BRB No. 11-0690 BLA

ALBERT HOLIDAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	DATE ISSUED: 07/24/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Darrell Dunham (Darrell Dunham & Associates), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (08-BLA-5493) of Administrative Law Judge William S. Colwell awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a claim filed on May 14, 2007.

After crediting claimant with twenty-nine years of coal mine employment,[1] the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge, therefore, found that claimant was entitled to benefits.

In considering the claim, the administrative law judge also properly noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[2] 30 U.S.C. §921(c)(4).

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[1] The record reflects that claimant's coal mine employment was in Arizona. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] On May 24, 2010, employer moved to remand the case to the district director in light of Section 411(c)(4), 30 U.S.C. §921(c)(4), and its potential applicability to this case. By Order dated June 3, 2010, the administrative law judge denied employer's motion. However, the administrative law judge set a schedule for the parties to submit additional evidence to respond to the change in law. In response, employer submitted supplemental reports from Drs. Repsher and Tuteur, and medical records from Chilchinbeto Community Clinic. Claimant submitted four pages of cardiology records. At a telephonic hearing on January 1, 2011, the administrative law judge admitted these documents into evidence. Employer's Exhibits 31-33; Claimant's Exhibit 1. By Order dated April 5, 2011, the administrative law judge set a schedule for employer to submit supplemental opinions for the sole purpose of addressing the evidence contained in

Applying Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge found that claimant was also entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2), (c). Finally, employer contends that the administrative law judge erred in finding that claimant was entitled to benefits pursuant to Section 411(c)(4). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. Employer initially challenges the administrative law judge's finding that claimant established that he worked for fifteen years in a surface mine with dust

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Claimant's Exhibit 1. Employer submitted supplemental reports from Drs. Repsher and Tuteur, which the administrative law judge admitted into evidence. Decision and Order at 11, 14; Employer's Exhibits 34, 35.

conditions substantially similar to those found in underground mines. The United States Court of Appeals for the Seventh Circuit has held that, while a claimant bears the burden of establishing comparability, he is "required only to produce sufficient evidence of the surface mining conditions under which he worked." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). In this case, the administrative law judge found that claimant proved that, during his twenty-nine years as a surface miner, he was exposed to dust conditions substantially similar to those existing underground:

> Claimant worked as a helper from 1976 to 1987, a coal loading shovel operator from 1987 to 1996, and a mobile equipment operator from 1996 to 2005. As a helper, [c]laimant would assist with pushing coal into holes loaded with dynamite and then "get out of the way and shoot it." He recalled that the wind would blow coal dust. Claimant was not provided respirators or breathing masks at the time. At some point, [c]laimant recalled that he did wear a mask, but the dust would sometimes go through it.
>
> As a shovel operator, [c]laimant recalled that "they blast the coal . . . loose" and he would load the trucks with coal using the shovel. He described the shovel as "a big bucket that you load it up there eight hours a day." There was a cab on the truck, but the "coal dust" would come in because it was not "really insulated like today." Claimant recalled that coal dust would be "all over" inside the cab.
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> As a mobile equipment operator, [c]laimant operated a dozer. He recalled there was "a lot of dust in [the] equipment." The truck was about 40 feet in length and the tires were six feet high. Claimant would push coal out of a pit and sometimes push it to the hopper. Although the dozer had a cab, the coal dust was "fine" and would get inside the cab on the floor and dashboard. Claimant stated that he wore a mask for the job, but the "coal dust gets real fine and go[es] through . . . your respirator."
>
> . . . .
>
> This tribunal finds that [c]laimant worked as a surface miner and was exposed to dusty conditions throughout his 29 years of such employment. The conditions of this above-ground employment "were substantially similar to conditions in an underground mine."

Decision and Order at 27-28 (citations omitted).[3]

Because it is based upon substantial evidence, the administrative law judge's finding, that claimant established more than fifteen years of employment in a surface mine with dust conditions substantially similar to those found in an underground mine, is affirmed.

Employer next argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically challenges the administrative law judge's findings that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[4]

The record contains four arterial blood gas studies conducted on August 30, 2007, October 25, 2007, April 16, 2008, and December 5, 2008. While the resting arterial blood gas studies conducted on August 30, 2007, October 25, 2007, and April 16, 2008, produced non-qualifying values, the most recent arterial blood gas study, conducted on December 5, 2008, produced qualifying values at rest.[5] Director's Exhibits 14, 34; Employer's Exhibits 4, 19. The only exercise arterial blood gas study of record, a study conducted on August 30, 2007, also produced qualifying values. Director's Exhibit 14. The administrative law judge found that, because claimant's coal mine employment required physical exertion, the exercise study conducted on August 30, 2007, was "the most probative." Decision and Order at 23. Based upon the qualifying nature of claimant's August 30, 2007 exercise arterial blood gas study, and claimant's qualifying resting arterial blood gas study conducted on December 5, 2008, the administrative law judge found that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer argues that the administrative law judge erred in finding that claimant's August 30, 2007 arterial blood gas study was valid. Although Dr. Kennedy concluded

[3] Claimant's characterization of the conditions of his surface coal mine employment is uncontradicted.

[4] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 20-21.

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

that this arterial blood gas study was valid, Director's Exhibit 14, Drs. Renn, Repsher, and Tuteur each questioned its validity. Drs. Renn, Repsher, and Tuteur questioned the validity of the arterial blood gas study in light of the normal pulmonary function study results obtained on the same day. Employer's Exhibits 14, 9, 29 at 37. Drs. Repsher and Tuteur also questioned the validity of the study in light of the negative x-ray evidence, and the lack of evidence of obstructive lung disease. Employer's Exhibits 29 at 37, 30 at 87. Drs. Renn, Repsher, and Tuteur further explained that the reduced pO2 and increased pCO2 values from the study could be explained by a venous, as opposed to an arterial, blood draw.[6] Employer's Exhibits 14, 30, 31. Dr. Repsher also opined that claimant's obesity may have influenced the results of the exercise portion of claimant's August 2007 blood gas study. Employer's Exhibit 31.

In evaluating the conflicting evidence regarding the validity of claimant's August 30, 2007 arterial blood gas study, the administrative law judge credited Dr. Kennedy's validation of the study over the invalidations of Drs. Repsher and Tuteur, based upon Dr. Kennedy's superior qualifications. Decision and Order at 23. The administrative law judge also found that Drs. Renn, Repsher, and Tuteur failed to provide proper reasons for questioning the validity of the study. *Id.* at 22-23. The administrative law judge, therefore, found that the August 30, 2007 arterial blood gas study was valid.

Employer argues that the administrative law judge erred in crediting Dr. Kennedy's validation of the August 30, 2007 arterial blood gas study over the contrary opinions of Drs. Renn, Repsher, and Tuteur. We disagree. The administrative law judge permissibly credited Dr. Kennedy's validation of the study over the invalidations of Drs. Repsher and Tuteur, based upon Dr. Kennedy's superior qualifications.[7] *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge also permissibly accorded less weight to the

[6] Drs. Renn, Repsher, and Tuteur theorized that the single stick method utilized in administering the August 2007 blood gas study could explain the occurrence of an improper venous blood draw. Employer's Exhibits 14, 30, 31.

[7] Although the administrative law judge noted that Drs. Kennedy, Repsher, and Tuteur are each Board-certified in Internal Medicine, Pulmonary Diseases, and Critical Care Medicine, he noted that Dr. Kennedy possesses greater "expertise in the area of blood gas testing," having co-authored numerous articles in the field, including "Computerization of Arterial Blood-Gas Reports and Interpretation," "Interpretations of Arterial Blood Gases by Computer," and "Interpretation of Arterial Blood Gas Software, Computerized Pulmonary Services." Decision and Order at 23; Exhibit 14. The administrative law judge found that Drs. Repsher and Tuteur did not possess similar expertise. *Id.*

opinions of Drs. Renn, Repsher, and Tuteur because they improperly questioned the validity of the August 30, 2007 arterial blood gas study based on the normal pulmonary function study results obtained on the same day. As the administrative law judge accurately noted, because pulmonary function and arterial blood gas studies measure different types of impairment, the validity of a qualifying arterial blood gas study is not called into question by a contemporaneous normal pulmonary function study. *See Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797 (1984); Decision and Order at 22. The administrative law judge also permissibly found that the reliance of Drs. Repsher and Tuteur on the absence of x-ray evidence of pneumoconiosis, and the absence of evidence of obstructive lung disease, to invalidate the August 30, 2007 arterial blood gas study was improper. *Id.* As the administrative law judge accurately noted, the regulations do not provide that the validity of an arterial blood gas study is contingent upon the presence of x-ray evidence of pneumoconiosis, or evidence of obstructive lung disease. *Id.* The administrative law judge also properly discredited Dr. Repsher's opinion, that claimant's obesity compromised the exercise portion of the August 30, 2007 arterial blood gas study, in light of the doctor's subsequent acknowledgement, during his deposition, that such a possibility "would be unlikely." *Id.* at 22-23; Employer's Exhibit 29 at 40. Because it is supported by substantial evidence,[8] we affirm the administrative law judge's determination that claimant's August 30, 2007 arterial blood gas study is valid. Because employer does not allege any additional error in regard to the administrative law judge's consideration of the arterial blood gas study evidence, we affirm his finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Gagon, Repsher, and Tuteur. Dr. Gagon, after diagnosing claimant with "poor

[8] Drs. Renn, Tuteur, and Repsher, in discussing the validity of the August 30, 2007 arterial blood gas study, suggested that the administering physician, in using the "single-stick" method, rather than the arterial cannula method, to draw blood, may have mistakenly collected a venous, rather than an arterial, blood sample, thereby affecting the results of the study. The administrative law judge noted that the regulations do not require the use of an arterial cannula to draw blood during an arterial blood gas study. Decision and Order at 22. In fact, the administrative law judge accurately noted that Dr. Tuteur testified that his own laboratory uses the single-stick method to collect blood samples. Employer's Exhibit 30 at 59. Noting that Dr. Kennedy, the best qualified physician, did not indicate that a venous sample was taken during the August 30, 2007 blood gas study, and that there was no indication that the technician conducted the study improperly, the administrative law judge found the doctors' suspicions of a venous blood sample to be unpersuasive. Decision and Order at 23.

pulmonary reserve," concluded that, "with significant hypoxia on exertion, [claimant] would have mod[erate] limitations with physical work."[9] Director's Exhibit 14. In contrast, Dr. Repsher opined that claimant is not totally disabled from his prior coal mine employment, as he "should have no difficulty whatsoever" in operating a dozer. Employer's Exhibit 29 at 16, 18. Dr. Tuteur similarly opined that claimant does not suffer from a totally disabling respiratory impairment. Employer's Exhibits 9, 30 at 37-40, 34.

In weighing the conflicting medical opinion evidence, the administrative law judge found Dr. Gagon's opinion, that claimant was totally disabled, to be well-reasoned, as the doctor based his assessment on claimant's "symptoms and complaints, qualifying blood gas testing on exercise as well as his observations and findings during the physical examination, including the fact that the miner 'developed significant hypoxia' while exercising." Decision and Order at 25. In contrast, the administrative law judge found the opinions of Drs. Repsher and Tuteur to be less probative, as these physicians discounted the qualifying August 2007 blood gas study as invalid, while the administrative law judge found this test to be valid. *Id.* "[G]iven the moderate level of physical exertion required of [claimant's] last job and the 'moderate' physical limitations noted in Dr. Gagon's opinion . . . .," the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues that the administrative law judge erred in his consideration of Dr. Gagon's opinion. We disagree. In this case, the administrative law judge properly considered Dr. Gagon's assessment of claimant's physical limitations (moderate limitations with physical work) in conjunction with the exertional requirements of claimant's usual coal mine employment (work requiring a moderate level of manual labor),[10] and found the physician's opinion sufficient to support a finding of total

[9] Dr. Gagon noted that claimant had most recently been a dozer operator from 2000 to June of 2005, a position in which he pushed coal to a loader. Director's Exhibit 14.

[10] In support of his finding that claimant's usual coal mine job as a dozer operator required "a moderate level of manual labor," the administrative law judge noted that claimant was required to "get into and out of the cab of the truck or dozer, which had large tires," and to "operate steering mechanisms for the dozer or truck for 12 to 16 hours a day." Decision and Order at 25. Claimant also testified that he would assist in changing the tires on his truck. Director's Exhibit 33 at 80. Because it is supported by the record, we affirm the administrative law judge's finding that claimant's usual coal mine work required "a moderate level of manual labor." Decision and Order at 25.

disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); Decision and Order at 25.

We also reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Tuteur. The administrative law judge permissibly discounted the opinions of Drs. Repsher and Tuteur since they were based, in part, on their mistaken belief that the qualifying exercise arterial blood gas study obtained on August 30, 2007, was invalid. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *see generally Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 22. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer next contends that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b). We disagree. Because pulmonary function studies and blood gas studies measure different types of impairment, the administrative law judge found that the non-qualifying pulmonary function study evidence did not call into question the qualifying arterial blood gas study evidence, or Dr. Gagon's disability assessment based upon the results of the arterial blood gas study evidence. *See Sheranko*, 6 BLR at 1-798. Consequently, the administrative law judge properly considered all of the relevant evidence together in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 13 BLR 2-196

(10th Cir. 1989). The administrative law judge found that employer established neither method of rebuttal, and therefore found claimant entitled to benefits.

In finding that employer failed to disprove the existence of pneumoconiosis, the administrative law judge relied upon his earlier determination that the medical opinion evidence established the existence of legal pneumoconiosis[11] pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 16-19, 29. Employer, however, challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Gagon, Repsher, and Tuteur. Dr. Gagon diagnosed legal pneumoconiosis, in the form of chronic bronchitis related to coal mine dust exposure. Director's Exhibit 14. In contrast, Drs. Repsher and Tuteur opined that claimant does not suffer from any pulmonary disease. Employer's Exhibits 4, 9, 32, 35.

In his consideration of the conflicting evidence, the administrative law judge accorded "great weight" to Dr. Gagon's diagnosis of legal pneumoconiosis because he found that it was well-reasoned. Decision and Order at 19. Conversely, the administrative law judge accorded less weight to the contrary opinions of Drs. Repsher and Tuteur because he found that they were insufficiently reasoned, and inconsistent with the premises underlying the regulations. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Repsher and Tuteur. We agree. In according less weight to Dr. Repsher's opinion, the administrative law judge relied upon the fact that the doctor "declined to diagnose coal dust[-]induced chronic bronchitis on grounds that such a disease 'generally resolves after cessation of coal dust exposure.'" Decision and Order at 18. The administrative law judge, however, mischaracterized Dr. Repsher's opinion. Dr. Repsher declined to diagnose coal dust-induced chronic bronchitis, not because he believed that claimant's chronic bronchitis was not due to his coal mine dust exposure, but because he did not believe that claimant suffered from chronic bronchitis. In fact, Dr. Repsher opined that claimant did not suffer from any lung disease, or any type of pulmonary impairment. Employer's Exhibits 4, 29 at 43, 47. The administrative law judge improperly focused upon Dr. Repsher's response to a hypothetical question,

[11] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

acknowledging that, if he were to diagnose chronic bronchitis, he would be unable to rule out coal dust exposure as a contributing cause. *See* Employer's Exhibit 29 at 50-51.

The administrative law judge found that Dr. Tuteur's opinion was insufficiently reasoned, because the doctor declined to diagnose legal pneumoconiosis based "on the absence of findings of obstructive lung disease on pulmonary function testing and a lack of radiological findings of the disease on x-ray." Decision and Order at 19. However, the administrative law judge again failed to address the significance of the fact that Dr. Tuteur, like Dr. Repsher, disagreed with Dr. Gagon's diagnosis of chronic bronchitis. During a March 9, 2010 deposition, Dr. Tuteur discussed his reasons for questioning Dr. Gagon's diagnosis of chronic bronchitis:

> Dr. Gagon, on page 2 of his report, checks off yes, chronic bronchitis, and says chronic productive cough. That is the only notation of such in this data set that I can find, except for one time where somebody said scant yellow sputum. But that is not fulfilling the World Health Organization accepted definition of chronic bronchitis, which is cough most days, three months out of [the] year and two successive years, without any specific reason for it. So I think that is a deep concern. And then the description is not present in full.

Employer's Exhibit 30 at 79.

Because Dr. Tuteur found no evidence of obstruction on claimant's pulmonary function studies, he opined that there was no evidence to support a finding of a chronic obstructive pulmonary disease, including chronic bronchitis. Employer's Exhibit 30 at 74. Similarly, Dr. Tuteur found that the x-ray evidence, and more importantly, the CT scan evidence, did not reveal any abnormalities of the visualized airways. *Id.*

We also agree with employer that the administrative law judge erred in his consideration of Dr. Gagon's opinion. Although the administrative law judge found that Dr. Gagon based his diagnosis of chronic bronchitis "on [claimant's] complaints and symptoms, examination findings, qualifying blood gas testing on exercise, and work history," he failed to provide any support for his finding that Dr. Gagon based his diagnosis on these factors.[12] Decision and Order at 19. Moreover, although the administrative law judge accepted the fact that Dr. Gagon, as a physician Board-certified

[12] For example, as employer points out, the administrative law judge did not address how Dr. Gagon's physical examination notations support a conclusion that claimant has a chronic productive cough indicative of a diagnosis of chronic bronchitis. Employer's Brief at 14-15.

in Family Practice, understood the medical definition of chronic bronchitis, Decision and Order at 9, 17, he failed to address the contrary opinions of Drs. Repsher and Tuteur, each Board-Certified in Internal Medicine and Pulmonary Disease, that claimant does not suffer from the disease. Because the administrative law judge's weighing of the above evidence cannot be affirmed, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In light of our decision to vacate the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate his finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Because it was based upon the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), we also vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. On remand, the administrative law judge must reconsider whether employer has rebutted the 411(c)(4) presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). In considering this issue, the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-314 (10th Cir. 2010); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Accordingly, the Decision and Order awarding benefits 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge