U.S. Department of Labor

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

BRB Nos. 15-0464 BLA
and 15-0482 BLA

LENA F. WRIGHT (Widow of and on behalf of COY L. WRIGHT)	)	
Claimant-Respondent	)	
v.	)	
KC ROGERS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 07/28/2016
and	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits and Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits (2011-BLA-5917) and the Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act (2011-BLA-5678) of Administrative Law Judge Alice M. Craft, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a consolidated miner's claim and survivor's claim. The relevant procedural history of both claims is as follows.

The miner filed a claim for benefits on October 14, 2005. Director's Exhibit 2. A hearing was held before Administrative Law Judge Kenneth A. Krantz on December 12, 2007, at which time the miner testified. Director's Exhibit 82. While the case was pending, the miner died on October 3, 2008. Director's Exhibit 129. Subsequently, claimant, the widow of the miner, indicated on October 20, 2008, that she would be pursuing the miner's claim on his behalf. Director's Exhibit 103. Claimant also filed a survivor's claim on October 20, 2008. Director's Exhibit 123. In a Decision and Order issued on June 23, 2009, Judge Krantz denied benefits in the miner's claim because he found that, although the miner had been totally disabled, the evidence was insufficient to establish that the miner had suffered from pneumoconiosis. Director's Exhibit 105. Claimant filed a request for modification of the denial of the miner's claim on August 1, 2009. Director's Exhibit 109. On January 28, 2011, the district director issued a Proposed Decision and Order granting modification in the miner's claim and a Proposed Decision and Order awarding benefits in the survivor's claim. Director's Exhibits 119, 160. Employer requested a hearing in both claims. The claims were consolidated and transferred to the Office of Administrative Law Judges, where they were assigned to Judge Craft (the administrative law judge). On July 24, 2015, the administrative law judge issued her two Decisions and Orders, which are the subject of this appeal.

In her Decision and Order on the miner's claim, the administrative law judge determined that the claim was timely filed. Furthermore, the administrative law judge noted that employer stipulated that the miner worked for at least fifteen years in underground coal mine employment, and also suffered from a totally disabling

respiratory or pulmonary impairment. Based on those stipulations, and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] Furthermore, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption. Therefore, the administrative law judge found that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. The administrative law judge also found that granting modification would render justice under the Act, and awarded benefits, commencing May 2000. In her Decision and Order in the survivor's claim, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[2]

On appeal, employer contends that the administrative law judge erred in finding that the miner's claim was timely filed. Alternatively, employer asserts that if the claim is not time barred, the administrative law judge's decision on the merits must be vacated, as she did not properly weigh the medical opinions in considering whether employer established rebuttal of the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge erred in her determination as to the date for commencement of benefits. Claimant responds, asserting that the claim was timely filed and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its argument that the claim is time-barred.[3]

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis where the record establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] Section 422(*l*) provides that the survivor of a miner who was 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. 30 U.S.C. §932(*l*) (2012).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, total disability pursuant to 20 C.F.R. §718.204(b), and invocation of the Section

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. THE MINER'S CLAIM

A. TIMELINESS OF CLAIM

Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). Therefore, to rebut the presumption of timeliness, employer must show by a preponderance of the evidence that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" specifically was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. . . ." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298 (emphasis in the original); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43; *see also Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993) (receipt of a medical determination of

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411(c)(4) presumption. Miner's Claim (MC) Decision and Order at 4, 32; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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); MC Decision and Order at 6; Director's Exhibit 124.

total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner).

In this case, to support its assertion that the miner's claim was not timely filed, employer submitted an August 19, 1991 report from Dr. Clarke, pertaining to the miner's application for Kentucky workers' compensation benefits. Director's Exhibit 83; Miner's Claim (MC) Decision and Order at 7. Dr. Clarke made the following statement: "inability to perform coal mining and/or comparable employment is based on his coal workers' pneumoconiosis and associated ventilatory impairment and is 100% permanently and totally disabled." Director's Exhibit 83. In its post-hearing brief submitted to the administrative law judge, employer also "summarized three of the medical opinions [from Drs. Anderson, Wright, and Myers] offered as part of the [m]iner's state claim for benefits, and [argued] that the miner received a medical determination of total disability in 1990." MC Decision and Order at 7.

With respect to whether the substance of Dr. Clarke's report was ever communicated to the miner, the administrative law judge summarized the miner's testimony at the December 12, 2007 hearing before Judge Krantz as follows:

> [The miner] said he did not "recall" a report from Dr. [Clarke], but he said it was "a possibility" because he thought he went to "four or five doctors altogether" in conjunction with his state claim. He said he did not read the reports until his attorney give [sic] him his medical records. . . . The [miner] testified [that] he did not "remember right offhand" whether any of those reports said he had black lung. He said all he knew is what his attorney told him, which was that Dr. Anderson said that he had black lung. When asked whether his attorney told him that any of the doctors said he was disabled by black lung, the [miner] responded "No, Kelsey didn't tell me nor [sic] – I found out I was disabled by Dr. Wright, and that's after I got the reports of my records and things." He clarified that Dr. Wright did not tell him he was disabled; rather, he read it in the report. Moreover, he testified that although his attorney gave him copies of the medical reports from the state workers' compensation claim, he did not have them in his possession and he did not have copies of them.

MC Decision and Order at 7-8, *quoting* Director's Exhibit 82 at 23-28.

In addition, the administrative law judge noted that the miner further testified as follows:

> At his deposition on January 26, 2006, [the miner] testified he was disabled. He said he got a report from Dr. Myers who "gave him" permanent disability in 1991. The [m]iner testified that Drs. Anderson, Wright, Myers, Broudy, Jarboe, and one other doctor, whose name he could not recall, examined him in connection with his state workers' compensation claim. He said three physicians told him he had black lung, while three told him he did not. At the hearing before Judge Krantz on December 12, 2007, the [m]iner testified that "no doctors" ever "told" him that he had black lung, but he had seen some reports where doctors said he had black lung. The [m]iner stated he saw reports from Dr. Anderson, Dr. Wright, and Dr. Myers.

MC Decision and Order at 7-8, *quoting* Director's Exhibit 44 at 6-14, 82 at 23-28.

The record also includes an affidavit signed by the miner on January 28, 2008 in which he stated that he could "not recall or remember a Dr. Clarke's report advising or telling [him] that [he] was totally and permanently disabled due to [coal workers' pneumoconiosis]" nor could he recall "a medical report from 'a' Dr. Clark." Director's Exhibit 86.

In considering whether employer satisfied its burden to rebut the presumption of timeliness, the administrative law judge found that Dr. Clarke's opinion did not constitute a *reasoned* medical determination of total disability due to pneumoconiosis because "the pulmonary function test upon which Dr. Clarke relied does not meet the Federal requirements for establishing disability." MC Decision and Order at 8. Alternatively, even if Dr. Clarke's report did constitute a reasoned medical determination of total disability due to pneumoconiosis, the administrative law judge found that "insufficient evidence exists to establish that Dr. Clarke's medical opinion was communicated to the [m]iner." *Id*. The administrative law judge concluded that the miner's testimony "about what was communicated to him and by whom is confusing" and "unclear." *Id*. at 7-8. Moreover, the administrative law judge noted that employer has not "provided any additional evidence, such as delivery confirmations or return receipts, establishing exactly if or when the [m]iner received Dr. Clarke's medical report." *Id*. at 9.

The administrative law judge also rejected employer's argument that the miner was told by Drs. Anderson, Wright, and Myers that he was totally disabled due to pneumoconiosis, as their opinions are not in the record, and the administrative law judge considered the miner's testimony to be "unclear" and "confusing" as to what he was told in relation to his state claim. MC Decision and Order at 7-8. The administrative law judge explained:

> I interpret the [m]iner's testimony to mean that no physician actually communicated to him that he was totally disabled by pneumoconiosis, but he did read some reports that indicated he had black lung. Even if Dr. Anderson or Dr. Wright concluded the [m]iner was totally disabled due to pneumoconiosis, other than Dr. Clarke's medical report, none of the medical reports authored in conjunction with the [m]iner's state claim for benefits is in the record. Moreover, although the [m]iner said Drs. Anderson and Myers said he was disabled, the [m]iner's testimony on the issue does not clearly explain what he was diagnosed with, when, and from whom.

Id. at 8. Therefore, the administrative law judge found that employer failed to establish that a medical determination of total disability due to pneumoconiosis was communicated to the miner more than three years before he filed his claim on October 14, 2005. *Id*.

Employer argues that the administrative law judge erred in concluding that the miner's testimony was "confusing" and "unclear" as to whether he received a medical determination of total disability due to pneumoconiosis from Dr. Clarke, and what he was told by Drs. Anderson, Wright, and Myers. Employer's Brief in Support of Petition for Review at 17-24. Employer maintains that "the record is clear that the reports of the doctors who deemed [the miner] to be totally disabled due to pneumoconiosis were communicated to him in 1991." *Id*. at 24. Employer also asserts that the miner's January 28, 2008 affidavit is a "self-serving retraction of his prior consistent statements" at the hearing, and should have been rejected by the administrative law judge because it was "of questionable value." *Id*. at 24 n.5. Employer's arguments are rejected as without merit.

The question of whether the evidence is sufficient to rebut the presumption of timeliness involves factual findings that are to be made by the administrative law judge. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Moreover, determining the reliability of witness testimony is within the sound discretion of the administrative law judge. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984).; *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999).

In this case, the administrative law judge rationally found that the miner's testimony was too vague to support a finding that a physician had communicated a medical determination of total disability due to pneumoconiosis to him more than three years prior to the filing of his claim. *Clark*, 12 BLR at 1-155. Contrary to employer's assertion, the administrative law judge acted within her discretion in finding the miner's testimony to be "unclear" and "confusing" as to whether he saw Dr. Clarke's report. MC

Decision and Order at 7-9; *see Mabe*, 9 BLR at 1-68; Director's Exhibits 82, 86. Additionally, the record does not indicate if the miner's attorney forwarded Dr. Clarke's report to the miner subsequent to the state workers' compensation award. Because there is no documentation in the record,[5] such as "delivery confirmations or return receipts" to show that Dr. Clarke's report was sent to the miner, we affirm the administrative law judge's finding that employer failed to meet its burden of establishing that Dr. Clarke's medical determination was communicated to the miner.[6] MC Decision and Order at 9; *see Clark*, 12 BLR at 1-155.

Employer maintains that the miner's testimony was not "unclear" with regard to what he was told by Dr. Myer in 1991. MC Decision and Order at 7-9; *see* Employer's Brief in Support of Petition for Review at 18. We disagree. At the January 26, 2006 deposition, the miner was specifically asked if Drs. Anderson, Wright, and Myers told him that he was "100% disabled because of [his] black lung[.]" Director's Exhibit 44 at 14. The miner responded, "*No*. Only Dr. Myers is the only one (sic) that gave me 100% disability." *Id*. at 15 (emphasis added). Contrary to employer's characterization, the miner did not specifically testify that Dr. Myers told him he was disabled *due to pneumoconiosis*. *Id*.; *see* Employer's Brief in Support of Petition for Review at 18.

[5] Employer also identifies a December 24, 1991 Agreed Opinion and Award that reflects a settlement of the miner's state workers' compensation benefits. Director's Exhibit 8; *see* Employer's Brief in Support of Petition for Review at 24. Employer asserts that the Agreed Opinion and Award describes the opinions of Drs. Anderson, Wright, and Clarke. Because the miner signed the settlement, employer maintains that he was aware of being totally disabled due to pneumoconiosis in 1991. Contrary to employer's contention, however, the Agreed Opinion and Award reflects that Drs. Anderson, Wright, and Clarke diagnosed pneumoconiosis, and also sets forth the FEV1 and FVC values from pulmonary function studies, but it does not indicate that any of these physicians concluded that the miner was totally disabled due to pneumoconiosis. Director's Exhibit 8.

[6] Employer argues that the administrative law judge erred in considering whether Dr. Clarke provided a "reasoned" opinion when determining whether to "reject his opinion for statute of limitation purposes." Employer's Brief in Support of Petition for Review at 24-25. Employer asserts that this finding is contrary to the Sixth Circuit's holding in *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). Because we affirm the administrative law judge's finding that employer failed to establish that Dr. Clarke's opinion was communicated to the miner, we need not address this allegation of error. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Because the reports of Drs. Anderson, Wright, and Myers are not in the record, and because the miner did not testify that any of these physicians specifically communicated to him that he was totally disabled *due to* pneumoconiosis, we affirm the administrative law judge's finding that their opinions do not constitute a medical determination of total disability due to pneumoconiosis. *See Adkins*, 19 BLR at 1-43; Director's Exhibits 44, 82.

For the foregoing reasons, we see no error in the administrative law judge's conclusion, based on the miner's hearing testimony and deposition testimony, that employer did not affirmatively establish that a medical determination of total disability due to pneumoconiosis was communicated to the miner more than three years prior to filing his claim. We therefore affirm the administrative law judge's finding that employer has not rebutted the presumption that the miner's application for benefits was timely filed pursuant to Section 725.308(a).

B. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement[7] that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). With respect to a mistake in a determination of fact, claimant need not allege any specific error made by the administrative law judge in order to establish a basis for modification. Rather, the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Consolidation*

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

Coal Co. v. Worrell, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc*., 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

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[8] nor clinical[9] pneumoconiosis, 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); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to rebut the presumption of clinical pneumoconiosis, as she found that the autopsy evidence of record established that the miner suffered from the disease, and that the autopsy evidence outweighed the negative x-ray and CT scans of record and the contrary medical opinions of record. MC Decision and Order at 43.

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[8] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

[9] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the opinions of employer's experts, Drs. Broudy and Rosenberg, each of whom opined that the miner suffered from an obstructive respiratory impairment due to cigarette smoking and asthma.[10] MC Decision and Order at 38-43; *see* Director's Exhibits 73, 74, 80, 90; Employer's Exhibit 2, 3. The administrative law judge rejected their opinions, that coal dust exposure was not a contributing factor in the miner's respiratory impairment, because she found that they were unpersuasive and inconsistent with the medical science credited by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. MC Decision and Order at 38-43. Therefore, the administrative law judge found that employer failed to rebut the presumption of legal pneumoconiosis. *Id*. at 43.

Employer maintains that the administrative law judge improperly relied on the preamble in discounting the medical opinions of Drs. Broudy and Rosenberg on the issue of legal pneumoconiosis.[11] Employer argues that the administrative law judge effectively transformed the rebuttable presumption into an irrebuttable presumption. We reject employer's argument that, in evaluating the credibility of the medical opinion evidence, the administrative law judge erred in relying on the studies credited by the DOL in the preamble. *See A&E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Rather, the administrative law judge permissibly consulted the preamble as a statement of medical science found credible by the DOL when it revised the definition of legal pneumoconiosis to include obstructive impairments arising out of coal mine employment, and permissibly evaluated the medical opinions of record in light of those studies. *Adams*, 694 F.3d at 801, 25 BLR at 2-210. Therefore, the administrative law judge's references to the preamble also did not convert the rebuttable presumption of Section 411(c)(4) into an irrebuttable presumption, as employer maintains, or deny employer a fair adjudication. *Little David Coal Co. v. Director, OWCP*, 532 F. App'x. 633, 635-36 (6th Cir 2012).

[10] The administrative law judge also considered the opinions of Drs. Mettu, Baker, and Forehand, but found that they did not assist employer on rebuttal because they diagnosed legal pneumoconiosis. MC Decision and Order at 42-43.

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711.

In determining the weight to accord the medical opinions, the administrative law judge noted correctly that both Dr. Broudy and Dr. Rosenberg opined that the miner's pattern of respiratory impairment is not consistent with coal dust exposure because he showed "some reversibility" in his pulmonary function testing, after the use of a bronchodilator. MC Decision and Order at 39; *see* MC Decision and Order at 41-42; Director's Exhibits 73, 74. However, the administrative law judge also observed correctly that the miner's "pulmonary function [studies were] still qualifying [for total disability] even after bronchodilators were administered." MC Decision and Order at 39; *see* MC Decision and Order at 41-42. Contrary to employer's argument, the administrative law judge rationally concluded that the opinions of Drs. Broudy and Rosenberg were not persuasive, because the fact that the miner "experienced some relief from bronchodilators does not address the etiology of the fixed portion of [the miner's] impairment that does not benefit from bronchodilator treatment." *Id*.; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-279 (7th Cir. 2001); *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. 2004) (unpub.).

The administrative law judge also acted within her discretion in giving less weight to Dr. Rosenberg's opinion, based on his statement that coal dust exposure could not be the cause of the significant reductions in claimant's FEV1/FVC ratio. MC Decision and Order at 40-41; Director's Exhibit 74, 80. The administrative law judge rationally found that Dr. Rosenberg's views are inconsistent with the DOL's observation in the preamble to the 2001 regulations that coal dust exposure can cause obstruction as measured by a decreased FEV1/FVC ratio.[12] *See* 65 Fed. Reg. 69,920, 79,943 (Dec. 20 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); Decision and Order at 40-41.

[12] The DOL stated:

> In addition to the risk of simple [coal workers' pneumoconiosis] and [progressive massive fibrosis], epidemiological studies have shown that *coal miners have an increased risk of developing* [*Chronic Obstructive Pulmonary Disease (COPD)*]. *COPD may be detected from decrements in certain measures of lung function, especially* FEV_1 *and the ratio of* FEV_1/FVC. Decrements in lung function *associated with exposure to coal mine dust are severe enough to be disabling in some miners*, whether or not pneumoconiosis is also present.

65 Fed. Reg. 69,930, 79,943 (Dec. 20 , 2000) (emphasis added).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and thus did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).

With respect to the presumed fact of disability causation, the administrative law judge rationally determined that the opinions of Drs. Broudy and Rosenberg were not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis, as neither physician diagnosed the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); MC Decision and Order at 44. Additionally, employer does not challenge the administrative law judge's finding that Drs. Oesterling and Crouch failed to address whether the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We affirm therefore, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Furthermore, we affirm the administrative law judge's finding that claimant established a basis for modification under 20 C.F.R. §725.310 because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and employer failed to rebut the presumption, thereby establishing that "the [m]iner was entitled to benefits under the Act."[13] MC Decision and Order at 46. In addition, because

[13] We reject employer's contention that the administrative law judge erred in finding a mistake in a determination of fact, insofar as claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and employer failed to rebut the presumption. *See Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012) (rejecting argument that the administrative law judge erred in relying on Section 932(*l*) to grant modification of the denial of benefits); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24

it is unchallenged by employer, we affirm the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711.

C. DATE FOR COMMENCEMENT OF BENEFITS

The determination of whether modification is granted based on a mistake in a determination of fact or a change in conditions affects the date from which benefits commence. If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis or, if that date is not ascertainable, as of the date the miner requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in a determination of fact, claimant is entitled to benefits from the date the miner first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Employer argues that the administrative law judge erred in awarding benefits as of May 2000. In this case, the administrative law judge found that claimant established a mistake in a determination of fact. The administrative law judge explained her finding for when benefits commence as follows:

> The [m]iner filed his claim for benefits in October 2005. When he was examined by Dr. Mettu in November 2005, he was already totally disabled. All of the available pulmonary function tests demonstrated total disability, including the testing administered in connection with the [m]iner's treatment in May 2000. There are no non-qualifying pulmonary function tests in the record. I find that the [m]iner was entitled to benefits commencing in May 2000, when pulmonary function testing first demonstrated that he was totally disabled by a pulmonary impairment.

MC Decision and Order at 47. Employer asserts that the administrative law judge erred in awarding benefits from the month of the first qualifying pulmonary function study, May 2000, because the qualifying pulmonary function study shows only the onset of the miner's total disability, but not the onset of total disability due to pneumoconiosis. Employer's argument has merit.

BLR 1-65, 1-70-71 (2008) (recognizing that a change in the ultimate factual issue may be grounds for finding a mistake in a determination of fact).

In this case, the administrative law judge rendered a finding on the earliest date that the miner became totally disabled, but not the date on which he became totally disabled due to pneumoconiosis. As a result, we vacate the administrative law judge's designation of May 2000 as the date for the commencement of benefits, and remand this case for further consideration of this issue. *See Williams*, 13 BLR at 1-30. On remand, the administrative law judge must determine when the miner became totally disabled due to pneumoconiosis. If the administrative law judge finds that the evidence does not establish when the miner became totally disabled due to pneumoconiosis, then claimant is entitled to benefits as of October 2005, the month during which the miner's claim was filed. If the administrative law judge again determines that claimant is entitled to benefits beginning at some time prior to the filing date of the current claim, she must explain the basis for this finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

II. SURVIVOR'S CLAIM

Employer asserts that the award of benefits to claimant flows from a "flawed award" in the miner's claim and should be vacated. Brief in Support of Petition for Review at 1. However, because we affirm the award of benefits in the miner's claim, employer's challenge to the survivor's claim is without merit.

After concluding that the miner was entitled to benefits, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: 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 determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order Awarding Continuing Benefits. Based on these findings, which are not challenged by employer, we affirm the administrative law judge's conclusion that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Granting the Claimant's Request for Modification, Awarding Benefits in the miner's claim is affirmed on the merits, but the administrative law judge's finding as to the date for commencement of benefits is vacated, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act in the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge