BRB No. 13-0212 BLA

ERMAL VANCE Claimant-Petitioner v. HOBET MINING, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2014 DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand (2008-BLA-5630) of Administrative Law Judge Richard A. Morgan (the administrative law judge) denying benefits on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time. In the

[1] Claimant filed his first claim on October 23, 2000. Director's Exhibit 1. It was finally denied by a claims examiner on January 29, 2001, because claimant failed to establish total respiratory disability. *Id*. Claimant filed this claim on October 1, 2007. Director's Exhibit 3.

original Decision and Order dated February 26, 2009, the administrative law judge credited claimant with at least 22 years of coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. Although the administrative law judge found that the new evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), he found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(iv) and 718.204(b)(2) overall. However, the administrative law judge found that the new evidence did not establish the existence of either clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)[2] or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found that the new evidence did not establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge additionally found that "the claimant has not established that a material change in condition has taken place since the previous denial, because he has not established that he is now totally disabled due to pneumoconiosis." 2009 Decision and Order at 23; *see* 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits. In a subsequent Decision on Motion for Reconsideration dated March 19, 2009, the administrative law judge corrected his previously issued Decision and Order to state that employer is the properly designated responsible operator in this case.

In response to claimant's first appeal, the Board affirmed the administrative law judge's determination that employer is the properly designated responsible operator. *Vance v. Hobet Mining, Inc.*, BRB Nos. 09-0487 BLA and 09-0487 BLA-A, slip op. at 2 n.3 (June 23, 2010)(unpub.). However, the Board vacated the administrative law judge's finding that the new evidence established total respiratory disability at 20 C.F.R. §§718.204(b)(2)(iv), and remanded the case for further consideration of the new medical opinion evidence thereunder. *Vance*, BRB Nos. 09-0487 BLA and 09-0487 BLA-A, slip op. at 7-8. Furthermore, the Board vacated the administrative law judge's finding that the new evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall. *Vance*, BRB Nos. 09-0487 BLA and 09-0487 BLA-A, slip op. at 8. The Board then instructed the administrative law judge, on remand, to weigh all relevant new evidence together under 20 C.F.R. §§718.204(b)(2) and 725.309(d), to determine whether total disability was established and explain his credibility determinations. *Id.* The Board also instructed the administrative law judge, on remand, to consider whether the new evidence established that claimant was entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), as the claim was filed after January 1, 2005, and claimant was credited with at least 22 years of coal mine employment. *Id.* Lastly, the Board vacated the administrative law

[2] Administrative Law Judge Richard A. Morgan (the administrative law judge) found that the causality issue at 20 C.F.R. §718.203(b) was moot, in view of his finding that the existence of clinical pneumoconiosis had not been proven.

judge's findings that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4), or total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), in light of its determination to remand the case for further findings relevant to the presumption at amended Section 411(c)(4) and for the submission of additional evidence by the parties addressing the change in law. *Id.*

In a Decision and Order on Remand dated April 11, 2011, the administrative law judge found that this claim was filed after January 1, 2005, that claimant worked at least 22 years in underground coal mine employment or coal mine employment in substantially similar conditions, and that the new evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge also found that the new evidence did not establish the existence of either clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) or legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found that the new evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge additionally found that claimant was not entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Accordingly, the administrative law judge again denied benefits. By Order dated May 3, 2011, the administrative law judge granted claimant's motion for reconsideration, but denied the relief sought.

In disposing of claimant's second appeal, the Board affirmed the administrative law judge's findings that this claim was filed after January 1, 2005, that claimant worked at least 22 years in underground coal mine employment or coal mine employment in substantially similar conditions, and that the new evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Vance v. Hobet Mining, Inc.*, BRB No. 11-0562 BLA, slip op. at 3 n.3 (May 30, 2012)(unpub.). However, the Board vacated the administrative law judge's finding that that the new evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for further consideration of the medical opinion evidence thereunder. *Vance*, BRB No. 11-0562 BLA, slip op. at 6. The Board instructed the administrative law judge, on remand, to reconsider the evidence relevant to the exertional requirements of claimant's job as an electrician, render a finding, and set forth the underlying rationale. *Vance*, BRB No. 11-0562 BLA, slip op. at 7. The Board also instructed the administrative law judge, on remand, to weigh the evidence supportive of a finding of total disability against the contrary probative evidence to determine whether claimant had proven total respiratory disability at 20 C.F.R. §718.204(b)(2) and a change in applicable condition of entitlement at 20 C.F.R. §725.309(d). *Vance*, BRB No. 11-0562 BLA, slip op. at 8. The Board additionally instructed the administrative law judge, on remand, to consider the merits of entitlement based on a weighing of all the evidence of record, if reached. *Id.* Further, the Board instructed the administrative law judge, on remand, to consider whether claimant invoked the presumption at amended Section 411(c)(4) and whether employer rebutted the presumption, if reached. *Id.*

In a Decision and Order on Second Remand dated February 1, 2013, the administrative law judge found that this claim was filed after January 1, 2005, that claimant worked at least 22 years in underground coal mine employment or coal mine employment in substantially similar conditions, and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant was entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge also found that employer established that claimant has neither clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) nor legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, the administrative law judge found that employer established that claimant's pulmonary impairment does not arise from coal mine dust exposure. Accordingly, the administrative law judge again denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer established rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of pneumoconiosis and total disability due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

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[3] Because the administrative law judge's findings that this claim was filed after January 1, 2005, that claimant worked at least 22 years in underground coal mine employment or coal mine employment in substantially similar conditions, and that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010. 30 U.S.C. §921(c)(4) (2012). We also affirm the administrative law judge's unchallenged finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, we will address claimant's contention that the administrative law judge erred in finding that employer established rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of pneumoconiosis. Specifically, claimant asserts that "the administrative law judge did not separately address the question of the existence of clinical pneumoconiosis and legal pneumoconiosis, instead, merely addressing pneumoconiosis as a whole." Claimant's Brief at 23. Contrary to claimant's assertion, the administrative law judge stated, "I find that employer has met its burden of proof in establishing the non-existence of clinical or legal pneumoconiosis." 2013 Decision and Order on Second Remand at 9. After finding that the existence of pneumoconiosis could not be disproven at 20 C.F.R. §718.202(a)(2) because there was no biopsy evidence in the record, the administrative law judge found that none of the presumptions at 20 C.F.R. §718.202(a)(3) were applicable to this case. The administrative law judge then found the x-ray evidence sufficient to disprove the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Further, the administrative law judge considered the opinions of Drs. Ranavaya, Rasmussen, Zaldivar, and Hippensteel with regard to the issues of clinical pneumoconiosis and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). After finding that Dr. Ranavaya was the only physician to diagnose clinical pneumoconiosis, the administrative law judge stated, "I give less weight to Dr. Ranavaya's 2000 diagnosis given its age and the negative results of the more recent X-rays."[5] 2013 Decision and Order on Second Remand at 9. Regarding the issue of legal pneumoconiosis, the administrative law judge noted that Dr. Rasmussen was the only physician to diagnose

[5] Claimant does not specifically challenge the administrative law judge's weighing of Dr. Ranavaya's opinion.

legal pneumoconiosis. The administrative law judge found that the opinions of Drs. Zaldivar and Hippensteel, that claimant does not have legal pneumoconiosis, outweighed Dr. Rasmussen's contrary opinion. Thus, because the administrative law judge considered the evidence with regard to the issues of clinical pneumoconiosis and legal pneumoconiosis, we reject claimant's assertion that the administrative law judge erred in failing to separately address these issues.

Claimant also asserts that the administrative law judge erred in failing to properly consider the issue of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). Specifically, claimant argues that the administrative law judge should have found the chest x-ray evidence to be in equipoise. We disagree.

The record consists of eight interpretations of two x-rays dated December 5, 2000 and November 20, 2007.[6] Dr. Ranavaya, a B reader, and Dr. Navani, dually-qualified as a B reader and Board-certified radiologist, read the December 5, 2000 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Drs. Alexander and Miller, dually-qualified radiologists, read the November 20, 2007 x-ray as positive for pneumoconiosis, Claimant's Exhibits 1, 2, while Dr. Rasmussen, a B reader, and Drs. Meyer, Spitz and Wiot, dually-qualified radiologists, read this x-ray as negative, Director's Exhibits 11, 12; Employer's Exhibits 2, 3. The administrative law judge reasonably determined that the December 5, 2000 x-ray was positive for pneumoconiosis, because both of the readings of this x-ray were positive for pneumoconiosis. Director's Exhibit 1. In addition, the administrative law judge permissibly determined that the November 20, 2007 x-ray was negative for pneumoconiosis, based on the superior qualifications of Drs. Meyer, Spitz and Wiot, as dually-qualified radiologists and University of Cincinnati professors.[7] *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Therefore, the administrative law judge permissibly found the x-ray evidence sufficient to disprove the existence of clinical pneumoconiosis based on "the qualifications of the readers."[8] 2013 Decision and Order on Second Remand at 6; *see*

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[6] Dr. Gaziano, a B reader, read the November 20, 2007 x-ray for quality only. Director's Exhibit 11.

[7] The record contains the credentials of Drs. Meyer, Spitz and Wiot as professors of radiology. Director's Exhibit 12; Employer's Exhibits 2, 3.

[8] The administrative law judge provided a valid basis for according less weight to the positive December 5, 2000 x-ray than to the negative November 20, 2007 x-ray, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983), namely, he permissibly relied on the superior credentials of Drs. Meyer, Spitz and Wiot. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation*

Worhach, 17 BLR at 1-108; *Melnick*, 16 BLR at 1-37. Thus, we reject claimant's assertion that the administrative law judge should have found the chest x-ray evidence to be in equipoise.

We further affirm the administrative law judge's determination that employer established the absence of clinical pneumoconiosis by a preponderance of the x-ray and medical opinion evidence, as claimant has raised no additional challenges to the administrative law judge's weighing of this evidence. *See Skrack*, 6 BLR at 1-711. We, therefore, affirm the administrative law judge's finding that employer rebutted the presumed existence of clinical pneumoconiosis pursuant to amended Section 411(c)(4).

Claimant additionally asserts that the administrative law judge erred in giving greater weight to the opinions of Drs. Zaldivar and Hippensteel, than to Dr. Rasmussen's opinion, with regard to the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). As discussed, *supra*, Dr. Rasmussen opined that claimant has legal pneumoconiosis. Director's Exhibit 11; Claimant's Exhibit 3. By contrast, Drs. Zaldivar and Hippensteel opined that claimant does not have legal pneumoconiosis. Employer's Exhibits 1, 4, 5, 6. In considering the opinions of Drs. Rasmussen, Zaldivar and Hippensteel, the administrative law judge stated:

> Given the faults in Dr. Rasmussen's opinion described by the somewhat better-qualified Dr. Zaldivar and also by Dr. Hippensteel, the speculation by Dr. Rasmussen that I have described, and the fact that Dr. Rasmussen was the only physician to attribute [claimant's] emphysema/[chronic obstructive pulmonary disease (COPD)] to coal mine dust exposure and the more recent negative X-rays, reflecting a lack of coal dust deposition, I find the employer has disproven pneumoconiosis.

2013 Decision and Order on Second Remand at 9.

Claimant argues that the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Hippensteel because he found they were supported by references to medical literature that post-dated the preamble to the 2001 amended regulations. Claimant maintains that the opinions of Drs. Zaldivar and Hippensteel were, in fact, based on studies that were issued prior to the 2001 amended regulations.

In considering the opinions of Drs. Zaldivar and Hippensteel, the administrative

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Coal Co., 16 BLR 1-31, 1-37 (1991) (en banc). Thus, the administrative law judge's error in referring to the chronological sequence of the conflicting x-rays to discredit the positive December 5, 2000 x-ray, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

law judge stated:

> Dr. Hippensteel agreed that smoking and coal mine dust exposure can cause emphysema, but, with reference to medical authority, disagreed with his conclusions regarding bullous emphysema which is not caused by coal dust exposure. (EX 7 at 24-25, 27-28). Likewise, citing medical authorities, Dr. Zaldivar testified bullous emphysema is not associated with coal mine dust exposure. (EX 8 at 28). Dr. Zaldivar did not agree that coal dust and smoking cause lung damage through similar processes. (EX 8 at 52-54). He distinguished between various forms of emphysema in his testimony. (EX 8).

2013 Decision and Order on Second Remand at 7 n.5. The administrative law judge further stated:

> Given the language in the 2000 Preamble to the 2001 regulations to the effect that emphysema from smoking and coal dust exposure "occur through similar mechanisms – namely the excess release of destructive enzymes from dust – (or smoke) stimulated inflammatory cells…" is over thirteen years old, Dr. Rasmussen's testimony that no studies "contradict" this view, and Dr. Zaldivar's reference, in 2011, to articles in the medical literature "every month" supporting his view (albeit he cited no specific article in his testimony), I do not discredit his testimony. 65 Fed. Reg. 79943 (12/20/00).

Id.

A party may dispute the science credited by the Department of Labor in the preamble to the 2001 amended regulations by laying the appropriate foundation. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013) (observing that neither of the employer's doctors had "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"). Otherwise, a party cannot dispute the science incorporated into the regulations. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). In this case, the administrative law judge indicated that Dr. Zaldivar relied on medical authority that was developed after the preamble to the 2001 amended regulations to support of the opinion of Dr. Zaldivar, as well as the opinion of Dr. Hippensteel, that bullous emphysema is not caused by coal dust exposure. However, as claimant asserts, the administrative law judge did not render a specific determination that the medical literature cited by Dr. Zaldivar was, in fact, developed after the preamble to the 2001 amended regulations. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32;

Shores, 358 F.3d at 490, 23 BLR at 2-26. Moreover, even if the studies cited by Drs. Zaldivar and Hippensteel were developed after the preamble to the 2001 amended regulations, the administrative law judge did not explain, as required by the APA, why the studies cited by Drs. Zaldivar and Hippensteel are more credible than the studies relied on by the Department of Labor. *Wojtowicz*, 12 BLR 1-165. Thus, the administrative law judge erred in crediting the opinions of Drs. Zaldivar and Hippensteel on the ground that they are supported by medical literature developed after the scientific evidence cited in the preamble to the 2001 amended regulations. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Shores*, 358 F.3d at 490, 23 BLR at 2-26. Consequently, we vacate the administrative law judge's finding that employer rebutted the presumed existence of legal pneumoconiosis pursuant to amended Section 411(c)(4), and remand the case for further consideration of the medical opinion evidence.

For the sake of judicial economy, we will address the other arguments raised by claimant with regard to the administrative law judge's weighing of the medical opinion evidence relevant to the presumed existence of legal pneumoconiosis. Specifically, claimant argues that the administrative law judge erred in discounting Dr. Rasmussen's opinion on the ground that it is speculative. Claimant's assertion has merit, in part.

The administrative law judge noted that "Dr. Rasmussen testified that he diagnosed legal pneumoconiosis because [claimant] had a significant reduction in single breath diffusing capacity with a mild airways obstruction consistent with COPD/ emphysema. (CX 5 at 12)." 2013 Decision and Order on Second Remand at 7. In considering the opinions of Drs. Rasmussen and Zaldivar, the administrative law judge stated:

> I find that Dr. Rasmussen injected undue speculation into his opinion which was only revealed on cross-examination. For instance, he admitted speculation concerning interstitial fibrosis when he testified there was no evidence of the same and admitted that it was "more likely" that the miner's continuing smoking was the cause of the chronic bronchitis he diagnosed rather than coal dust exposure.

Id. at 9. The administrative law judge further stated:

> Although Dr. Rasmussen mentioned the possibility of small airways disease, although the miner had "very little evidence of it," and Dr. Zaldivar agreed it was present, I find the latter's opinion regarding the smoking etiology more convincing. Dr. Rasmussen admitted both smoking and coal dust exposure can cause it. While he admitted on cross-examination that it was more likely [that] the smoking caused the miner's chronic bronchitis, he was neither asked on cross-examination nor did he otherwise explain the

> possible impact of continued smoking on the small airways disease. However, the somewhat better-qualified Dr. Zaldivar ruled out that etiology based on the bullous emphysema seen on x-ray.

Id. The administrative law judge then stated, "To make matters clear, I do not accept Dr. Rasmussen's view that the diffusing capacity test alone is a valid measurement of impairment; I find it speculative." *Id*.

The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Here, the administrative law judge stated that he addressed Dr. Rasmussen's view that the diffusing capacity test is a valid measurement of impairment in his analysis of the conflicting medical opinion evidence "to illustrate that much of what Dr. Rasmussen opined was speculative, a matter affecting the credibility of his opinion." 2013 Decision and Order on Second Remand at 9. However, the administrative law judge did not explain why Dr. Rasmussen's view that the diffusing capacity test is a valid measurement of impairment makes Dr. Rasmussen's opinion regarding the existence of legal pneumoconiosis speculative. *Wojtowicz*, 12 BLR at 1-165. Thus, the administrative law judge erred in giving less weight to Dr. Rasmussen's opinion on that basis. On remand, the administrative law judge must reconsider the medical opinion evidence in accordance with the APA.

Claimant additionally argues that the administrative law judge should have given the greatest weight to Dr. Rasmussen's opinion "[a]s Dr. Rasmussen is the best qualified physician of record." Claimant's Brief at 20. Claimant maintains that "Dr. Rasmussen has devoted his lifetime to a study of occupational diseases, mainly coal workers' pneumoconiosis." Claimant's Brief at 23. We disagree.

Although the administrative law judge indicated that he ranked the opinions of Drs. Rasmussen and Zaldivar "more or less equally" because of their Board-certifications and expertise,[9] he nonetheless accorded "slightly less weight" to Dr. Rasmussen's opinion than to Dr. Zaldivar's opinion because Dr. Rasmussen was not Board-certified in pulmonary diseases.[10] 2013 Decision and Order on Second Remand at 6. Further, the

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[9] The administrative law judge noted that Dr. Rasmussen had extensive experience treating and diagnosing coal miners. 2013 Decision and Order on Second Remand at 6.

[10] Dr. Rasmussen is Board-certified in internal medicine, Director's Exhibit 11; Claimant's Exhibit 3, while Dr. Zaldivar is Board-certified in internal medicine and pulmonary diseases. Employer's Exhibits 1, 6.

administrative law judge accorded "only somewhat slightly less weight" to Dr. Hippensteel's opinion than to Dr. Rasmussen's opinion because he found that Dr. Hippensteel's credentials were not equivalent to those of Dr. Rasmussen. *Id*. Thus, the administrative law judge permissibly accorded less weight to Dr. Rasmussen's opinion based on his consideration of the comparable qualifications of all the physicians. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 522, 21 BLR 2-323, 2-325 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Consequently, we reject claimant's assertion that the administrative law judge should have given the greatest weight to Dr. Rasmussen's opinion because of his superior qualifications.

Because the administrative law judge relied on his weighing of the medical opinion evidence regarding the existence of legal pneumoconiosis to conclude that employer also rebutted the presumed fact that claimant's totally disabling impairment was due to pneumoconiosis, we also vacate this finding. We, therefore, vacate the administrative law judge's finding that employer rebutted the amended Section 411(c)(4) presumption.

On remand, the administrative law judge should initially reconsider whether employer has rebutted the presumed existence of legal pneumoconiosis. Employer bears the burden to disprove the existence of legal pneumoconiosis on rebuttal under amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). When weighing the opinions of Drs. Rasmussen, Zaldivar and Hippensteel on this issue, the administrative law judge must render a finding on each of the factors relevant to their probative value, including the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In so doing, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

If the administrative law judge determines that employer has proven that claimant does not have legal pneumoconiosis, employer will have established rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). If the administrative law judge finds that employer has not rebutted the presumed fact that claimant has pneumoconiosis, he must reconsider his finding that employer established rebuttal by proving that claimant is not totally disabled due to pneumoconiosis. *Id*.

Accordingly, the administrative law judge's Decision and Order on Second Remand denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge