U.S. Department of Labor

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

BRB Nos. 15-0333 BLA
and 15-0334 BLA

PEGGY J. DUDLESON (o/b/o and Widow of BUSTER DUDLESON) Claimant-Respondent v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/13/2016 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in a Subsequent Claim and the Decision and Order Awarding Continuing Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Eugene E. Siler, III, Williamsburg, Kentucky, for claimant.

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

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits in a Subsequent Claim (2010-BLA-5284) and the Decision and Order Awarding Continuing Benefits (2015-BLA-5095) of Administrative Law Judge Joseph E. Kane (the administrative law judge) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The Board has consolidated the appeals for purposes of decision only. This case involves a miner's subsequent claim,[1] filed on January 7, 2009, and a survivor's claim,[2] filed on August 26, 2014.

Adjudicating these claims pursuant to the regulations at 20 C.F.R. Parts 718 and 725, the administrative law judge determined that the miner's claim was timely filed and that employer is the properly designated responsible operator. The administrative law judge accepted the parties' stipulation to twenty-five years of coal mine employment, finding that at least fifteen of those years were spent either underground or on the surface in substantially similar dust conditions. The administrative law judge found that the new evidence submitted in support of the miner's subsequent claim was sufficient to establish

[1] The current claim is the miner's fifth. The miner's initial claim, filed on April 2, 1976, was finally denied on June 20, 1985 by Administrative Law Judge Edward J. Murty, Jr., because the miner failed to establish any element of entitlement. Director's Exhibit 1. The miner's second claim, filed on January 3, 1992 was denied by the district director on June 16, 1992, because the miner failed to establish any element of entitlement. Director's Exhibit 2. The record reflects that claimant's third claim, filed on September 12, 2002, was finally denied by the district director on September 17, 2003, but the district director subsequently could not locate the claim file. Decision and Order at 2 n.7. The miner's fourth claim, filed on September 18, 2007, was withdrawn by the miner and, therefore, is considered not to have been filed. 20 C.F.R. §725.306(b); Decision and Order at 2.

[2] Claimant is the widow of the miner, who died on June 8, 2014. Director's Exhibit 8 (survivor's claim). In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate.

total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[3] Considering the entire record, the administrative law judge determined that the new evidence outweighed the earlier evidence, and found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. 921(c)(4).[4] The administrative law judge further found that employer failed to rebut the presumption, and awarded benefits in the miner's claim.

In a separate Decision and Order in the survivor's claim, the administrative law judge found that claimant was automatically entitled to benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), under which the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal, with respect to the miner's claim, employer asserts that the administrative law judge erred in his consideration of the pulmonary function study and medical opinion evidence in finding total disability established at 20 C.F.R. §718.204(b),

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the record associated with the miner's 2002 claim could not be located and, therefore, the bases for the denial could not be determined, the administrative law judge reasonably considered whether claimant established a change in an applicable condition of entitlement relative to the denial of the miner's 1992 claim, as it was "the most recent closed claim located within the record." *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-236 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order at 2-3, 18.

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment, are established. 30 U.S.C. §921(c)(4) (2012); see 20 C.F.R. §718.305.

and thus erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer did not rebut the presumption. In the survivor's claim, employer argues that the administrative law judge erred in awarding benefits under Section 932(*l*) before the award of benefits in the miner's claim became final. Claimant has filed responses in both claims, urging the Board to affirm the awards. The Director, Office of Workers' Compensation Programs, has filed a response in the survivor's claim, urging the Board to affirm the award of benefits. Employer has filed reply briefs in the miner's claim and the survivor's claim in support of its position.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that claimant established that the miner was totally disabled, pursuant to 20 C.F.R. §718.204(b)(2), and thus erred in 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). Employer asserts that the administrative law judge erred in finding that the pulmonary function studies and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[7] Employer's Brief at 10-15.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings in the miner's claim that the claim was timely filed; that the miner had at least fifteen years of qualifying coal mine employment; and that employer is the responsible operator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 15; Director's Exhibit 2-171.

[7] The administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 19-20; Director's Exhibit 14; Claimant's Exhibit 1. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the four newly-submitted pulmonary function studies of record, conducted on June 8, 1976, February 28, 2009, March 24, 2009, and July 20, 2011. Decision and Order at 8-9, 19-20. Finding that the studies reflected conflicting heights for the miner, the administrative law judge averaged the heights recorded on all four studies to determine the miner's height. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 8.

The administrative law judge initially determined, correctly, that the pulmonary function study conducted in June 1976 was developed in connection with a prior claim and, therefore, is not relevant to whether claimant established a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c)(4); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997); Decision and Order at 19 n.56. The administrative law judge further noted that Dr. Dahhan invalidated his February 2009 study.[8] Therefore, the administrative law judge accorded the June 1976 and February 2009 studies no weight. Decision and Order at 8, 19; Director's Exhibits 1, 17. In contrast, the administrative law judge determined that both the March 2009 pulmonary function study conducted by Dr. Ammisetty and the July 2011 study conducted by Dr. Vaezy were valid and produced qualifying values.[9] According the greatest weight to the July 2011 study, as more recent by two years, and supported by the March 2009 study, the administrative law judge found that "the [pulmonary function studies] weigh in favor of a finding that the [m]iner was totally disabled," pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 19-20.

Employer argues that the administrative law judge erred in averaging the heights recorded on all four pulmonary function studies to conclude that the miner's height was

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law judge found that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

[8] Dr. Dahhan invalidated his study due to the miner's poor effort, cooperation, and comprehension. Director's Exhibit 17; Decision and Order at 19.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

64.5 inches. Employer's Brief at 10-11. Employer argues that by wrongly including the miner's height from the 1976 study, which was developed with a prior claim, and misstating the miner's height from Dr. Dahhan's February 2009 study, the administrative law judge "identified a conflict [relating to the miner's height] where none existed." Employer's Brief at 10. Employer does not assert, however, that the administrative law judge's use of an incorrect average height of 64.5 inches adversely affected his weighing of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Rather, employer asserts that the administrative law judge's error led him to improperly discredit Dr. Rosenberg's medical opinion, pursuant to 20 C.F.R. §718.204(b)(2)(iv), on the grounds that the physician relied on a height of 64 inches in opining that the miner's objective test results did not reflect the presence of a disabling pulmonary impairment. Employer's Brief at 11. Further, Dr. Vaezy's July 2011 pulmonary function study, upon which the administrative law judge principally relied, reflects qualifying values at both the height of 64 inches recorded in the study and the height of 64.5 inches used by the administrative law judge. Claimant's Exhibit 1. Thus, any error the administrative law judge committed in averaging the recorded heights is harmless as it pertains to his evaluation of the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Employer also argues that, in crediting the qualifying results of Dr. Ammisetty's March 2009 study, the administrative law judge erred in "overlook[ing] the invalidations" of the study by Drs. Rosenberg and Jarboe. Employer's Brief at 12. We disagree. While Drs. Rosenberg and Jarboe questioned the validity of Dr. Ammisetty's study, both doctors ultimately opined that it reflected a disabling respiratory impairment. Employer's Exhibits 5 at 3; 7 at 3, 11; 8 at 4; 11 at 13. As employer has not explained how it was prejudiced by the administrative law judge's failure to consider the opinions of Drs. Rosenberg and Jarboe regarding the validity of the March 2009 study, any error by the administrative law judge in failing to discuss their "invalidations" was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni*, 6 BLR at 1-1278.

Further, employer argues that the administrative law judge erred in finding Dr. Vaezy's July 2011 qualifying pulmonary function study to be valid. In crediting the study, the administrative law judge found that while Dr. Rosenberg, who is a Board-certified internist and pulmonologist, opined that the study was invalid due to poor effort, Drs. Vaezy and Jarboe, who are similarly qualified, considered the testing to be valid.[10] Decision and Order at 19-20; Claimant's Exhibit 1. The administrative law judge

[10] The technician who administered the July 2011 pulmonary function study also noted that the miner's understanding and cooperation were "good." Claimant's Exhibit 1.

discounted Dr. Rosenberg's assessment of the study, however, and stated that Dr. Rosenberg "never explained how he determined that the Miner failed to exercise proper effort for the test." Decision and Order at 20. Thus, the administrative law judge concluded that Dr. Vaezy's July 2011 qualifying study was valid and supported a finding that the miner was totally disabled. *Id.* Employer asserts that the administrative law judge mischaracterized the opinions of Drs. Rosenberg and Jarboe regarding the validity of the July 2011 pulmonary function study.

Employer correctly contends that Dr. Rosenberg did offer an explanation as to how he determined that the July 2011 pulmonary function study was not performed with complete effort. Specifically, Dr. Rosenberg stated that Dr. Vaezy's July 2011 pulmonary function study was "performed with incomplete efforts based on the shape of the flow-volume and volume-time curves, and the expiratory time was less than three seconds." Employer's Exhibit 13. However, in rejecting Dr. Rosenberg's opinion that the study was invalid, the administrative law judge noted, correctly, that the regulations provide that even tests which reflect incomplete effort, due to the variability or lack of reproducibility of the curves, may still be submitted for consideration in support of a claim, and that Dr. Rosenberg did not explain whether the test fit within these criteria.[11] Decision and Order at 20 n.58, *referencing* 20 C.F.R. Part 718, Appendix B (2)(ii)(G). Thus, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion regarding the validity of the July 2011 pulmonary function study was not well reasoned. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 20.

With respect to Dr. Jarboe's opinion, employer correctly asserts that Dr. Jarboe initially stated that Dr. Vaezy's July 2011 pulmonary function studies "are not valid." Employer's Brief at 12; Employer's Exhibit 12 at 2-3. However, Dr. Jarboe later opined that the overall medical evidence indicates that the miner is "totally and permanently disabled from a pulmonary standpoint" and that "the FEV1/FVC ratio reported by Dr. Vaezy was qualifying under the federal guidelines." Employer's Exhibit 12 at 2-3, 5. As Dr. Jarboe relied, in part, on the results of the July 2011 pulmonary function study to conclude that the miner was totally disabled from a respiratory standpoint, employer has

[11] As summarized by the administrative law judge, the quality standards for pulmonary function studies state that "[a]s individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits." 20 C.F.R. Part 718, Appendix B, Section 2(ii)(G); Decision and Order at 20 n.58.

not shown how it was prejudiced by the administrative law judge's characterization of Dr. Jarboe's opinion regarding the validity of the pulmonary function study. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. Therefore, as employer has not demonstrated reversible error in the administrative law judge's evaluation of the pulmonary function study evidence, we affirm his finding that "the [pulmonary function studies] weigh in favor of a finding that the [m]iner was totally disabled," pursuant to 20 C.F.R. §718.204(b)(2)(i), as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer next argues that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). Prior to evaluating the medical opinions, the administrative law judge determined that the miner's usual coal mine work as a foreman required him to crawl on his knees, shovel coal on the belt line, and perform all other duties as needed and, therefore, required heavy manual labor. Decision and Order at 5. The administrative law judge then considered the medical opinions of Drs. Ammisetty, Jarboe, Vaezy, and Rosenberg, regarding whether the miner could perform such work. Decision and Order at 20-23. The administrative law judge noted that Drs. Ammisetty and Jarboe opined that the miner lacked the respiratory capacity to perform heavy labor and, therefore, was totally disabled from performing his usual coal mine employment from a respiratory standpoint. In contrast, Drs. Vaezy and Rosenberg opined that the miner was not disabled from a respiratory or pulmonary standpoint. Decision and Order at 10-15; 20-23; Director's Exhibits 14, 18, 18A; Claimant's Exhibit 1; Employer's Exhibits 2, 4, 7, 8, 10, 11, 12, 13, 15, 16. The administrative law judge credited the opinions of Drs. Ammisetty and Jarboe, as being well reasoned and well documented, over the contrary opinions of Dr. Vaezy and Rosenberg, which the administrative law judge found to be "unreasoned and undocumented," to conclude that medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22-23.

Employer asserts that the administrative law judge erred in finding that the miner's usual coal mine work required heavy manual labor. Employer's Brief at 14-15. Specifically, employer contends that, in finding that the miner's job duties included crawling and shoveling coal, the administrative law judge mistakenly relied on the miner's testimony describing his past jobs, *see* Hearing Tr. at 13, not his most recent job as a foreman. Employer's Brief at 14-15. Employer asserts that, as no doctor concluded that the miner was totally disabled from his work as a foreman, the administrative law judge erred in finding that the medical opinion evidence supported the conclusion that the miner was totally disabled. We disagree.

As employer asserts, the miner may have been describing his past jobs in the portions of the hearing transcript cited by the administrative law judge. Decision and

Order at 5. Nonetheless, substantial evidence in the record supports the administrative law judge's finding that the miner's usual coal mine work as a foreman required him to crawl on his knees, shovel coal, and perform other duties as needed, and, therefore, constituted heavy manual labor. At the hearing in his initial claim the miner testified that while working as a foreman his men "usually had sever[al] working places," that "[he] had to see about all these fellows, and the only way that [he] could get to [them was] to crawl on [his] hands and knees" and "if the coal was a little bit high, [he] used a ball hammer to get up." Hearing Tr. at Director's Exhibit 1-119-20. Assisting his men in the various locations required that he "drill one, roof hole in one, cutting machine in one, [and] scoop [his] end in the loader ring." Hearing Tr. at Director's Exhibit 1-119. The miner also stated that when machinery malfunctioned he "would have to fly in" and "grab a shovel and start helping the men . . . to clean it all up and get [the machinery] started as quick as we could." Director's Exhibit 1 at 139. Thus, as it is supported by substantial evidence in the record,[12] we affirm administrative law judge's finding that the miner's usual coal mine employment as a foreman required heavy manual labor.[13] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Employer also asserts that the administrative law judge failed to provide valid reasons for discrediting the opinion of Dr. Rosenberg, that the miner was not disabled from a pulmonary standpoint.[14] We disagree.

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[12] The record also contains Dr. Rosenberg's similar description of the miner's job duties as a foreman, set forth in his May 9, 2011 report:

> All of his work was underground and he last worked as a foreman being in charge of 11 men. The coal was low being down to 30 inches. He was involved helping to operate the miner and cutting machines, as well as all facets of employment. He would have to help with belt moves and any kind of dead work that was needed. He was sort of a working foreman. A lot of dust was created over the years and respiratory protection was not utilized. He began his [coal mine employment] with a pick and shovel, and he hauled coal out with ponies.

Employer's Exhibit 4 at 3.

[13] As employer raises no further challenge to the administrative law judge's findings regarding the medical opinions of Drs. Ammisetty, Jarboe, and Vaezy, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[14] Dr. Rosenberg examined the miner on April 26, 2011; provided reports dated May 9, 2011, July 14, 2011, September 10, 2012, and November 13, 2012; and provided

The administrative law judge correctly noted that because the miner was eighty-seven at the time of the 2011 pulmonary function study, and the applicable table values listed in Appendix B of 20 C.F.R. Part 718 end at age 71, Dr. Rosenberg utilized the "Knudson equations" to extrapolate qualifying values for the miner's July 2011 pulmonary function studies.[15] Decision and Order at 21; Employer's Exhibits 13, 16. Dr. Rosenberg then relied on the Knudson predicted values for the July 2011 pulmonary function studies to conclude that the miner was not disabled. *Id.*

Contrary to employer's argument, in finding Dr. Rosenberg's opinion to be inadequately explained, the administrative law judge correctly noted that the doctor "did not actually set forth the numbers inserted into the equation or show his work . . . when using the equation," but simply set forth the formula and stated his conclusion that use of the formula reflected that the miner was not disabled. Decision and Order at 22. Thus, the administrative law judge permissibly concluded that Dr. Rosenberg's failure to persuasively explain how the values obtained by the extrapolation formula supported his opinion that the miner was not disabled undermined the credibility of his opinion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 22. The administrative law judge further permissibly questioned Dr. Rosenberg's conclusions, noting correctly that Dr. Rosenberg "also failed to explain why he did not use the extrapolation of the numbers when he determined that the testing

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depositions on October 15, 2012 and April 12, 2013. Employer's Exhibits 4, 5, 8, 11, 13, 16. He opined that from a strictly respiratory perspective, the miner could perform his previous coal mine employment based on respiratory values that were not disabling. He determined that the miner could not perform his work because of his age, independent of any other whole person disorder. Dr. Rosenberg opined that the miner did not have any respiratory impairment that arose out of his occupation as a coal miner, and that the inhalation of coal mine dust did not have a material adverse effect upon his pulmonary well-being. Thus, he did not diagnose either clinical or legal pneumoconiosis, but determined that the miner had a smoking-related form of chronic obstructive pulmonary disease with emphysema. Employer's Exhibit 16 at 9-11; Employer's Exhibit 5 at 5.

[15] The Board has held that pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). However, the Board further held that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Meade*, 24 BLR at 1-47.

performed by Dr. Ammisetty [in March 2009] was qualifying [and supported total respiratory disability] in his earlier report."[16] *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 22. We, therefore, affirm the administrative law judge's discrediting of Dr. Rosenberg's assessment of the extent of the miner's pulmonary disability.[17] Because it is supported by 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).

Moreover, as the administrative law judge properly weighed the medical opinion evidence together with the pulmonary function and blood gas study evidence, we further affirm the administrative law judge's finding that the evidence, as a whole, establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order at 23.[18]

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).

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[16] In his report dated July 14, 2011, Dr. Rosenberg reviewed Dr. Ammisetty's March 2009 pulmonary function study testing, performed when the miner was eighty-five years old. In concluding that the March 2009 testing reflected that the miner was totally disabled, Dr. Rosenberg did not discuss extending the Department of Labor table found in Appendix B to age 85. Employer's Exhibit 5.

[17] Because the administrative law judge provided valid reasons for according less weight to the opinion of Dr. Rosenberg, the administrative law judge's error, if any, in according less weight to his opinion for other reasons is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Therefore, we need not address employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because he relied on an incorrect height in assessing the pulmonary function study evidence.

[18] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also affirm his determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[19] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

In addressing whether employer established that the miner did not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Jarboe and Rosenberg, the only medical opinions supportive of employer's burden on rebuttal. Dr. Jarboe opined that the miner did not have legal pneumoconiosis, but suffered from obstructive lung disease due to cigarette smoking[20] and bronchial asthma. Decision and Order at 14-15, 27-29; Employer's Exhibits 7, 10, 12, 17. Dr. Rosenberg similarly opined that the miner did not have legal pneumoconiosis, but suffered from chronic obstructive pulmonary disease (COPD) with emphysema, due solely to cigarette smoking. Decision and Order at 12-14, 30-31; Employer's Exhibits 4, 8, 11, 13, 16.

The administrative law judge discredited the opinions of Drs. Jarboe and Rosenberg because he found that the physicians did not provide persuasive reasons for concluding that coal mine dust exposure did not contribute to the miner's obstructive lung disease. Specifically, the administrative law judge found that each opinion was inadequately reasoned and, in some respects, inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions. Decision and Order at 25-31. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 31.

Employer asserts that the administrative law judge erred in referring to the preamble when determining the credibility of the medical opinion evidence, in violation

[19] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" is defined as any chronic lung disease or impairment and its sequelae that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2), (b).

[20] The administrative law judge found that the miner had a sixty-five pack-year smoking history. Decision and Order at 5.

of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 15-21. We disagree. The Board and multiple courts of appeals have held that an administrative law judge, as part of the deliberative process, may permissibly evaluate expert opinions in conjunction with the DOL's discussion of prevailing medical science in the preamble to the revised regulations. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *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, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

Further, contrary to employer's contention, the administrative law judge's utilization of the preamble did not render the Section 411(c)(4) presumption "irrebuttable." Employer's Brief at 15. The administrative law judge merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32. Moreover, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; Employer's Brief at 16. In addition, contrary to employer's contention, the fact that Drs. Jarboe and Rosenberg cited more recent medical literature did not require the administrative law judge to conclude that advances in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was endorsed by the DOL in the preamble. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (observing that neither of the employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble"). We, therefore, reject employer's arguments.

Employer next maintains that, even if the administrative law judge could permissibly refer to the preamble, he failed to provide valid reasons for discounting the medical opinions of Drs. Jarboe and Rosenberg on the issue of legal pneumoconiosis. Employer's Brief at 21-26. This contention lacks merit.

The administrative law judge noted that both Drs. Jarboe and Rosenberg concluded that the miner's obstructive impairment was not coal mine dust-induced, in part because the miner's FEV_1/FVC ratio was reduced. Noting that the preamble recognizes that coal miners have an increased risk of developing COPD, with associated decrements in FEV_1 and the FEV_1/FVC ratio, the administrative law judge acted within

his discretion in finding that the opinions of Drs. Jarboe and Rosenberg were unpersuasive and inadequately explained. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-92, 25 BLR 2-633, 2-644-45 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000); Decision and Order at 13-14, 27-29.

The administrative law judge further rejected Dr. Jarboe's opinion that the miner's impairment could not have been caused by coal mine dust because the miner's disease developed after he left coal mine employment. Decision and Order at 28-29. Contrary to employer's contention, the administrative law judge permissibly found Dr. Jarboe's reasoning to be inconsistent with the regulations, which recognize that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." Decision and Order at 29, *citing* 20 C.F.R. §718.201. Thus, the administrative law judge acted within his discretion in finding that the opinions of Drs. Jarboe and Rosenberg were not well reasoned and were entitled to little weight. *See Sterling*, 762 F.3d at 491-92, 25 BLR at 2-644-45; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. As the administrative law judge's credibility determinations are supported by substantial evidence, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis.

Employer next contends that the administrative law judge did not adequately address whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 26.

Contrary to employer's contention, the administrative law judge rationally found that the same reasons undercutting Drs. Jarboe and Rosenberg on the issue of legal pneumoconiosis also undercut their opinions that the miner's disabling respiratory impairment was not caused by pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 32. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of the miner's total disability was caused by pneumoconiosis. *See* 20 C.F.R.§718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge determined that claimant is automatically entitled to survivor's benefits under Section 932(*l*).[21] Employer contends that the administrative law judge's application of Section 932(*l*) was error because the miner's award was not yet final. Employer's Brief (Survivor's Claim) at 2-11. As employer recognizes, however, the Board has rejected that argument, and held that an award of benefits in a miner's claim need not be final for a claimant to receive benefits under Section 932(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). We decline employer's request to reconsider the Board's holding in *Rothwell* and, therefore, affirm the award of benefits to claimant in the survivor's claim. 30 U.S.C. §932(*l*).

[21] The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was found to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Survivor's Claim Decision and Order at 2-4.

Accordingly, the administrative law judge's Decision and Order Granting Benefits in a Subsequent Claim and the Decision and Order Awarding Continuing Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge