satisfy its burden to establish that claimant is not totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge must reconsider his disability causation finding on remand, if reached,[10] in light of his reweighing of Dr. Basheda's opinion under 20 C.F.R. §718.305(d)(1)(i)(A).

IV. Commencement of Benefits

[10] Based on the administrative law judge's determination that employer rebutted the presumed fact of clinical pneumoconiosis, if the administrative law judge finds, on remand, that Dr. Basheda's opinion is sufficient to rebut the presumed fact of legal pneumoconiosis, employer will have rebutted the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i). As a result, the administrative law judge would not be required to revisit his findings on rebuttal of the presumed fact of total disability causation at 20 C.F.R. §718.305(d)(1)(ii).

Finally, employer asserts that, because evidence establishes that claimant "was not disabled at the time he filed this claim for benefits," the administrative law judge erred in finding that May 2010, the month in which claimant filed his subsequent claim, is the date from which payment of benefits should commence. Employer's Brief at 29. This contention has merit.

If the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credited medical evidence indicates that the miner was not totally disabled at some point after that date. 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In this case, the administrative law judge stated, without explanation, that "no specific onset date of disability is evident from the record." Decision and Order at 30. This left unresolved the conflict between the administrative law judge's crediting of Dr. Fino's diagnosis of a totally disabling respiratory impairment, based on a qualifying pulmonary function study performed on October 15, 2012, and Dr. Fino's determination that claimant was not totally disabled when Drs. Lenkey and Basheda obtained nonqualifying pulmonary function studies on June 4, 2010 and December 29, 2010, respectively.[11] Employer's Exhibits 10, 16 at 19. Thus, we must vacate the administrative law judge's determination that benefits commence as of May 2010, and remand the case for the administrative law judge to reconsider the date from which benefits are payable, based on his consideration of all relevant evidence.[12]

[11] We reject employer's allegation that Dr. Basheda's report, concluding that claimant was not totally disabled at the time of his examination on December 29, 2010, supports Dr. Fino's opinion. As indicated *supra,* slip op. at 5, the administrative law judge permissibly discredited Dr. Basheda's opinion on the issue of total disability because he did not assess the extent of claimant's impairment without the use of bronchodilators. *See* Decision and Order at 24-25.

[12] Employer suggests that the administrative law judge cannot credit Dr. Lenkey's diagnosis of a totally disabling respiratory impairment, based on claimant's June 4, 2010 pulmonary function study, because he determined that this diagnosis was entitled to "less weight" pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See* Decision and Order 25. We disagree. Because the administrative law judge did not wholly reject or discredit Dr. Lenkey's opinion on the issue of total disability, he should address it when reconsidering the appropriate date of onset under 20 C.F.R. §725.503.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge