U.S. Department of Labor

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

BRB No. 16-0564 BLA

EARL LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION, SUNCOAL COMPANY c/o WELLS FARGO	)	
	)	
Employer/Carrier-Petitioners	)	DATE ISSUED: 07/28/2017
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson, Gilbertson Law, LLC, Columbia, Maryland, for employer.

BEFORE: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2012-BLA-05581) of Administrative Law Judge Richard M. Clark rendered on a claim filed 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 subsequent claim filed on August 19, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with twenty-five years of underground coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. In addition, employer contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, submitted a response brief in this appeal.[4]

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[1] Claimant's prior claim, filed on August 24, 2001, was denied by Administrative Law Judge Thomas F. Phalen, Jr., on November 29, 2004, because claimant did not establish any element of entitlement. Director's Exhibit 2. On appeal, Judge Phalen's denial of benefits was affirmed by the Board on September 30, 2005.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant established twenty-five years of underground coal mine

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

Invocation of the Section 411(c)(4) Presumption - Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Total disability may be established based on pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). In this case, the administrative law judge found that the pulmonary function study evidence and the medical opinion evidence support a finding of total disability.[5] Decision and Order at 12, 14.

Pulmonary Function Studies

When considering pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine

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employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10-11.

[5] The administrative law judge found that because only one of three blood gas studies is qualifying, the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 12. The administrative law judge further found that because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

whether it constitutes credible evidence of claimant's pulmonary function.[6] *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *see Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-5 (1987) (Levin, J., concurring). In accomplishing this task, the administrative law judge must consider all relevant evidence, resolve any conflicts as to the reliability of the testing, and explain his findings in compliance with the Administrative Procedure Act (APA).[7] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, the administrative law judge cannot substitute his or her opinion for that of the medical experts. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

The administrative law judge considered five new pulmonary function studies[8] performed on November 29, 2010,[9] August 15, 2011, August 7, 2012, April 15, 2014 and June 2, 2015, and found that all five of the pre-bronchodilator pulmonary function studies

[6] The quality standards apply only to evidence developed in connection with a claim for benefits. 20 C.F.R. §718.101(b). Thus pulmonary function studies that are part of claimant's treatment records are not subject to the quality standards set forth at 20 C.F.R. §718.103 and Appendix B to 20 C.F.R. Part 718. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). However, the administrative law judge must still determine whether each test is sufficiently reliable to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Stowers*, 24 BLR at 1-89, 1-92.

[7] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A).

[8] Finding that the studies reflected conflicting heights for the miner, the administrative law judge permissibly averaged the heights recorded on the studies to determine claimant'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 11.

[9] The administrative law judge sometimes referred to this pulmonary function study as having been performed on November 10, 2010. Decision and Order at 5, 11. The report of the test results is dated November 29, 2010.

were qualifying,[10] and two of the three post-bronchodilator studies were qualifying. Decision and Order at 5, 11-12. The administrative law judge noted that the November 29, 2010 and August 15, 2011 pulmonary function studies produced qualifying values both before, and after, the administration of a bronchodilator. Director's Exhibit 14; Employer's Exhibit 6. The August 7, 2012 pulmonary function study also produced qualifying values before the administration of a bronchodilator, but produced non-qualifying values after the administration of a bronchodilator. Employer's Exhibit 5. Finally, the April 15, 2014 and June 2, 2015 pulmonary function studies produced qualifying values before the administration of a bronchodilator; post-bronchodilator studies were not performed. Claimant's Exhibits 3, 4. Noting that the "overwhelming majority" of the new pulmonary function studies produced qualifying values, and "giving greater weight to the most recent testing"[11] the administrative law judge found that the new pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 12.

Employer argues that in so finding, however, the administrative law judge failed to consider all relevant evidence and resolve the conflicts in the evidence regarding the validity of the pulmonary function testing. Employer's contentions have merit. The administrative law judge noted that Dr. Alam, who performed the November 29, 2010 qualifying study, recorded that claimant had put forth good effort and cooperation. Decision and Order at 5 n.9; Director's Exhibit 14. In addition, Dr. Mettu reviewed these test results on behalf of the Department of Labor and indicated that they were acceptable. Director's Exhibit 14. As the administrative law judge further noted, however, Dr. Vuskovich also reviewed the results and opined that claimant "did not put forth the effort required to generate valid spirometry results." Decision and Order at 5 n.6; Employer's Exhibit 7. In crediting the November 29, 2010 study, the administrative law judge did not resolve the conflict in the opinions between Drs. Alam, Mettu, and Vuskovich regarding the validity of the results. Employer's Brief at 3, 8-13.

The administrative law judge also failed to adequately address Dr. Rosenberg's statements calling into question the validity of his August 7, 2012 pulmonary function study, and the April 15, 2014 and June 2, 2015 pulmonary function studies, administered

[10] 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).

[11] It is unclear to which studies the administrative law judge was specifically referring.

for Dr. Almataria at St. Charles Respiratory Clinic.[12] Employer's Brief at 13. Specifically, the administrative law judge noted Dr. Rosenberg's statement that his August 7, 2012 "pulmonary function tests were performed with incomplete effort," but the administrative law judge did not address the significance of this comment in crediting the test results.[13] Decision and Order at 5; Employer's Exhibit 5 at 7. Regarding the April 15, 2014 study, the administrative law judge did not resolve the conflict in medical opinion between Dr. Rosenberg, who opined that the study was invalid due to incomplete efforts, and the technician who performed the study, who indicated that claimant's effort was "good." Employer's Exhibit 14 at 1; Claimant's Exhibit 4. Finally, the administrative law judge did not address Dr. Rosenberg's statement that he could not assess the validity of the June 2, 2015 pulmonary function study,[14] also performed for Dr. Almataria at St. Charles Respiratory Clinic, due to its poor copy quality.[15] Employer's Exhibit 14 at 1.

For the foregoing reasons, we agree with employer that the administrative law judge's evaluation of the pulmonary function study evidence contravenes the requirement of the APA that the administrative law judge consider all relevant evidence, render findings on all material issues of fact or law, and set forth the rationale underlying his findings. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a);

[12] Employer also asserts that the administrative law judge failed to consider Dr. Vuskovich's opinion that the pulmonary function study results administered at St. Charles Respiratory Clinic were illegible and could not be validated. Employer's Brief at 13; Employer's Exhibit 15. However, Dr. Vuskovich did not identify the date, or dates, of the results he reviewed. *Id.*

[13] In his summary, however, Dr. Rosenberg did not attribute the August 7, 2012 qualifying results solely to poor effort, but stated that the reduced FVC and FEV1 values were due to a "combination of poor effort coupled with [claimant's] elevated right diaphragm" resulting from claimant's liver transplantation. Employer's Exhibit 5 at 7.

[14] After stating that the April 15, 2014 study was invalid and that the validity of June 2, 2015 study could not be assessed, Dr. Rosenberg stated that the results were nonetheless "consistent with [claimant's] previously noted decrease in FVC and FEV1." Employer's Exhibit 14 at 2. Dr. Rosenberg added that this "relates to a variety of factors including [claimant's] elevated right hemidiaphragm in relationship to his liver transplantation, varying efforts on pulmonary function testing and obesity." *Id.*

[15] The technician who performed this study indicated that claimant's effort was "good." Claimant's Exhibit 3.

Wojtowicz, 12 BLR at 1-165; Employer's Brief at 8-10, 13. We therefore vacate the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration. On remand, the administrative law judge must weigh all of the pulmonary function study evidence, and explain his consideration of it.[16] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480-81, 25 BLR 2-1, 2-10 (6th Cir. 2011).

Medical opinions

Employer next argues that the administrative law judge erred in weighing the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The determination of whether a medical opinion is reasoned and documented requires the fact finder to examine the validity of the physician's reasoning in light of studies conducted and the objective indications upon which the opinion is based. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). While the regulations do not require a physician's diagnosis of total disability to be based on qualifying objective testing, *see* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), a medical opinion based on invalid testing may be found unreliable. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-233-34 (3d Cir. 1997).

The administrative law judge considered the opinions of Drs. Alam, Rosenberg and Repsher. Decision and Order at 13-14; Director's Exhibit 14, Employer's Exhibits 5, 8, 14, 17. While Dr. Alam opined that claimant suffers from a totally disabling pulmonary impairment, Drs. Rosenberg and Repsher opined that claimant is not disabled from a pulmonary standpoint. Director's Exhibit 14; Employer's Exhibits 5, 8. The administrative law judge found that Dr. Alam's opinion was "supported by the weight of the other evidence in the record," including the "overwhelming majority" of the

[16] In evaluating the evidence, the administrative law judge should be mindful that the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present, not whether a respiratory or pulmonary impairment is due to an intrinsic, or extrinsic, disease process. *See* 20 C.F.R. §718.204(a). Thus, an opinion that the reduced results of a pulmonary function study are due to poor effort or cooperation, i.e., that the test results do not demonstrate the *presence* of a respiratory impairment, is properly considered at 20 C.F.R. §718.204(b)(2)(i). In contrast, an opinion that the reduced results of a pulmonary function study are due to extrinsic factors, like obesity or an elevated diaphragm, is properly considered at 20 C.F.R. §718.204(c).

pulmonary function studies.[17] Decision and Order at 14. The administrative law judge also found that Dr. Alam's opinion was "better documented" and "more thoroughly explained" than the opinions of Drs. Repsher[18] and Rosenberg. *Id.* Thus the administrative law judge concluded that the medical opinion evidence supported a finding of total disability. Decision and Order at 14.

As employer correctly asserts, in finding Dr. Alam's opinion supported by the pulmonary function study evidence of record, the administrative law judge failed to resolve the conflict in medical opinions regarding the validity of the November 29, 2010 qualifying pulmonary function study upon which Dr. Alam relied.[19] *See Wojtowicz*, 12 BLR at 1-165; Employer's Brief at 17. Therefore, the administrative law judge has not adequately considered whether Dr. Alam's diagnosis of total disability constitutes a reasoned medical opinion.[20] *See Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Mancia*,

[17] Relevant to total disability, Dr. Alam noted that claimant has "dyspnea on exertion" and "severe pulmonary limitations." Director's Exhibit 14 at 32. Dr. Alam interpreted claimant's pulmonary function study results as showing "severe restriction" with "possible concomitant obstruction," a "severely reduced" MVV, and a post-bronchodilator FEV1 value of 41% of predicted. *Id.* at 21, 32.

[18] The administrative law judge discredited Dr. Repsher's opinion as being based, in part, on his unexplained conclusion that the pulmonary function study results "have been generally within normal limits," contrary to the administrative law judge's finding that "an overwhelming majority of the tests produced qualifying results." Decision and Order at 14; Employer's Exhibit 8. While employer does not challenge this determination, we note that Dr. Repsher reviewed only the pulmonary function studies from the prior claim, dated September 15, 2001, October 31, 2001, August 5, 2002, and September 17, 2003. All of them were all non-qualifying. Employer's Exhibit 8, Director's Exhibit 1.

[19] We reject employer's assertion that, because Dr. Alam's November 29, 2010 pulmonary function study is dated after his November 10, 2010 report, "it does not appear" that Dr. Alam considered the results in formulating his opinion. Employer's Brief at 17. While the discrepancy in dates in unexplained, Dr. Alam's report clearly references the results of the November 29, 2010 study. Director's Exhibit 14 at 21, 32, 32; *supra* n.5.

[20] There is no merit, however, to employer's argument that Dr. Alam's opinion cannot support a finding of total disability because he did not specifically address whether claimant is capable of performing his usual coal mine work from a pulmonary standpoint. Employer's Brief at 17. In light of Dr. Alam's statements that claimant has

130 F.3d at 588, 21 BLR at 2-233-34. Consequently, we vacate the administrative law judge's finding that Dr. Alam's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, the administrative law judge should reconsider Dr. Alam's opinion in light of all of the relevant evidence of record, including his re-evaluation of the pulmonary function studies as a whole, and explain his findings.

On remand, the administrative law judge should also reconsider Dr. Rosenberg's opinion. In connection with his August 16, 2016 report, Dr. Rosenberg examined claimant and reviewed medical evidence, including Dr. Alam's report and the November 29, 2010 and August 15, 2011 pulmonary function studies. Employer's Exhibit 5. Dr. Rosenberg recorded claimant's exposure histories and complaints, noting that claimant, who underwent a liver transplant in 2009, reported shortness of breath with minimal exertion, cough, sputum production and wheezing. Employer's Exhibit 5. Dr. Rosenberg also performed objective testing, noting that while claimant's pulmonary function study reflected reduced FEV1 and FVC values, his total lung capacity was normal, indicating that claimant did not have restriction. Dr. Rosenberg noted that claimant's diffusing capacity, corrected for lung volumes, was also normal, which correlates with a preserved alveolar capillary bed and claimant's normal PO2 value on blood gas study testing. *Id.* at 7. Thus, Dr. Rosenberg explained that "from an impairment perspective, [claimant] has no restriction and he has preserved oxygenation. . . . When all the above information is looked at in total, [claimant] is not disabled strictly from a pulmonary perspective; however as a whole person he can not (sic) perform his previous coal mine job or other similarly arduous types of labor."[21] *Id.*

"severe pulmonary limitations" and that "50% of his total disability" is due to coal dust exposure, substantial evidence supports the administrative law judge's reasonable inference that Dr. Alam diagnosed a totally disabling respiratory or pulmonary impairment. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985); Decision and Order at 7, 13, 14.

[21] In a supplemental report dated October 1, 2015, Dr. Rosenberg reviewed additional evidence, including the April 15, 2014 and June 2, 2015 pulmonary function testing conducted by Dr. Almatari. Employer's Exhibit 14. Dr. Rosenberg reiterated his conclusion that claimant's reduced FVC and FEV1 values were due to a variety of factors, including varying effort, the physical effects of his liver transplant, and obesity, but did not comment on the severity of any pulmonary impairment the testing reflected. *Id.* at 2. Finally, in a second supplemental report dated November 17, 2015, Dr.

In discrediting Dr. Rosenberg's opinion, the administrative law judge stated:

> Dr. Rosenberg opined that Claimant's FVC and FEV1 were reduced due to his elevated right hemi-diaphragm in relationship to Claimant's liver transplant, but his [opinion] was equivocal and he did not explain the nature and extent of the elevated right hemi-diaphragm and its impact on the reduction in Claimant's FVC and FEV1. (Employer's Exhibits 5, 14, 17.) Accordingly, I find that Dr. Rosenberg's opinion is not well-reasoned, and not well-documented on the disability issue. . . .

Decision and Order at 14.

As employer correctly asserts, the administrative law judge's discussion of Dr. Rosenberg's opinion is cursory and does not comport with the APA. Employer's Brief at 15. Initially, the administrative law judge has not explained, and we cannot discern, the basis for his conclusion that Dr. Rosenberg's opinion is equivocal. Employer's Brief at 15. Further, Dr. Rosenberg appeared to address the nature and extent of claimant's elevated right hemidiaphragm, stating that claimant's x-rays revealed that it was "significantly elevated" and explaining that it "undoubtedly exists consequent to his liver transplantation" which "resulted in a distorted position of the diaphragm post surgery." Employer's Exhibit 5 at 6-7. Moreover, Dr. Rosenberg's opinion regarding the impact of claimant's elevated diaphragm on his test results is relevant to the cause, not the presence or severity, of claimant's impairment. *See* 20 C.F.R. §718.204(a). Thus, even if Dr. Rosenberg's explanation is inadequate, it is unclear how it undermines his opinion regarding total disability. In light of these discrepancies, which the administrative law judge has not addressed, we vacate the administrative law judge's determination to discredit Dr. Rosenberg's opinion. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). On remand, the administrative law judge should reconsider Dr. Rosenberg's opinion in light of the other evidence of record, including the valid pulmonary function studies, and explain his findings.[22]

Rosenberg stated that claimant had a "respiratory impairment" due to many factors, but did not comment on the severity of the impairment. Employer's Exhibit 17.

[22] The administrative law judge should also consider whether Dr. Rosenberg's opinion that claimant is "not disabled strictly from a pulmonary perspective" but is "disabled as a whole person" constitutes an opinion as to the *presence* of a respiratory impairment, or an opinion as to the *cause* of claimant's impairment. Employer's Exhibit 5 at 7. We note that in his second supplemental report Dr. Rosenberg acknowledged that

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption, in the event that claimant again invokes the presumption. Upon invocation of the Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[23] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In finding that employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Alam, Repsher and Rosenberg.[24] Dr. Alam diagnosed legal pneumoconiosis, in the form of chronic bronchitis due to a combination of coal dust exposure and immuno-suppressant treatment following claimant's liver transplant. Decision and Order at 19, 21; Director's Exhibit

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claimant has a "respiratory impairment, but not [one due] to past coal mine dust exposure." Employer's Exhibit 17.

[23] Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[24] The administrative law judge noted that the record also contains medical opinions from Drs. Baker, Hussain, Dahhan, and Rosenberg, submitted in connection with claimant's prior claim. However, the administrative law judge reasonably relied upon the more recent medical evidence, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co*., 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 20-21.

14. In contrast, Drs. Repsher and Rosenberg opined that claimant does not have legal pneumoconiosis.[25] Employer's Exhibits 5, 8, 14, 17. The administrative law judge found Dr. Alam's opinion to be well-reasoned and well-documented and entitled to full probative weight. Decision and Order at 19. Conversely, the administrative law judge discredited the opinions of Drs. Repsher and Rosenberg as inadequately explained. *Id.*

Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Rosenberg.[26] Contrary to employer's contention, the administrative law judge permissibly questioned the opinion of Dr. Rosenberg because he found that, in attributing claimant's respiratory impairment to other causes, Dr. Rosenberg failed to explain why claimant's twenty-six years of underground coal dust exposure were not also a causative or aggravating factor. Decision and Order at 21. Because the regulatory definition of legal pneumoconiosis encompasses respiratory and pulmonary impairments "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), it was proper for the administrative law judge to determine whether the doctors adequately addressed whether coal dust had aggravated claimant's respiratory or pulmonary impairment. The administrative law judge, therefore, permissibly discredited the opinion of Dr. Rosenberg. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 21.

As we have affirmed the administrative law judge's determinations to discredit the opinions of Drs. Repsher and Rosenberg, the only opinions supportive of employer's burden, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis.[27] *See Martin*, 400 F.3d at 305, 23 BLR at 2-283. Accordingly, we

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[25] Dr. Repsher opined that claimant does not suffer from clinical or legal pneumoconiosis but suffers from "other serious and potentially serious diseases and conditions" that are "related to heredity and lifestyle factors" and cannot be attributed to coal mine dust exposure. Employer's Exhibit 8. Dr. Rosenberg opined that claimant's respiratory impairment is due to "many other factors" including his liver transplant and obesity, but is not due to coal mine dust exposure. Employer's Exhibits 5, 14, 17.

[26] We affirm, as unchallenged on appeal, the administrative law judge's determination to discredit Dr. Repsher's opinion that claimant does not have legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

[27] Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, we need not address employer's arguments regarding the administrative law judge's weighing of Dr. Alam's

affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[28] *See* 20 C.F.R. §718.305(d)(1)(i); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

The administrative law judge next addressed whether employer established rebuttal by proving that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Repsher and Rosenberg that claimant does not suffer from legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment was not caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); Decision and Order at 22. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

In summary, if the administrative law judge finds on remand that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. Finally, if the administrative law judge finds invocation of the Section 411(c)(4) presumption on remand, in light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant would be entitled to benefits.

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opinion diagnosing legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.305(d)(1).

[28] Thus, under the facts of this case, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge