BRB No. 12-0453 BLA

DARRELL JULIAN, SR. (Deceased Miner)	)	
Claimant-Respondent	)	
v.	)	
MIDWEST COAL COMPANY f/k/a AMAX COAL COMPANY	)	DATE ISSUED: 07/16/2013
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Maia S. Fisher (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5681) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited the miner[1] with at least sixteen years of coal mine employment in underground mines or in surface mines under substantially similar conditions, and adjudicated this claim, filed on October 9, 2008, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to support a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b), and was, therefore, sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption.[3] Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's admission of Claimant's Exhibits 1-4 into the record, and her finding that the miner was entitled to invocation of the amended Section 411(c)(4) presumption. Employer argues that the evidence is insufficient to establish at least fifteen years of underground coal mine employment or comparable surface mine employment. Employer also challenges the administrative law judge's weighing of the evidence in finding that employer failed to establish rebuttal of the presumption. Lastly, employer challenges the commencement date set by the administrative law judge for the payment of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge was not required to analyze the miner's treatment records under 20 C.F.R.

[1] By Order dated November 29, 2012, the Board amended its records to reflect that the miner died on August 7, 2012. The miner's widow, Brenda Julian, is pursuing the claim on his behalf.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

§718.104(d) in determining the extent of the miner's smoking history. Employer has filed a combined reply brief in support of its position.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning to the first evidentiary issue raised in this appeal, employer contends that the administrative law judge erred in admitting Claimant's Exhibits 1 and 2 into the record,[5] arguing that the miner's evidence summary form was not given to employer in accordance with the terms of the administrative law judge's Order.[6] Employer asserts that the administrative law judge overlooked the terms of her Order instructing the parties to submit completed evidentiary summary forms at least five workdays prior to the hearing, and abused her discretion when she admitted the exhibits into the record absent a valid showing of good cause by the miner. Employer's Brief at 20-24. Employer's arguments lack merit. In admitting this evidence into the record, the administrative law judge noted that the miner's counsel had agreed to represent him "about three weeks prior to the hearing," and that, while counsel had been unable to timely complete the evidence summary form as required, the evidence itself had been exchanged in a timely manner and counsel had shown good cause for the late submission of the form. The administrative law judge determined that the designation of evidence in advance of the hearing is not as important as the exchange of the actual evidence, and that employer had not demonstrated any prejudice in this case. Order at 2-3. On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's admission of Claimant's Exhibits 1 and 2 into the record, based on her determination that the miner

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner was last employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[5] Claimant's Exhibit 1, Dr. Smith's re-reading of the December 1, 2008 x-ray taken as part of the complete pulmonary evaluation by the Department of Labor (DOL), and Claimant's Exhibit 2, Dr. Smith's re-reading of the April 9, 2009 x-ray taken by employer's expert, Dr. Wiot, were designated as rebuttal evidence on the evidence summary form submitted to employer one day prior to the hearing.

[6] On May 23, 2011, the administrative law judge issued her Order Ruling on Evidentiary Matters and Setting the Date for the Parties to Submit Closing Arguments.

demonstrated good cause for failing to timely submit his evidence summary form. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47, 1-62 (2004)(en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Employer next challenges the admission of Claimant's Exhibit 3 into the record, arguing that the report at issue, authored by Dr. Houser, the physician who performed the miner's pulmonary evaluation for the Department of Labor (DOL), does not meet the requirements of rehabilitative evidence and was improperly obtained through an *ex parte* communication between the miner's lay representative[7] and Dr. Houser, a potential witness for DOL. Employer's Brief at 24-28. The administrative law judge, however, rationally found no impropriety in the *ex parte* communication, noting that the Director did not object thereto. Relying on *W.S.* [*Strong*] *v. Patsy Jane Coal Corp*., BRB No. 07-0625 BLA (Apr. 30, 2008)(unpub.),[8] where the Director supported the admission into the record of a report obtained by a miner from the physician who performed the DOL evaluation, characterizing it as a supplemental report and "clarification" of the initial report, the administrative law judge acted within her discretion in finding that "Dr. Houser's report in Claimant's Exhibit 3 is admissible as a supplemental report to the [DOL complete pulmonary] evaluation." Order at 3-4. Finding no abuse of discretion, we affirm the administrative law judge's evidentiary ruling. *See Clark*, 12 BLR at 1-153.

Employer next challenges, "on the grounds of foundation, hearsay, and facts not in evidence," the administrative law judge's admission into the record of Claimant's Exhibit 4, Dr. Rasmussen's report, because the miner failed to provide employer with any of the articles from the medical literature upon which Dr. Rasmussen relied to support his opinion. Employer's Brief at 28-29. The administrative law judge correctly noted that there is no requirement that copies of such articles be attached to medical reports, observing that all of the articles were published in medical journals and are easily

[7] Before obtaining counsel, the miner was assisted by a benefits counselor from the Southwestern Indiana Respiratory Disease Program. Director's Exhibit 11.

[8] In that case, the miner obtained a supplemental report from the physician who performed the Department of Labor pulmonary evaluation, who reviewed and commented on the reports of the employer's experts. *W.S.* [*Strong*] *v. Patsy Jane Coal Corp*., BRB No. 07-0625 BLA (Apr. 30, 2008)(unpub.). In affirming the administrative law judge's admission into evidence of the report, the Board adopted the position of the Director, Office of Workers' Compensation Programs, that the report should be treated as a supplemental report to the initial report, and not as claimant's evidence. *Id.*; *see* 20 C.F.R. §725.406(b). In the present case, even if Dr. Houser's supplemental report were treated as claimant's evidence, its admission would not exceed the evidentiary limitations at 20 C.F.R. §725.414.

obtainable by employer. Order at 4. As we discern no abuse of discretion, we affirm the administrative law judge's determination that Claimant's Exhibit 4 is admissible. *See Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-153.

We next address employer's contention that the administrative law judge erred in crediting the miner with at least sixteen years of qualifying coal mine employment that entitled him to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Specifically, employer asserts that the record supports only a finding of fourteen years and four months of coal mine employment, and argues that the administrative law judge's calculation is not consistent with the miner's testimony or the Social Security Administration (SSA) records. Employer contends that the administrative law judge erred in determining that the miner's employment spanned a total of twenty years, from 1969 to 1989, rather than nineteen years, because the miner testified that he stopped working in the mines in September 1988. Employer asserts that the administrative law judge also failed to correctly reduce the length of the miner's employment based on the SSA records and the miner's testimony regarding time he was off work for injuries or layoffs. Employer further contends that, even if the miner had over fifteen years of coal mine employment, the administrative law judge's finding, that his surface mine employment was substantially similar to his underground employment, is not rational or supported by substantial evidence, as "[the miner's] above-ground coal dust exposure working in an enclosed bulldozer was not comparable to underground mining." Employer's Brief at 5-7.

In calculating the length of the miner's coal mine employment, the administrative law judge noted that, according to his employment histories and SSA records, the miner worked in the mines over a span of twenty years, beginning work in 1969 and retiring in 1989. Decision and Order at 6. The administrative law judge also credited the miner's testimony that he was off work for six months between 1971 and 1972, Hearing Transcript at 42, and that he received: a year of sickness and accident benefits from May 1977 to May 1978, Hearing Transcript at 64; a year of sickness and accident benefits from October 1980 to October 1981, Hearing Transcript at 64; a layoff from October 31, 1982 to July 25, 1983, Hearing Transcript at 64; eleven months of sickness and accident benefits from December 14, 1984 to November 25, 1985, Hearing Transcript at 65; and that he left the mines in September 1988 due to a work injury, Hearing Transcript at 65. Decision and Order at 6. The administrative law judge further noted that, while the SSA records reflected that there were some years where the miner did not work an entire year, the reduced earnings generally coincided with the miner's testimony regarding the periods of time that he was off work. The administrative law judge found that the miner had "at least sixteen years of coal mine employment," Decision and Order at 6, and further determined that, while half of the miner's work occurred at a surface mine, he credibly testified that "in his early years on the bulldozer, it did not have an enclosed cab," and that the surface work "was in substantially similar conditions to those

underground, since [the miner] was engaged in working around operating machinery or running a bulldozer, generating dust." Decision and Order at 4.

Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Smith v. National Mines Corp*., 7 BLR 1-803, 1-805 (1985). Contrary to employer's contention, the administrative law judge's determination, that the miner's coal mine employment spanned a period of twenty years, is consistent with the evidence of record and the regulatory definition and calculation of a "year" at 20 C.F.R. §725.101(a)(32), which provides, in pertinent part, that:

> "Year" means a period of one calendar year (365 days. . .) or partial periods totaling one year, during which the miner worked in or around a coal mine for at least 125 "working days."
>
> In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.
>
> A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave.

20 C.F.R. §725.101(a)(32).

While employer is correct that the miner stopped working in the mines in September 1988 due to a workplace injury, the miner's SSA records, reflecting income in 1988 and 1989, and his pension records, reflecting "constructive S & A [leave] from September 26, 1988 to September 26, 1989," supports the administrative law judge's finding that he was still employed and on approved absence through September 1989. As the records supports the administrative law judge's determination that the miner started work in September 1969 and retired in September 1989, we affirm her finding that the miner "worked in the mines over a span of twenty years." Decision and Order at 6; Hearing Transcript at 41; Director's Exhibit 3. Further, in crediting the miner's testimony regarding the time periods he was laid off or on sickness and disability leave, and noting that the reduced earnings reflected in the miner's SSA records "generally coincide[ed] with his testimony about the times he was off work," the administrative law judge appropriately deducted four years and two months from the twenty-year total. *See* 20 C.F.R. §725.101(a)(32); Decision and Order at 6. We find no merit to employer's

contention that the administrative law judge should have deducted one additional year of time because the miner's SSA records reflected reduced earnings for several quarters in 1971, 1972, 1973, and 1976, as no evidence was presented to indicate that the miner was not still employed at those times. We note, however, that the administrative law judge's Decision and Order reflects a mathematical and/or clerical error in her finding of at least sixteen years of coal mine employment. Because the administrative law judge determined that the miner's employment spanned twenty years, and that this time must be reduced by four years and two months, the correct calculation is fifteen years and ten months of coal mine employment, as noted by employer.[9] *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993), *citing Johnson v. Director, OWCP*, 7 BLR 1-206 (1984); *McLaughlin v. Jones & Laughlin Steel Corp.*, 2 BLR 1-103 (1979). We further note that, because the miner did not have any working days from January 1, 1989 through September 26, 1989, and then ceased his employment, a further reduction of nine months must be made, because the miner could not have "worked in or around a coal mine for at least 125 working days" in 1989, as required under Section 725.101(a)(32). Any error, however, is harmless, as fifteen years and one month of coal mine employment is sufficient to invoke the amended Section 411(c)(4) presumption. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

We find no merit in employer's argument that the miner's surface mining work was not performed in conditions comparable to those in his underground mining work. Contrary to employer's contention, substantial evidence, in the form of the miner's uncontradicted testimony regarding his dust exposure, supports the administrative law judge's finding that the miner established that his surface coal mine employment took place in conditions that were substantially similar to those in an underground mine. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995). Consequently, we affirm the administrative law judge's finding that the miner had the requisite number of years of qualifying coal mine employment for the purpose of invoking the presumption at amended Section 411(c)(4). Because employer does not challenge the administrative law judge's finding of a totally disabling respiratory impairment, we affirm the administrative law judge's determination that the miner established invocation of the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer next challenges the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, arguing that the administrative law judge erred in her consideration of the opinions Drs. Repsher and

[9] Claimant agrees that the correct calculation is fifteen years and ten months. Claimant's Response Brief at 7 n.5.

Westerfield. In this regard, employer asserts that the administrative law judge miscalculated the miner's smoking history and thus improperly discounted the doctors' opinions on the ground that they relied on an exaggerated smoking history.[10] Employer also contends that the administrative law judge impermissibly substituted her opinion for those of the physicians by determining that their analysis of the pulmonary function data was inconsistent with the preamble, arguing that she "extrapolated a view from the Federal Register and the National Institute for Occupational Safety and Health (NIOSH) that does not exist in the quoted material." Employer further maintains that the administrative law judge "misconstrued the regulations and extrapolated them beyond their meaning" in discounting the opinions of Dr. Repsher and Westerfield for their views regarding centrilobular emphysema. Employer's Brief at 11-16. Employer's arguments lack merit.

In evaluating the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that the opinions of Drs. Houser and Rasmussen, that the miner's disabling obstructive impairment was attributable to cigarette smoking and coal dust exposure, would not support rebuttal, whereas the opinions of Drs. Repsher and Westerfield, that the miner did not have pneumoconiosis and that his disabling obstructive impairment was due solely to cigarette smoking, would support rebuttal. Director's Exhibit 10; Claimant's Exhibit 4; Employer's Exhibits 5, 6, 7, 8, 9. The administrative law judge found that the opinions of Drs. Repsher and

[10] We reject employer's argument that the administrative law judge was required "to analyze the treatment records as they pertain to smoking history according to the mandate of 20 C.F.R. §718.104(d)." Employer's Brief at 10. By its plain language, the regulation mandates that an administrative law judge must give "consideration to the relationship between the miner and any treating physician whose report is admitted into the record" in weighing the evidence as to "whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis." 20 C.F.R. §718.104(d). In the present case, the miner's treating physicians did not submit any reports, and the administrative law judge was not obligated to analyze their treatment notes regarding the miner's smoking history pursuant to 20 C.F.R. §718.104(d). Rather, the administrative law judge properly weighed the miner's testimony in conjunction with the smoking history contained in his medical records and physicians' reports, and concluded that the miner had a "20 to 25 pack-year smoking history between 1968 (age 18) and 1995 (age 50)," and then smoked only two or three cigarettes per day until somewhere between 1997 and 2002. *See* Decision and Order at 4-5. As the miner turned 18 in 1964, however, *see* Director's Exhibit 2, the correct calculation of his smoking history pursuant to the administrative law judge's analysis would be 24 to 29 pack-years.

Westerfield were entitled to little weight because they were not well-reasoned, as the physicians failed to adequately explain "why [the miner's] coal mine dust exposure did not at least contribute to his lung disease." Decision and Order at 36. The administrative law judge additionally determined that Drs. Repsher and Westerfield relied on exaggerated smoking histories and that their opinions were premised on assumptions that were contrary to the scientific views endorsed by the DOL in the preamble to the revised regulations. Decision and Order at 34-36. The administrative law judge, therefore, found that employer failed to affirmatively prove that the miner did not have legal pneumoconiosis or that his disabling pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 36.

In assessing Dr. Repsher's opinion,[11] the administrative law judge noted that the physician credited the miner with over fifty pack-years of smoking, approximately double the administrative law judge's finding of a twenty to twenty-four pack-year history, "based on one anomalous report among many in [the miner's] treatment records." Thus, the administrative law judge concluded that Dr. Repsher's reliance on this exaggerated smoking history undermined the reasoning of his opinion. Decision and Order at 34. The administrative law judge further determined that Dr. Repsher's opinion was inconsistent with the preamble to the amended regulations, based on the doctor's explanation that the pattern of impairment demonstrated by the FEV_1/FVC ratio was inconsistent with that induced by coal dust exposure, and based on the doctor's view that

[11] Dr. Repsher examined the miner on April 9, 2009; provided a report in response to Dr. Houser's supplemental opinion; and provided a deposition on August 27, 2009. Dr. Repsher determined that the miner did not have clinical or legal pneumoconiosis. He stated that the miner's pulmonary function study results showed a marked disproportionate decrease in the FEV_1 compared to the decrease in the FVC, characteristic of cigarette smoking-induced chronic obstructive pulmonary disease (COPD), and the opposite of what you would see in coal dust-induced COPD, *i.e.*, a proportionate decrease in the FEV_1 and the FVC. Employer's Exhibit 8 at 35. He further stated that when the miner's diffusing capacity was adjusted for alveolar volume, the miner was in the normal range, but his overall diffusing capacity was moderate to moderately severely low. He opined that this suggests that the miner had significant centrilobular emphysema, which is caused by smoking, not coal dust. Employer's Exhibit 9 at 36-37. He observed that the blood gas studies showed marked hypoxemia with significant CO_2 retention, which is characteristic of severe COPD due to smoking, but is generally not seen with coal workers' pneumoconiosis. He also diagnosed the miner with a number of other serious conditions that were not attributable to coal dust exposure. Employer's Exhibits 5, 7, 8.

coal dust cannot cause centrilobular emphysema.[12] Decision and Order at 34-35. With respect to Dr. Westerfield's opinion,[13] the administrative law judge determined that "he, too, found a 50 pack-year smoking history," and that the physician's alternative calculation of thirty-seven pack-years was based on the unrealistic assumption that the miner started smoking in 1958 at age 12, and did not account for periods when the miner had temporarily stopped smoking. Decision and Order at 35. The administrative law judge further noted that "[Dr. Westerfield], too, relied on the decreased FEV_1/FVC ratio, and the type of emphysema [the miner] has, as bases to distinguish between [chronic obstructive pulmonary disease (COPD)] caused by smoking from that caused by coal dust exposure." Decision and Order at 35. The administrative law judge noted that Dr. Westerfield, in determining that the miner's respiratory impairment developed recently and, thus, was not due to coal dust exposure, relied on the incorrect assumption that the miner did not develop COPD or respiratory injury until twenty years after he left the mines.[14] Decision and Order at 35-36.

[12] Additionally, Dr. Repsher stated that "coal mine dust causes very mild and generally clinically insignificant COPD as a result of industrial bronchitis," and "catastrophic COPD is very uncommon in nonsmoking coal miners." Employer's Exhibit 6 at 2. The administrative law judge concluded that Dr. Repsher's view "is inconsistent with the premise underlying the regulations that coal dust causes clinically significant COPD even in the absence of smoking." Decision and Order at 35.

[13] Dr. Westerfield provided a consulting opinion and opined that there is no evidence of either medical or legal pneumoconiosis. He noted that the miner was a heavy smoker, as reflected in some of the records showing up to fifty pack years of smoking. Employer's Exhibit 9 at 10. At his deposition, he agreed that the miner's smoking history could be thirty-seven pack years, which would not cause him to change his conclusions. Employer's Exhibit 9 at 13. He stated that although the miner had a severe respiratory impairment, it was not due to coal dust because the miner's symptoms of COPD developed a number of years after he had left coal mining but while he continued smoking; his x-ray indicated hyperlucency and expanded lungs that are types of abnormalities associated with emphysema from smoking; and the miner had a markedly decreased FEV_1 in relationship to his FVC, which in 2008 was still normal. Employer's Exhibits 7, 9.

[14] Dr. Westerfield stated that it is not reasoned thinking that an individual would terminate his exposure 20 years previously without any evidence of an injury and then attribute a recently developed respiratory impairment to coal dust exposure. Employer's Exhibits 7 at 8; 9 at 15.

Drs. Repsher and Westerfield each eliminated coal dust exposure as a source of the miner's disabling obstructive pulmonary impairment, in part, because they found a disproportionate decrease in the miner's FEV_1 compared to his FVC, which each explained is characteristic of a cigarette smoke-induced lung disease, but not one caused by coal mine dust. The administrative law judge, however, noted that scientific evidence endorsed by DOL recognizes that coal dust can cause clinically significant obstructive disease in the absence of clinical pneumoconiosis, as shown by a reduced FEV_1/FVC ratio. Decision and Order at 34-35, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Contrary to employer's assertion, the administrative law judge acted within her discretion in finding that the opinions of Drs. Repsher and Westerfield were inconsistent with the preamble to the amended regulations, based on the doctors' explanation of the role that the FEV_1/FVC ratio played in determining the cause of impairment. Thus, the administrative law judge permissibly found that the opinions were not well-reasoned and were entitled to little weight. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Further, as DOL recognized in the preamble that "centrilobular emphysema (the predominant type observed) was significantly more common among the coal workers," the administrative law judge rationally discounted Dr. Repsher's opinion, that cigarette smoking causes centrilobular emphysema, but coal mine dust does not. Decision and Order at 35; Employer's Exhibit 8 at 37; *see* 65 Fed. Reg. 79,940 (Dec. 20, 2000). Lastly, because the miner had a reduced PO_2, was on breathing medication, and was diagnosed with COPD nine years after he left the mines, Employer's Exhibit 11 at 241, the administrative law judge permissibly determined that Dr. Westerfield's opinion, based on the erroneous assumption that the miner did not develop COPD or pulmonary injury until twenty years after he left the mines, was not credible. We conclude that, contrary to employer's contention, the administrative law judge provided valid reasons for discounting the opinions of Drs. Repsher and Westerfield, that the miner did not have pneumoconiosis and that his disabling impairment was unrelated to his years of coal dust exposure.[15] We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4), and affirm the award of benefits. *See Morrison v. Tenn. Consol. Coal Co.*, 644

[15] Because the administrative law judge provided multiple valid reasons for discounting the opinions of Drs. Repsher and Westerfield, any miscalculation of the miner's smoking history by the administrative law judge constitutes harmless error that would not change the result herein. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, as the opinions of Drs. Houser and Rasmussen do not support rebuttal of the amended Section 411(c)(4) presumption, we need not address employer's argument that the administrative law judge erred in crediting these opinions. *Id*.

F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980)

Lastly, employer argues that the administrative law judge's award of benefits commencing in July 2008, based on the results of a qualifying pulmonary function study obtained by Dr. Watson on July 17, 2008, is not supported by substantial evidence, and that the miner's benefits should be payable from the date of filing of his claim in October 2008. Employer's Brief at 29-30. As Dr. Watson did not affirmatively opine that the miner was totally disabled due to pneumoconiosis, we agree with employer that the administrative law judge's finding of July 2008 as the appropriate date for the commencement of benefits cannot be affirmed.[16] *See Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In the present case, the miner filed his formal application for benefits on October 9, 2008, but he previously filed a request concerning benefits with DOL in September 2008, which DOL acknowledged, by letter dated September 11, 2008, as follows:

> Your letter is being considered an intent to file a claim and it will protect your entitlement to benefits back to the date it was received, provided you go to a Social Security office to complete the required U.S. Department of Labor claim forms within six (6) months of the date of this letter.

Director's Exhibit 2. As the miner completed his claim form in October 2008, within the six-month period referenced in the DOL letter, he protected his entitlement to benefits back to the date his letter was received, September 2008. Consequently, because the evidence of record did not indicate the date upon which the miner because totally disabled due to pneumoconiosis, and the administrative law judge did not credit any evidence showing that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of the miner's claim, we modify the administrative law judge's decision to reflect that the miner is entitled to benefits as of September 2008, in accordance with the district director's acknowledgment letter.

[16] Dr. Watson diagnosed possible pneumoconiosis and noted that, when asked, the miner denied that he had ever been assessed for pneumoconiosis or had an x-ray read by a B reader. Employer's Exhibit 11 at 156.

Accordingly, the administrative law judge's onset date determination is modified, and her Decision and Order Awarding Benefits is otherwise affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues' decision in all other respects, I respectfully dissent from their conclusion that the appropriate date for the commencement of benefits is September 2008. The regulations provide that where the evidence does not establish the month of onset, benefits shall be payable beginning with the month during which the claim was filed. As the miner's claim was filed in October 2008, I would hold that benefits are payable from October 2008. *See* 20 C.F.R. §725.503(b).

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ROY P. SMITH
Administrative Appeals Judge