BRB No. 13-0522 BLA

JAMES DAVID BOUNDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/29/2014
	)	
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 on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (2010-BLA-5334) of Administrative Law Judge Thomas M. Burke (the administrative law judge) awarding benefits on a claim filed on May 14, 2009, pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In

the original Decision and Order dated June 28, 2011, the administrative law judge credited claimant with 32 years in underground coal mine employment, 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 pulmonary function study evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), he found that the arterial blood gas study and medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge therefore found that claimant was entitled to invocation of 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). The administrative law judge also found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding. *Bounds v. Marfork Coal Co.*, BRB No. 12-0043 BLA, slip op. at 3 n.3 (Oct. 25, 2012)(unpub.). The Board declined to revisit the issue of whether the rebuttal provisions at amended Section 411(c)(4) apply only to the Secretary of Labor, noting that it has held that these provisions apply to claims brought against responsible operators. *Bounds*, BRB No. 12-0043 BLA, slip op. at 3. The Board also rejected employer's contentions that retroactive application of amended Section 411(c)(4) constituted a due process violation and an unconstitutional taking of private property. *Id*. The Board additionally determined that the absence of implementing regulations did not bar application of amended Section 411(c)(4) because the mandatory language in it was self-executing. *Id*. Hence, the Board held that the administrative law judge properly found that the provisions of amended Section 411(c)(4) were applicable to this claim. *Id*. Further, the Board concluded that the administrative law judge acted within his discretion in denying employer's request for a post-hearing second pulmonary evaluation of claimant. *Bounds*, BRB No. 12-0043 BLA, slip op. at 4. However, the Board vacated the administrative law judge's finding that the arterial blood gas study and medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). *Bounds*, BRB No. 12-0043 BLA, slip op. at 7. The Board therefore vacated the administrative law judge's findings that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) and that employer did not establish rebuttal of the presumption, and remanded the case for further consideration. *Id*.

On remand, the administrative law judge found that the pulmonary function study evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). However, the administrative law judge found that the arterial blood gas study and medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge also determined that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at

amended Section 411(c)(4). Further, the administrative law judge found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Specifically, employer challenges the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of pneumoconiosis and total disability due to pneumoconiosis. Further, employer contends that the administrative law judge violated its due process rights and the Administrative Procedure Act (APA)[1] by denying its motion to obtain a second affirmative medical examination of claimant. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited letter brief, urging the Board to reject employer's assertion that the administrative law judge improperly restricted its ability to rebut the presumption at amended Section 411(c)(4). The Director also urges the Board to reject employer's assertion that the case should be remanded for further evidentiary development concerning rebuttal of the presumption because it was not notified that the Secretary's rebuttal standard was going to be applied to it.

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.[2] 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.

[1] The Administrative Procedure Act, 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).

[2] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibit 5. 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).

In 2010, 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 will address employer's contention that the administrative law judge violated its due process rights and the APA by denying its motion to obtain a second pulmonary evaluation of claimant. During an October 21, 2010 hearing, employer requested a post-hearing second pulmonary evaluation of claimant, in response to Dr. Rasmussen's September 15, 2010 report, which claimant submitted just prior to the hearing. Hearing Tr. at 7, 8. The administrative law judge determined that employer had had sufficient time to present its case in chief, as it had previously submitted Dr. Crisalli's January 29, 2010 examination report and Dr. Castle's September 8, 2010 consultation report. Hearing Tr. at 9, 10, 37, 38. Hence, the administrative law judge denied employer's request for a second pulmonary evaluation of claimant. Hearing Tr. at 9, 35. Nevertheless, the administrative law judge held the record open and specifically allowed employer additional time to depose Drs. Crisalli and Castle in response to Dr. Rasmussen's September 15, 2010 report. Hearing Tr. at 10, 38, 39. The Board held that the administrative law judge did not abuse his discretion in finding that a second pulmonary evaluation of claimant was inappropriate under the facts of this case. *Bounds*, BRB No. 12-0043 BLA, slip op. at 4-5. As employer has not shown that the Board's holding was clearly erroneous or results in a manifest injustice to it, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Next, we address employer's assertion that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator.[3]

[3] The Board previously declined to address the issue of whether the rebuttal provisions of amended Section 411(c)(4) apply to claims brought against responsible operators. *Bounds v. Marfork Coal Co.*, BRB No. 12-0043 BLA, slip op. at 3 (Oct. 25, 2012)(unpub.). Citing *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), the Board noted that it has held that the pertinent provisions apply to claims brought against responsible operators. *Id*. Subsequent to the Board's decision in this case, however, the Board's decision in *Owens* was considered by the Fourth Circuit. *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011*), aff'd sub nom. Mingo Logan Coal Co. v. Owens*,

Employer's assertion is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011*), aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013)(Niemeyer, J., concurring). Moreover, the Department of Labor recently promulgated regulations implementing amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), that make clear that the rebuttal provisions apply to responsible operators. *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(codified at 20 C.F.R. §718.305(d)). Thus, we reject employer's assertion that the rebuttal provisions do not apply to this claim against it.

Turning to the merits of entitlement, we address employer's contention that the administrative law judge erred in finding that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Specifically, employer contends that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). Employer asserts that the arterial blood gas study evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). Employer maintains that the qualifying results produced by the studies administered by Dr. Rasmussen "do not reflect a total respiratory impairment but rather a hypertensive cardiovascular response to exercise." Employer's Brief at 37. We disagree.

A miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by blood gas studies showing values equal to, or less than, those set forth in Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii).

The record contains three arterial blood gas studies dated July 20, 2009, January 18, 2010, and September 15, 2010. While the January 18, 2010 study administered by Dr. Crisalli produced non-qualifying values at rest, Employer's Exhibit 1, the July 20, 2009 and September 15, 2010 studies administered by Dr. Rasmussen produced qualifying values at rest and during exercise, Director's Exhibit 10; Claimant's Exhibit 3. Based on his consideration of the arterial blood gas study evidence, the administrative law judge reasonably found that "[t]hese studies show a disabling impairment of gas

---

724 F.3d 550 (4th Cir. 2013)(Niemeyer, J., concurring). In addition, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114-15 (Sept. 25, 2013)(codified at 20 C.F.R. §718.305). Thus, we address employer's assertion regarding this issue.

exchange under the criteria of Appendix C of Part 718."[4] Decision and Order on Remand at 2; *see* 20 C.F.R. §718.204(b)(2)(ii). Furthermore, employer's experts did not dispute that the post-exercise blood gas studies revealed a disabling condition; they disputed that the studies revealed a disabling pulmonary condition because they believed the studies revealed cardiac disease. Thus, we reject employer's assertion that the arterial blood gas study evidence is insufficient to establish a totally disabling respiratory impairment.

Employer also asserts that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Rasmussen, Crisalli, and Castle. Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his regular coal mine employment. Claimant's Exhibit 2. Conversely, Dr. Crisalli opined that claimant has the respiratory capacity to perform his last coal mine work and that he has no pulmonary functional impairment. Employer's Exhibit 1. Similarly, Dr. Castle opined that claimant does not have a respiratory impairment that would preclude him from performing his last coal mining work. Employer's Exhibit 5. The administrative law judge noted that "[a]ll three physicians agree that the spirometry results and diffusion capacity results are normal or close to normal, and that the only objective testing revealing a problem were the arterial blood gas test results." Decision and Order on Remand at 5. However, the administrative law judge noted that Drs. Crisalli and Castle disagreed with Dr. Rasmussen's contention that "this pattern, exercise-induced hypoxia absent ventilatory impairment, is indicative of a coal dust caused condition and supports his finding that [c]laimant suffers from a pulmonary condition caused by coal dust exposure." *Id*. at 5-6. The administrative law judge further noted that Drs. Crisalli and Castle offered the following three reasons for finding that claimant suffers from cardiac disease not from a pulmonary impairment caused by coal dust exposure: 1) the variability observed by Drs. Rasmussen and Crisalli in claimant's breath sounds, diffusing capacity, and resting pO2 was inconsistent with a diagnosis of coal dust-induced lung disease; 2) an obstruction must be present for legal pneumoconiosis to exist; and 3) the absence of positive x-ray evidence. *Id*. at 6-7. In addition, the administrative law judge determined that "Dr. Rasmussen's qualifications to offer an opinion on the causative effect of coal dust exposure are credited over those of Drs. Crisalli and Castle." *Id*. at 7. Hence, the administrative law judge found that Dr. Rasmussen's well-reasoned opinion established total respiratory disability.

[4] In considering the arterial blood gas study evidence, the administrative law judge stated: "Both post-exercise results qualify. Thus, even if the at rest results are considered to be equivocal, the post-exercise qualifying values are uncontradicted. They are considered as indicative of a total disability from [c]laimant's last coal mine job as, being at exercise, they reflect his condition while working." Decision and Order on Remand at 2.

Employer asserts that the administrative law judge erred by crediting Dr. Rasmussen's opinion over the opinions of Drs. Crisalli and Castle, without a sufficient basis. Contrary to employer's assertion, the administrative law judge permissibly found that Dr. Rasmussen's opinion was better reasoned than the contrary opinions of Drs. Crisalli and Castle, as Dr. Rasmussen refuted their views that the variability observed in the resting arterial blood gas study was inconsistent with an impairment caused by coal dust exposure[5] and that an obstruction must be present for legal pneumoconiosis to exist,[6] and as he cited scientific literature to support his positions.[7] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In addition, the administrative law judge permissibly found that Dr. Rasmussen's qualifications were superior to those of Drs. Crisalli and Castle.[8] *See Hicks*,

[5] The administrative law judge noted: "Dr. Rasmussen, in his December 13, 2010 report, does not consider this [variability] as a reason to reject coal dust exposure as [a] causative factor because '[i]t is important to realize that resting arterial blood gases in normal individuals and individuals with impairments varies over short periods of time. This makes the resting blood gas a very poor determinate of respiratory function.'" Decision and Order on Remand at 6.

[6] The administrative law judge noted that "[Dr. Rasmussen] reports that he consistently has observed the pattern of exercise-induced hypoxia absent ventilatory impairment in impaired coal miners." Decision and Order on Remand at 6.

[7] The administrative law judge noted that "Dr. Rasmussen references an article on variations of pulmonary gas exchange from a 1967 edition of *Journal of Applied Physiology* for his opinion on variability of resting gas exchange." Decision and Order on Remand at 6. With regard to Dr. Rasmussen's position that claimant's hypoxia was caused by coal dust exposure, the administrative law judge noted that Dr. Rasmussen "references two studies that he authored in 1971 and 1972 to support his contention." *Id*. (footnote omitted). The administrative law judge stated that "[Dr. Rasmussen] characterizes the studies as demonstrating that coal workers' pneumoconiosis often results in exercise induced hypoxia absent ventilatory impairment." *Id*. Additionally, the administrative law judge noted that "[Dr. Rasmussen] references a book by Karlman Wasserman, et al., *Lung Function and Exercise Gas Exchange in Chronic Heart Failure*, Circulation, 1997, Vol. 96, pp. 2221-2227," in support of his position that cardiac disease, including left ventricle failure, does not lead to exercise hypoxia. *Id*. at 7.

[8] Employer argues that the administrative law judge erred in selectively considering the respective qualifications of the physicians. Dr. Rasmussen is Board-certified in internal medicine. Director's Exhibit 10. Drs. Crisalli and Castle are Board-

138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 275-76; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Thus, we reject employer's assertion that the administrative law judge erred by crediting Dr. Rasmussen's opinion over the opinions of Drs. Crisalli and Castle.

Employer also argues that the administrative law judge relieved claimant of the burden of establishing a totally disabling respiratory impairment by focusing on the cause of claimant's impairment. Employer's Brief at 18. Contrary to employer's assertion, the administrative law judge properly addressed the issue of whether the medical opinion evidence established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(iv). The issue of the existence of a pulmonary impairment was inextricably tied up with the issue of the cause of claimant's hypoxia because all three physicians premised their diagnoses regarding a pulmonary impairment on their determinations of the cause of claimant's hypoxia. Dr. Rasmussen found that claimant has a disabling pulmonary impairment because his hypoxia was caused by coal dust exposure. By contrast, Drs. Crisalli and Castle found that claimant does not have a pulmonary impairment because his hypoxia was caused by coronary artery disease, and not coal dust exposure. As discussed, *supra*, the administrative law judge permissibly credited Dr. Rasmussen's opinion over the contrary opinions of Drs. Crisalli and Castle because it is better reasoned. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Hicks*, 138 F.3d at

---

certified in internal medicine and pulmonary disease. Employer's Exhibits 1, 7. Based on their qualifications in pulmonary disease, the administrative law judge found that Drs. Crisalli and Castle are highly qualified pulmonary specialists. The administrative law judge also noted that Dr. Crisalli is a clinical associate professor of the Department of Medicine at West Virginia University School of Medicine, and that he is affiliated with the Charleston Area Medical Center. Nevertheless, the administrative law judge acted within his discretion in crediting Dr. Rasmussen's qualifications over those of Drs. Crisalli and Castle regarding the causative effect of coal dust exposure because Dr. Rasmussen has the most significant experience in the study and treatment of coal dust-induced lung diseases. Decision and Order on Remand at 7, 8; *see 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). The administrative law judge specifically noted: "[Dr. Rasmussen] has been immersed in this area of medicine since at least 1969 when he received the American Public Health Association's Presidential Award for 'exceptional service in the fight against black lung.' He has been appointed to serve on several NIOSH and United Mine Workers of America committees addressing issues related to coal workers' pneumoconiosis. Dr. Rasmussen has also testified before both houses of the United States Congress as well as the West Virginia State Legislature on issues related to occupational pneumoconiosis." Decision and Order on Remand at 8. Thus, we reject employer's assertion that the administrative law judge erred in considering the qualifications of the physicians.

528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In addition, the administrative law judge permissibly determined that Dr. Rasmussen's qualifications were superior to those of Drs. Crisalli and Castle. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 275-76; *Dillon*, 11 BLR at 1-114. Thus, we reject employer's assertion that the administrative law judge improperly combined his analysis of the issues of total disability and disability causation.

Employer further asserts that the administrative law judge erred in failing to weigh together all of the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i)-(iv). Contrary to employer's assertion, however, the administrative law judge weighed together all of the evidence, like and unlike, in finding that it established total respiratory disability. *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). As discussed, *supra*, in weighing the conflicting medical opinion evidence, the administrative law judge noted that "[a]ll three physicians [Drs. Rasmussen, Crisalli, and Castle] agree that the spirometry results and diffusion capacity results are normal or close to normal, and that the only objective testing revealing a problem were the arterial blood gas test results." Decision and Order on Remand at 5. Based on his weighing of the evidence, the administrative law judge found that "Dr. Rasmussen's well-reasoned report and [c]laimant's qualifying arterial blood gas results establish that [c]laimant has a total pulmonary disability." *Id*. at 8. Thus, we reject employer's assertion that the administrative law judge erred on this basis.

We, therefore, affirm the administrative law judge's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b), as supported by substantial evidence. Furthermore, because claimant established 15 or more years of qualifying coal mine employment and total respiratory disability, we affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), as supported by substantial evidence.

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), 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) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(codified at 20 C.F.R. §718.305(d)). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the

absence of clinical pneumoconiosis. The administrative law judge considered the x-ray and medical opinion evidence. At Section 718.202(a)(1), the record consists of five interpretations of an x-ray dated July 20, 2009.[9] Dr. Rasmussen, a B reader, and Drs. Alexander and Smith, dually-qualified B readers and Board-certified radiologists, read the July 20, 2009 x-ray as positive for pneumoconiosis. Director's Exhibit10; Claimant's Exhibits 1, 5. Drs. Meyer and Wiot, dually-qualified B readers and Board-certified radiologists, read this x-ray as negative. Employer's Exhibits 2, 3. The administrative law judge found that, "[b]ecause Drs. Alexander and Smith are equally as qualified as Drs. Meyer and Wiot, the weight of the [x-ray] evidence fails to preponderantly disprove the existence of clinical pneumoconiosis." Decision and Order on Remand at 9-10.

Employer asserts that the administrative law judge should have determined that Dr. Wiot's qualifications are superior to those of the other radiologists based on his experience and credentials. In weighing each individual x-ray reading, the administrative law judge followed the admonition of 20 C.F.R. §718.202(a)(1), to consider the radiological credentials of each physician interpreting the x-ray. The regulations specifically discuss B reader certification and Board-certification. 20 C.F.R. §718.202(a)(1)(ii)(C) and (E). Although an administrative law judge may accord greater weight to a physician's x-ray readings based on his or her expertise, the administrative law judge is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). In this case, as discussed, *supra*, the administrative law judge acknowledged the superior credentials of the dually-qualified physicians. Decision and Order on Remand at 9. Thus, we reject employer's assertion that the administrative law judge should have determined that Dr. Wiot's qualifications are superior to those of the other radiologists.

Regarding Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Rasmussen, Crisalli, and Castle. Dr. Rasmussen diagnosed coal workers' pneumoconiosis. Director's Exhibit 10; Claimant's Exhibit 2. By contrast, Drs. Crisalli and Castle opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibits 1, 5, 6, 7. The administrative law judge noted that Dr. Rasmussen's opinion was based on his positive reading of the July 20, 2009 x-ray, and that the contrary opinions of Drs. Crisalli and Castle were based on Dr. Wiot's negative reading of that x-ray. In considering the opinions of Drs. Crisalli and Castle, the administrative law judge determined that, "[s]ince the x-rays on which they relied failed to disprove the

[9] Dr. Gaziano, a B reader, read the July 20, 2009 x-ray for quality only. Director's Exhibit 10.

existence of clinical pneumoconiosis, the opinions relying thereon also fail to rebut the presumption that [c]laimant has pneumoconiosis." Decision and Order on Remand at 10.

Employer asserts that, "[a]s the [administrative law judge] should have determined [that] the weight of the radiological evidence was negative for the existence of clinical pneumoconiosis, he should have deemed Dr. Rasmussen's opinion, relying upon a positive x-ray interpretation, to be unsupported by the objective evidence." Employer's Brief at 14. Contrary to employer's assertion, however, the administrative law judge found that the weight of the x-ray evidence did not disprove the existence of clinical pneumoconiosis. Decision and Order on Remand at 9-10. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we reject employer's assertion that the administrative law judge should have discounted Dr. Rasmussen's opinion that claimant has coal workers' pneumoconiosis.

Employer also contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of legal pneumoconiosis.[10] Specifically, employer asserts that "the record fails to establish the existence of a pulmonary impairment sufficient to satisfy the definition of legal pneumoconiosis." Employer's Brief at 35. In addressing the issue of legal pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Crisalli and Castle. The administrative law judge determined that "[e]mployer did not present any evidence to rebut the presumption that [c]laimant's total pulmonary impairment is caused by coal dust exposure as its evidence, the reports by Dr. Crisalli and [Dr.] Castle, maintained that [c]laimant did not have a pulmonary impairment but rather had the pulmonary capacity to perform his last coal mine job." Decision and Order on Remand at 10. The administrative law judge therefore found that employer did not disprove the existence of legal pneumoconiosis. An 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); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). In this case, employer does not specifically challenge the administrative law judge's determination that the opinions of Drs. Crisalli and Castle failed to disprove the existence of legal pneumoconiosis. Thus, we reject

[10] Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(codified at 20 C.F.R. §718.305(d)). Nevertheless, we will address employer's contention that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis because this finding affects his disability causation finding.

employer's assertion that the administrative law judge erred in finding that it failed to rebut the presumption of legal pneumoconiosis.

We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of clinical and legal pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).

Finally, employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. In addressing the issue of disability causation, the administrative law judge noted that claimant had established the existence of legal pneumoconiosis, as claimant's disabling pulmonary impairment was caused by coal dust exposure. The administrative law judge therefore found that "a separate determination of the etiology of [c]laimant's disease is unnecessary as the legal pneumoconiosis inquiry necessarily subsumes that inquiry." Decision and Order on Remand at 10. The administrative law judge further found that employer failed to disprove that claimant's total disability was due to pneumoconiosis.

Employer argues that "[the administrative law judge] failed to perform a separate analysis regarding whether the [c]laimant's purported 'legal pneumoconiosis' substantially contributed to the [c]laimant's alleged total disability because [the administrative law judge's discussion of the matter was limited to the statement:] 'the legal pneumoconiosis inquiry necessarily subsumes that inquiry.'" Employer's Brief at 35-36; Decision and Order on Remand at 10. Contrary to employer's assertion, however, an employer bears the burden to disprove that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment 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)(codified at 20 C.F.R. §718.305(d)); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Employer does not specifically challenge the administrative law judge's determination that it failed to rebut the presumption of total disability due to pneumoconiosis. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

_____

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

_____

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision insofar as it declines to disturb the Board's prior determination that the administrative law judge did not abuse his discretion in finding that a second pulmonary evaluation of claimant was inappropriate under the facts of this case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). I also agree with the majority's determination to reject employer's assertion that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator, in light of the Board's decision in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011*), aff'd sub nom. Mingo Logan Coal Co. v. Owens*, 724 F.3d 550 (4th Cir. 2013)(Niemeyer, J., concurring), and the regulations promulgated by the Department of Labor that implement amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114-15 (Sept. 25, 2013)(codified at 20 C.F.R. §718.305). Further, I agree with the majority's determination to reject employer's assertion that the qualifying results produced by the July 20, 2009 and September 15, 2010 arterial blood gas studies do not reflect a total respiratory impairment, and the majority's determination to affirm the administrative law judge's finding that the arterial blood gas study evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). However, I respectfully dissent from the majority's determination to affirm the administrative law judge's finding that the medical opinion

evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). I would hold that employer's contention that the administrative law judge erred in considering whether coal mine dust caused claimant's impairment at 20 C.F.R. §718.204(b)(iv), in discrediting the opinions of Drs. Crisalli and Castle, has merit.

At Section 718.204(b)(2)(iv), the administrative law judge considered Dr. Rasmussen's opinion that claimant does not retain the pulmonary capacity to perform his regular coal mine employment, Claimant's Exhibit 2; Dr. Crisalli's opinion that claimant has the respiratory capacity to perform his last coal mine work and that he has no pulmonary functional impairment, Employer's Exhibit 1; and Dr. Castle's opinion that claimant does not have a respiratory impairment that would preclude him from performing his last coal mining work, Employer's Exhibit 5. The administrative law judge noted that Drs. Rasmussen, Crisalli, and Castle agreed that the spirometry and diffusion capacity tests yielded normal or close to normal results. The administrative law judge also noted that the doctors agreed that the arterial blood gas tests were the only objective testing revealing a problem. However, the administrative law judge noted that Drs. Crisalli and Castle disagreed with Dr. Rasmussen's contention that "this pattern, exercise-induced hypoxia absent ventilatory impairment, is indicative of a coal dust caused condition and supports his finding that [c]laimant suffers from a pulmonary condition *caused by coal dust exposure*." Decision and Order on Remand at 5-6 (emphasis added). The administrative law judge also noted that "[Drs. Crisalli and Castle] offer three reasons for finding [that] [c]laimant's condition was not *caused by coal dust exposure*. *Id*. at 6 (emphasis added). First, the administrative law judge found that the variability observed by Drs. Rasmussen and Crisalli in claimant's breath sounds, diffusing capacity, and resting pO2 was inconsistent with a diagnosis of coal dust-induced lung disease. Second, the administrative law judge found that an obstruction must be present for legal pneumoconiosis to exist. Third, the administrative law judge found the absence of positive x-ray evidence. In addition, the administrative law judge determined that "Dr. Rasmussen's qualifications to offer an opinion on *the causative effect of coal dust exposure* are credited over those of Drs. Crisalli and Castle." *Id*. at 7 (emphasis added). The administrative law judge therefore found that Dr. Rasmussen's well-reasoned opinion established total respiratory disability.

Contrary to the administrative law judge's finding, however, the sole inquiry at Section 718.204(b)(2)(iv) is whether the evidence establishes a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv). Thus, I would hold that the administrative law judge erred in combining his discussion of the issue of total respiratory disability with the issue of total disability due to pneumoconiosis. These are separate elements of entitlement. *Compare* 20 C.F.R. §718.204(b) *with* 20 C.F.R. §718.204(c). Further, I would hold that the administrative law judge did not adequately explain why he found that Dr. Rasmussen's opinion was better reasoned than the contrary opinions of Drs. Crisalli and Castle. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-

162 (1989). Consequently, I would vacate the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.

_____

ROY P. SMITH
Administrative Appeals Judge