U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0514 BLA

JOHN M. HAWKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	
	)	DATE ISSUED: 07/11/2018
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2016-BLA-5977) of Administrative Law Judge Natalie A. Appetta, rendered on a claim filed on November 7, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with twenty-four years and seven months of underground coal mine employment[1] and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). Thus she determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] She further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it failed to rebut the presumption.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2).[4]

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[1] Claimant's coal mine employment was in Pennsylvania. Decision and Order at 3; Hearing Transcript at 25; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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.

[3] We affirm, as unchallenged, the administrative law judge's finding that claimant established twenty-four years and seven months of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[4] Six months after filing its brief in support of the petition for review, employer argued for the first time that the manner in which Department of Labor administrative law judges are appointed may violate the Appointments Clause of the Constitution, Art. II § 2, cl. 2. Employer's Motion at 1-4. The Director, Office of Workers' Compensation

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).

I. 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). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 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).

Employer argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5] We disagree.

Programs (the Director), responded that employer waived the argument by failing to raise it in its opening brief. We agree with the Director. The Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982). While we retain the discretion in exceptional cases to consider nonjurisdictional constitutional claims that were not timely raised, *Freytag v. Comm'r*, 501 U.S. 868, 879 (1991), employer has not established that this case so qualifies. Because employer did not raise the Appointments Clause argument in its opening brief, it waived the issue. *See Lucia v. SEC*, 585 U.S. , 2018 WL 3057893 at *8 (June 21, 2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case").

[5] The administrative law judge found that the arterial blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9-10. Further, because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at n.9.

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four pulmonary function studies, dated February 12, 2015, July 8, 2015, June 29, 2016, and January 4, 2017. Decision and Order at 8-9; Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibit 24. Before determining whether the studies were qualifying[6] for total disability, she noted a discrepancy in the measurements of claimant's height, which ranged from sixty-eight to sixty-nine inches.[7] Decision and Order at 8-9. The administrative law judge resolved the evidentiary conflict by averaging the various heights, finding that claimant's correct height is 68.6 inches.[8] *Id*.

The administrative law judge next considered claimant's age at the time the pulmonary function studies were conducted. Claimant was seventy-two years old at the time of the February 12, 2015 and July 8, 2015 studies, seventy-three years old at the time of the June 29, 2016 study, and seventy-four years old at the time of the January 4, 2017 study. Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibit 24. The administrative law judge noted the Board's holding that, absent contrary probative evidence, pulmonary function studies performed on a miner who is over the age of seventy-one must be treated as qualifying if the values produced by the miner would be qualifying for a seventy-one year old. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); Decision and Order at 9. The administrative law judge further noted, however, that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for a miner who is seventy-one years old are actually normal or otherwise do not represent a totally disabling pulmonary impairment for a miner who is over the age of seventy-one. *Meade*, 24 BLR at 1-47.

The administrative law judge therefore considered Dr. Rosenberg's opinion that, using the "Knudson predictive equations," qualifying values could be extrapolated for the

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[6] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] Claimant's height was measured as sixty-eight inches for the June 29, 2016 pulmonary function study, as sixty-eight and one-half inches for the July 8, 2015 study, and as sixty-nine inches for the February 12, 2015 and January 4, 2017 studies. Director's Exhibit 10; Claimant's Exhibits 1, 2; Employer's Exhibit 24.

[8] When assessing whether the pulmonary function studies were qualifying, the administrative law judge applied the next closest height listed in the table at 20 C.F.R. Part 718, Appendix B, which she noted was 68.5 inches. Decision and Order at 8-9, n.12.

January 4, 2017 pulmonary function study for a seventy-four year old miner. Employer's Exhibit 24. Dr. Rosenberg opined that doing so revealed that the study does not reflect total disability. *Id*. However, the administrative law judge found that Dr. Rosenberg's opinion was unpersuasive. Decision and Order at 9. Consequently, she resolved to use the values for a seventy-one year old man as set forth in the tables at Appendix B. Decision and Order at 9.

Using the Appendix B tables for a seventy-one year old man of 68.5 inches in height, the administrative law judge found that the pre-bronchodilator results for the February 12, 2015, July 8, 2015, June 29, 2016 pulmonary function studies were non-qualifying, but that the pre-bronchodilator results for the January 4, 2017 study were qualifying. Decision and Order at 8-9. The administrative law judge found that none of the studies produced qualifying post-bronchodilator results. *Id*. Further, she found that the January 4, 2017 pulmonary function study was the most probative of claimant's condition because it was the most recent study conducted. *Id*. She was not persuaded by Dr. Rosenberg's opinion that all of the pulmonary function studies of record were invalid. *Id*. Crediting the qualifying pre-bronchodilator results of the January 4, 2017 study over its non-qualifying post-bronchodilator results, the administrative law judge concluded that the pulmonary function study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(i). *Id*. at 9.

Employer asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion that the January 4, 2017 pulmonary function study is not indicative of total disability based on an application of the Knudson equations. Employer's Brief at 5-9. Specifically, employer argues that the administrative law judge failed to adequately explain why Dr. Rosenberg's opinion extrapolating qualifying values for a seventy-four year old miner was unpersuasive. *Id*.

We need not resolve this issue, as any error by the administrative law judge in finding Dr. Rosenberg's extrapolation to be unpersuasive would be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As the Director notes, even if the administrative law judge had credited Dr. Rosenberg's opinion with respect to the application of the Knudson equations and used Dr. Rosenberg's suggested values, the pre-bronchodilator results for

the January 4, 2017 pulmonary function study would still be qualifying for total disability for a seventy-four year old miner.[9] Director's Brief at 2-3.

Specifically, Dr. Rosenberg opined that the qualifying values for a seventy-four year old miner are 1.75 for the FEV_1 and 2.26 for the FVC. Employer's Exhibit 27 at 5. The January 4, 2017 pulmonary function study yielded pre-bronchodilator values of 1.27 for the FEV_1 and 1.93 for the FVC.[10] *Id*. at 14. Thus, the January 4, 2017 pre-bronchodilator values are qualifying for total disability whether considered under Appendix B for a seventy-one year-old miner, or under the Knudson equations utilized by Dr. Rosenberg to derive qualifying values for a seventy-four year-old miner. Thus, any error by the administrative law judge in finding Dr. Rosenberg's extrapolation to be unpersuasive would not affect her determination that the January 4, 2017 pulmonary function study was qualifying in its pre-bronchodilator values. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.

Employer does not specifically challenge the administrative law judge's decision to credit the January 4, 2017 pulmonary function study over the February 12, 2015, July 8, 2015, and June 29, 2016 studies, because the January 4, 2017 study is the most recent study.[11] Nor does it challenge the administrative law judge's decision to credit the pre-bronchodilator values of the January 4, 2017 pulmonary function study over its post-bronchodilator values. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence supports a finding of total disability under 20 C.F.R. §718.204(b)(2)(i).

B. Medical Opinion Evidence

Employer next argues that the administrative law judge erred in her consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The

[9] Although Dr. Rosenberg indicated that the Knudson predictive equations formula was set out in Appendix 1 of his report, review of the record reveals that no such appendix was included.

[10] The January 4, 2017 post-bronchodilator results are non-qualifying under Appendix B for a seventy-one year-old miner and under the Dr. Rosenberg's Knudson equations values for a seventy-four year-old miner. Employer's Exhibit 27.

[11] Employer also does not challenge the administrative law judge's finding that Dr. Rosenberg's invalidation of the pulmonary function studies of record was unpersuasive. Decision and Order at 9. Therefore, this finding is also affirmed. *Skrack*, 6 BLR at 1-711.

administrative law judge considered the medical opinions of Drs. Rasmussen,[12] Cohen, and Rosenberg. Decision and Order at 11-14.

Dr. Rasmussen identified claimant's usual coal mine employment as a general inside laborer, which Dr. Rasmussen indicated required heavy and some very heavy manual labor.[13] Director's Exhibit 10. Dr. Rasmussen noted that claimant experienced shortness of breath with exertion, dyspnea when walking up slopes or stairs, productive cough and wheezing, and wheezing with exertion. Director's Exhibit 10. He further noted that claimant's pulmonary function studies revealed a minimal, irreversible, restrictive ventilatory impairment and that his arterial blood gas testing was non-qualifying for total disability. *Id*. Dr. Rasmussen had claimant undergo an incremental treadmill exercise study which evidenced "over-ventilation" during exercise. *Id*. Based on this testing, Dr. Rasmussen opined that claimant does not retain the "pulmonary capacity to perform his regular coal mine job." *Id*. Dr. Rasmussen explained that claimant "exceeded his anaerobic threshold normally at 65% of his predicted maximum oxygen uptake," that claimant's "minute volume was moderately increased," and that claimant "retained a breathing reserve of only 12 liters, indicating that he had exhausted his ventilatory capacity." *Id*.

Dr. Cohen noted that claimant's usual coal mine work required him to lift and move a miner cable weighing up to 100 pounds and a ventilation curtain weighing up to 50 pounds. Claimant's Exhibit 1. He opined that claimant's pulmonary function studies showed a moderately severe obstructive defect and that his cardiopulmonary exercise testing evidenced an "expiratory flow limitation to exercise." Claimant's Exhibit 1. He opined that claimant's respiratory impairment prevents him from performing his usual coal mine work. *Id*.

Dr. Rosenberg opined that claimant is not totally disabled by a respiratory or pulmonary impairment because the pulmonary function and arterial blood gas studies were not qualifying for total disability. Director's Exhibit 17; Employer's Exhibit 27. He concluded that none of the pulmonary function studies supported a finding of total

[12] Following Dr. Rasmussen's death, Dr. Forehand reviewed Dr. Rasmussen's opinion and agreed with Dr. Rasmussen's assessment that claimant is totally disabled. Director's Exhibit 11-12, 21. The administrative law judge noted that Dr. Forehand did not provide an independent assessment of total disability. *Id*. at 14.

[13] Dr. Rasmussen noted that claimant operated equipment, including the roof bolter and shuttle car, that he worked in maintenance and on a long wall, and that his last job was loading machine operator. Director's Exhibit 10. Dr. Rasmussen also noted that claimant shoveled to clean spills and moved a miner cable. *Id*.

disability when one uses the Knudson equations to extrapolate qualifying values for a seventy-four year old miner. Employer's Exhibit 27.

The administrative law judge discounted Dr. Rosenberg's opinion, reiterating her finding that his reliance on the Knudson equations to conclude that claimant's January 4, 2017 pulmonary function study was not qualifying was unpersuasive. Decision and Order at 15. Contrary to employer's contention, we see no error in the administrative law judge weighing of Dr. Rosenberg's opinion. As noted *supra*, the January 4, 2017 pulmonary function study produced qualifying pre-bronchodilator values both under Appendix B for a seventy-one year-old miner and under the Knudson equations utilized by Dr. Rosenberg for a seventy-four year-old miner. Employer's Exhibit 27. Therefore, insofar as Dr. Rosenberg assumed that none of claimant's pulmonary function studies were qualifying when opining that claimant is not totally disabled, the administrative law judge rationally discounted his opinion. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002) (holding that an administrative law judge should reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation); *Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20 (3d Cir. 1997); Decision and Order at 15.

Furthermore, contrary to employer's argument, the administrative law judge permissibly found that Dr. Rasmussen's opinion was well-reasoned and documented because Dr. Rasmussen "explained how the over-ventilation seen in the claimant is disabling, despite non-qualifying" arterial blood gas and pulmonary function testing. Decision and Order at 15; *see Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). The administrative law judge also permissibly found that Dr. Cohen's opinion was well-reasoned and documented, because he "adequately explained how the non-qualifying testing indicated total disability in this claimant" and "he explain[ed] the objective testing he relied upon to make his diagnosis." *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge thereafter weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 15. Because employer does not allege any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R.

§718.204(b)(2), we affirm her determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[14] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish that claimant does not have legal pneumoconiosis,[15] the administrative law judge considered Dr. Rosenberg's medical opinion.[16] Decision and Order at 19-20.

[14] "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[15] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 22.

[16] The administrative law judge also considered the opinions of Drs. Rasmussen and Cohen. Decision and Order at 19-20. Dr. Rasmussen diagnosed legal pneumoconiosis, as he attributed claimant's restrictive ventilatory impairment to his coal mine dust exposure. Director's Exhibit 10. Dr. Forehand reviewed Dr. Rasmussen's opinion and opined that he agreed with Dr. Rasmussen's conclusions. Director's Exhibit 21. Dr. Cohen also diagnosed legal pneumoconiosis, as he opined that claimant's obstructive respiratory impairment arose out of coal mine employment. Claimant's Exhibit 1. The administrative law judge found that the opinions of Drs. Rasmussen and Cohen were reasoned and documented and entitled to the most weight. Decision and Order at 19-20. The

In an August 18, 2015 report, Dr. Rosenberg opined that claimant has a restrictive ventilatory impairment related to an abnormality of the thoracic spine. Director's Exhibit 17. He further opined that claimant has no airflow obstruction "which would suggest the presence of legal" pneumoconiosis. *Id*. In a March 6, 2017 report, Dr. Rosenberg concluded that claimant has an obstructive respiratory impairment due to asthma. Employer's Exhibit 27. He explained that the marked bronchodilator response and the pattern of FEV1 and FVC values seen on claimant's pulmonary function study suggests that the obstructive respiratory impairment is unrelated to chronic scarring caused by legal pneumoconiosis. *Id*. However, Dr. Rosenberg also stated that claimant "possibly has a component of legal coal workers' pneumoconiosis." *Id*. Specifically, he explained that "coal mine dust exposure can contribute to airflow obstruction with an impairment pattern similar to what is observed" on claimant's pulmonary function testing. *Id*. Dr. Rosenberg therefore indicated that he needed to review medical records and previous pulmonary function studies to address whether claimant has legal pneumoconiosis. *Id*.

The administrative law judge accorded Dr. Rosenberg's 2015 opinion "little weight" because she found it to be inconsistent with the regulations, in that Dr. Rosenberg required the presence of an obstructive respiratory impairment to diagnose legal pneumoconiosis. Decision and Order at 19. The administrative law judge specifically noted that the definition of legal pneumoconiosis includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*, *quoting* 20 C.F.R. §718.201(a)(2).

Additionally, the administrative law judge found that Dr. Rosenberg's 2017 opinion was inconsistent with the regulations because Dr. Rosenberg required the presence of scarring within the lungs to diagnose legal pneumoconiosis, when the regulatory definition "do[es] not indicate that legal pneumoconiosis must be associate with scarring . . . ." Decision and Order at 20. She found that Dr. Rosenberg's diagnosis of asthma was "poorly documented" because claimant's "extensive" medical treatment records did not indicate any prior diagnosis or treatment of asthma. *Id*. Further, she found that Dr. Rosenberg's opinion was unpersuasive because he did not adequately explain why claimant's years of coal mine dust exposure did not aggravate his obstructive respiratory impairment. *Id*. The administrative law judge additionally found that Dr. Rosenberg "equivocate[d] in his opinion" by stating both that claimant does not have legal pneumoconiosis, and that he may have a component of legal pneumoconiosis. *Id*. Therefore, the administrative law judge accorded Dr. Rosenberg's opinion "little weight." *Id*.

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administrative law judge did not independently weigh Dr. Forehand's opinion on the issue of legal pneumoconiosis.

Employer argues that Dr. Rosenberg's was not equivocal, and that Dr. Rosenberg adequately explained why twenty-five years of coal mine dust exposure did not aggravate claimant's obstructive respiratory impairment.[17] Employer's Brief at 16-17. Employer's arguments lack merit. Because Dr. Rosenberg stated that claimant "possibly" has legal pneumoconiosis and that Dr. Rosenberg needed to review additional medical evidence in order to exclude a diagnosis of legal pneumoconiosis, the administrative law judge permissibly found that his opinion was equivocal. Employer's Exhibit 27; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Contrary to employer's additional contention, the administrative law judge permissibly found that Dr. Rosenberg did not adequately explain why twenty-five years of coal mine dust exposure did not aggravate claimant's obstructive respiratory impairment. *See* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95.

Substantial evidence supports the administrative law judge's credibility determinations regarding Dr. Rosenberg's opinion, and the Board is not empowered to reweigh the evidence.[18] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Accordingly, we 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 legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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). Contrary to employer's argument, the

[17] Employer does not challenge the administrative law judge's findings that aspects of Dr. Rosenberg's opinion are inconsistent with the regulatory definition of pneumoconiosis, or that his diagnosis of asthma is poorly documented. Decision and Order at 19-20. Therefore, these credibility determinations are affirmed. *See Skrack*, 6 BLR at 1-711. Employer has cited no other rationale set forth by Dr. Rosenberg which supports its position that claimant does not have legal pneumoconiosis.

[18] Employer does not challenge the administrative law judge's decision to assign greater weight to Dr. Cohen's diagnosis of legal pneumoconiosis. Therefore this finding is affirmed. *Skrack*, 6 BLR at 1-711. We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Rasmussen and Forehand, as their opinions do not assist employer in establishing that claimant does not have legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

administrative law judge rationally discounted Dr. Rosenberg's opinion that claimant's disability is not due to pneumoconiosis because Dr. Rosenberg did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove that claimant has the disease.[19] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013); *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 23-24. Therefore, we 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[19] We reject employer's argument that the administrative law judge cannot discredit Dr. Rosenberg's opinion for failing to diagnose legal pneumoconiosis where legal pneumoconiosis is established by the Section 411(c)(4) presumption. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 452 (6th Cir. 2013) (rejecting the employer's argument that the administrative law judge erred by discrediting an opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found).