U.S. Department of Labor

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

BRB No. 15-0342 BLA

ROBERT C. THOMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 06/30/2016
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT/SELF-INSURED THROUGH CONSOL ENERGY	)	
	)	
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 Awarding Benefits on Second Remand of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P.C.), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Maia S. Fisher, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Second Remand (2009-BLA-05197) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed on February 14, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the third time. In its most recent Decision and Order, the Board vacated the award of benefits issued by Administrative Law Judge Richard K. Malamphy on March 23, 2013, and remanded the case for reconsideration of total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), and invocation of 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).[1] *Thompson v. Consolidation Coal Co.*, BRB No. 13-0321 BLA, slip op. at 5 (Apr. 23, 2014) (unpub.). The Board also instructed Judge Malamphy to reconsider his rebuttal findings relevant to legal pneumoconiosis and total disability causation if claimant invoked the Section 411(c)(4) presumption on remand.

Due to Judge Malamphy's retirement, the case was reassigned to Judge Bergstrom (the administrative law judge). The administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. The administrative law judge further determined that employer failed to rebut the presumption and awarded benefits accordingly.

Employer argues that the administrative law judge erred by applying the rebuttal provisions at 20 C.F.R. §718.305(d)(1), because the regulation is not valid and employer was not given the opportunity to develop evidence relevant to the standard for rebutting

[1] 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 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.

the presumed fact of total disability causation. Employer also contends that the administrative law judge erred by finding that claimant established total disability, thereby invoking the Section 411(c)(4) presumption, and by finding that employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to summarily reject employer's arguments with regard to the application of Section 411(c)(4) and its implementing regulation at 20 C.F.R. §718.305. Employer has filed briefs in reply to claimant's and Director's responses, reiterating its contentions.[2]

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.[3] 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

Employer contends that the administrative law judge did not properly weigh the evidence on the issue of total disability, specifically challenging the administrative law judge's findings that the arterial blood-gas tests and medical opinion evidence are sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(b)(2).

[2] We agree with the Director, Office of Workers' Compensation Programs, regarding the summary rejection of employer's challenge to the application of the rebuttal provisions of Section 411(c)(4) and 20 C.F.R. §718.305. We determined in our most recent prior Decision and Order that these arguments are without merit, and those holdings now constitute the law of the case. *Thompson v. Consolidation Coal Co.*, BRB No. 13-0321 BLA, slip op. at 3 (Apr. 23, 2014) (unpub.); *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). Because employer has not advanced any persuasive reasons for recognizing an exception to that doctrine, we decline to revisit our prior holdings.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as claimant's coal mine employment was in Utah. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

A. Arterial Blood-Gas Tests

Prior to weighing the arterial blood-gas tests at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered Dr. Repsher's opinion that the qualifying pO2 and pCO2 values,[4] designated in Appendix C to 20 C.F.R. Part 718, are not accurate indicators of total disability. Decision and Order at 29; Employer's Exhibits 8, 11. Dr. Repsher obtained a resting arterial blood-gas test on November 13, 2008 at Crestview Hospital. Employer's Exhibit 8. This test produced qualifying values under the table at Appendix C to 20 C.F.R. Part 718. *Id*. Dr. Repsher noted, however, that the test results were "normal" according to the values used by Dr. Gagon in his laboratory, which is located at Crestview Hospital in Price, Utah. *Id*. Dr. Repsher characterized these values as more accurate than those in Appendix C because they more precisely account for the age of the test subject and the altitude where the test was performed. *Id*. The administrative law judge discredited Dr. Repsher's opinion, finding it "poorly reasoned." Decision and Order at 29.

Employer alleges that, contrary to the administrative law judge's determination, Dr. Repsher's opinion is well-reasoned because it is supported by Crestview Hospital's predicted normal values. This contention is without merit. Assessing the probative value of the evidence is a task committed to the discretion of the administrative law judge in his role as fact-finder, and his findings will not be disturbed unless they are plainly irrational. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). Because the disability standards in Appendix C are already adjusted for age and altitude and, by extension, for barometric pressure, the administrative law judge acted within his discretion in finding Dr. Repsher's opinion poorly reasoned in light of his failure "to provide or explain the adjustments he made to determine that the values he obtained were 'non-qualifying.'"[5] Decision and Order at 30;

[4] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[5] The regulation at 20 C.F.R. §718.204(b)(2)(ii) provides, "[i]n the absence of contrary probative evidence," arterial blood-gas values that are equal to or less than those set forth in Appendix C "shall establish a miner's total disability." 20 C.F.R. §718.204(b)(2)(ii). Regarding comments received before the final version of Appendix C was promulgated, the Department of Labor (DOL) acknowledged that altitude affects arterial blood-gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). Consequently,

see Big Horn v. Director, OWCP [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990). The administrative law judge also rationally found that, although Dr. Repsher asserted that the blood-gas test results were affected by claimant's "likely" cardiovascular disease, he did not explain how this detracted from the reliability of claimant's pO2 and pCO2 values as a measure of total respiratory or pulmonary disability. Employer's Exhibit 11 at 2; *see Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1217, 24 BLR 2-155, 2-164 (10th Cir. 2009); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 30. Similarly, the administrative law judge acted within his discretion in discrediting Dr. Repsher's statement that the May 7, 2008 qualifying exercise blood-gas test was "probably the result of laboratory error," because it was speculative. Decision and Order at 29, *quoting* Employer's Exhibit 11 at 2; *see Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988).

The administrative law judge then considered whether the results of the blood-gas tests administered on May 7, 2008, November 13, 2008, and September 17, 2009, were sufficient to establish total disability under 20 C.F.R. 718.204(b)(2)(ii). Decision and Order at 31; Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibit 8. The May 7, 2008 arterial blood-gas test, administered by Dr. Gagon during the examination sponsored by the Department of Labor, produced qualifying values at exercise, but not at rest. Director's Exhibit 10. As previously indicated, Dr. Repsher's November 13, 2008 test, performed only at rest, was also qualifying. Employer's Exhibit 8. Dr. James obtained the September 17, 2009 resting test, which produced qualifying values. Claimant's Exhibit 3.

The administrative law judge concluded that the arterial blood-gas evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), because the preponderance of the more recent tests was qualifying, and the qualifying post-exercise results from the May 7, 2008 test more accurately reflected claimant's ability to perform heavy labor. Decision and Order at 31. We affirm the administrative law judge's findings, as they are rational and supported by substantial evidence. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988).

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the DOL adopted a sliding scale that designated three levels of altitude. *Id*. The DOL also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. *Id*. Therefore, the values set forth in Appendix C were determined by the DOL after consideration of elevation and the advanced age of many miners filing claims for benefits.

B. Medical Opinions

Before weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the exertional requirements of claimant's usual coal mine employment. On a signed form, dated January 26, 2009, and entitled *Requirements of Last Coal Mine Job*, claimant reported:

> As a pre-plant operator, I would load trucks from [the] tipple or with [a] front-end loader. I would have to shovel by hand coal spills from [the] belt or trucks. I would also load materials, belt rollers, rock dust, grease buckets and timbers with [a] fork-lift and by hand to go underground. I would have to grease belt rollers, clean [the] large magnet which removed all metal which came out of the miner, such as roof bolt[s] and put in [the] dumpster at pre-plant and maintain all equipment outside. When there were no trucks to load, I was sent underground to help move belts, belt structure, set timbers, etc., whatever needed to be done.

Employer's Exhibit 14 at 52. Claimant further indicated that his duties required him to: walk approximately two miles per shift; climb forty-five steps, two to three times per shift or as needed; lift from fifteen to one-hundred pounds, including belt rollers weighing one-hundred pounds, rock dust bags weighing fifty pounds, and timbers weighing one-hundred pounds; and carry grease cans, five gallon buckets, respiratory gear, a mine belt, and a mine light. *Id*.; Claimant's Exhibit 6. Based on his review of this evidence, the administrative law judge concluded that claimant's usual coal mine employment required "heavy labor." Decision and Order at 31. We affirm this finding because it is unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. James and Zaldivar that claimant has a totally disabling pulmonary impairment and the contrary opinion of Dr. Repsher.[6] Decision and Order at

[6] The administrative law judge noted that the Board affirmed Judge Malamphy's finding that Drs. Cohen and Gagon did not address whether claimant is totally disabled. Decision and Order at 32. The Board only observed, however, "that no party challenged this aspect of [Judge Malamphy's] decision." *Thompson*, BRB No. 13-0321 BLA, slip op. at 5, n.8. Dr. Cohen reviewed the three arterial blood gas-tests of record and diagnosed "mild gas exchange abnormalities." Employer's Exhibit 12 at 3. Dr. Gagon performed resting and exercise arterial blood-gas tests on April 7, 2008, diagnosed an impairment of "moderate severity," and attributed the impairment to shortness of breath and hypoxia on exertion. Director's Exhibit 10. Because neither Dr. Cohen, nor Dr.

32-34; Claimant's Exhibits 1, 10, 11; Employer's Exhibits 4, 6, 11, 13. The administrative law judge acknowledged the "excellent credentials" possessed by Drs. James, Zaldivar, and Repsher, and noted that each is "thoroughly published, though many of Dr. Zaldivar's publications relate to sleep medicine rather than pulmonology." Decision and Order at 32. The administrative law judge accorded Dr. James's opinion "much probative weight" because his diagnosis of a totally disabling pulmonary impairment was supported by the underlying objective studies and the exertional requirements of claimant's usual coal mine work. *Id*. at 34; Claimant's Exhibits 1, 10, 11. In contrast, the administrative law judge determined that Dr. Zaldivar's opinion was entitled to "little probative weight," as it "seem[ed] to pertain only" to claimant's ability to carry objects up and down steps.[7] Decision and Order at 33-34; Employer's Exhibit 13. The administrative law judge further found that Dr. Zaldivar mischaracterized Dr. Morgan's treatment records "in noting that [c]laimant rarely complained of respiratory symptoms[.]" Decision and Order at 32. The administrative law judge determined that Dr. Repsher's opinion was also entitled to "little probative weight," because he relied on discredited conclusions regarding the arterial blood-gas test evidence, failed to describe the exertional requirements of claimant's coal mine work, and was incorrect in stating that Dr. Morgan's treatment records contained no relevant information. *Id*. at 33; Employer's Exhibits 4, 6. Based on his decision to accord greatest weight to Dr. James's opinion diagnosing a totally disabling pulmonary impairment, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 34. The administrative law judge further determined that, when considered as a whole, the evidence of record was sufficient to satisfy claimant's burden of proof under 20 C.F.R. §718.204(b)(2). *Id*.

Gagon, offered an opinion as to the extent, if any, these impairments prevented claimant from performing his usual coal mine work, the administrative law judge permissibly determined that he was not required to weigh their opinions under 20 C.F.R. §718.204(b)(2)(iv). *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc).

[7] Dr. Zaldivar initially opined, "from a pulmonary standpoint[,] judging by the blood-gas abnormality, [claimant] has an impairment that would not allow him to do very heavy manual labor." Employer's Exhibit 13 at 7. When specifically describing claimant's ability to perform his usual coal mine job, Dr. Zaldivar stated, "[f]rom the blood-gas standpoint, [claimant] would not be able to his usual coal mining work as he described it regarding carrying objects up and down steps." *Id*.

Employer argues that the administrative law judge erred in finding that Dr. James's medical opinion was sufficient to establish total disability without considering that the pulmonary function study Dr. James performed produced nonqualifying[8] results and that he characterized the study as showing only a "mild" impairment. *See* Claimant's Exhibit 1. Employer further alleges that the administrative law judge erred in stating that Dr. James's opinion is supported by Dr. Morgan's treatment records.

We hold that employer has not identified error requiring us to vacate the administrative law judge's decision to accord "much probative weight" to Dr. James's opinion. Contrary to employer's contention, the fact that the pulmonary function study Dr. James obtained is nonqualifying under 20 C.F.R. 718.204(b)(2)(i) did not preclude the administrative law judge from crediting his diagnosis of a totally disabling pulmonary impairment.[9] Decision and Order at 34; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). Rather, the administrative law judge rationally found that Dr. James's opinion was documented by the arterial blood-gas test evidence, in addition to the pulmonary function study showing a mild obstructive impairment, particularly in light of the fact that claimant's usual coal mine job required heavy manual labor. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873, 20 BLR 2-334, 2-338-39 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 370, 17 BLR 2-48, 2-59 (10th Cir. 1993); *Clark*, 12 BLR at 1-155.

[8] A "nonqualifying" pulmonary function study exceeds the values set out in the table at Appendix B to 20 C.F.R. Part 718. 20 C.F.R. §718.204(b)(2)(i).

[9] We also reject employer's argument, erroneously raised at rebuttal, that the administrative law judge erred in discounting Dr. Repsher's invalidation of the pulmonary function study performed by Dr. James. The administrative law judge reasonably determined that Dr. Repsher's opinion is not supported by the record, in light of notations on the test results that claimant showed good effort and that the testing satisfied the American Thoracic Society's criteria. *See Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 40; Claimant's Exhibit 1. In addition, we decline to consider employer's contention that Dr. Repsher "testified that his opinion was based upon review of the flow volume curves." Employer's Brief at 16, *citing* Employer's Exhibit 5 at 14. When Judge Malamphy reopened the record after the Board's initial Decision and Order remanding the case to him, he allowed the parties to develop evidence relevant to invocation and rebuttal of the Section 411(c)(4) presumption. The parties conferred as to their submissions and agreed that employer would submit two supplemental reports from Dr. Repsher, but withdraw his deposition. Judge Malamphy's March 28, 2013 Decision and Order on Remand at 2.

In addition, although Dr. James recorded the symptoms of "morning cough and phlegm production over the past 4 to 5 years" in the "History" section of the report of his examination of claimant, and indicated that he reviewed only one office note from Dr. Morgan, employer does not explain how the administrative judge's identification of Dr. Morgan's treatment records as the source of this information detracts from the credibility of Dr. James's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984). We affirm, therefore, the administrative law judge's weighing of Dr. James's opinion.

Despite the fact that Dr. Zaldivar rendered a diagnosis of a totally disabling pulmonary impairment that assists claimant in satisfying his burden, employer argues that the administrative law judge erred in discrediting Dr. Zaldivar's opinion, based on Dr. Zaldivar's erroneous understanding that claimant's treatment records contained only rare mentions of respiratory or pulmonary complaints. We hold that error, if any, in the administrative law judge's finding is harmless, as he provided a valid alternative rationale for his discrediting of Dr. Zaldivar's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161, 1-164 n.5 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-383 n.4 (1983). The administrative law judge acted within his discretion in giving little weight to Dr. Zaldivar's opinion because Dr. Zaldivar limited his assessment of claimant's ability to perform his usual coal mine work to the requirement that he carry items up and down steps. *See Poole*, 897 F.2d at 893-94, 13 BLR at 2-355-56. We affirm, therefore, the administrative law judge's decision to accord little weight to Dr. Zaldivar's diagnosis of a totally disabling pulmonary impairment.

Employer next argues that the administrative law judge erred in "disregard[ing]" Dr. Repsher's opinion because he relied on his belief that the blood gas-tests were not qualifying, and reiterates that Dr. Repsher was correct, based on Castleview Hospital's "predicted normal values." Brief in Support of Petition for Review at 11. Employer also contends that the administrative law judge mistakenly determined that Dr. Repsher failed to consider Dr. Morgan's notes indicating claimant's "progressively worsening complaints of breathing difficulties." *Id.* at 12. Employer further alleges that, although the administrative law judge "dismissed" Dr. Repsher's opinion because he did not explain how he calculated the A-a gradient value, there was no indication that either Dr. Zaldivar or Dr. James characterized Dr. Repsher's calculation as erroneous. *Id*. at 14. In addition, employer asserts that the administrative law judge's finding that Dr. Repsher erroneously observed that claimant's hearing testimony and a note in Dr. Morgan's treatment records established that claimant walked to the summit of a hill to get to his job is unsupported by the record.

We reject employer's contentions. The administrative law judge rationally discredited Dr. Repsher's view that the A-a gradient is the most accurate measure of

blood-gas exchange impairments because he failed to explain how he selected the predicted or reported A-a gradient, and he did not identify the adjustments he made for altitude to determine that claimant's A-a gradient is "well within the normal range."[10] Employer's Exhibit 6; *see Pickup,* 100 F.3d at 873, 20 BLR at 2-338-39. Regarding Dr. Morgan's comment on claimant's ability to walk up hills,[11] the administrative law judge correctly stated, "[c]laimant's testimony that he avoided hills[12] related to his ability to walk up hills, as hiking was a hobby of his, whereas he did not report to Dr. Morgan that he *walks* up the mountain to get to work every day." Decision and Order at 33 (emphasis added); Hearing Transcript at 48; Employer's Exhibit 14. Finally, the administrative law judge acted within his discretion in determining that Dr. Repsher's opinion was

[10] The administrative law judge also reasonably concluded that Dr. Zaldivar's characterization of the A-a gradient as a "tool with which to standardize the blood gases at any altitude," was entitled to little weight because he did not address whether claimant's reported A-a gradient values were consistent with the diagnosis of a blood-gas exchange impairment. Employer's Exhibit 13 at 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 34. Similarly, the administrative law judge acted within his discretion in finding that Dr. James's comment that claimant's A-a gradient was consistent with "oxygen transfer/gas exchange problems" did not prove or disprove the presence of a totally disabling impairment, as Dr. James did not compare the A-a gradient he calculated to the values obtained on the other arterial blood-gas tests in the record. Decision and Order at 34, *quoting* Claimant's Exhibit 10 at 4; *see Clark*, 12 BLR at 1-155.

[11] Dr. Morgan reported that claimant had "to travel**,"** not walk, "from high to low altitude on a daily basis." Employer's Exhibit 14 at 13, 15.

[12] At the September 17, 2009 hearing in this case, when asked if he had "any difficulties going up hills or stairways," claimant responded:

A: Oh, Yes . . .

A: I can't generally go up on them. I have to stop, if I walk them at all. I try to go around them, you know . . . I just don't go up and down, climb the mountains anymore.

I used to do a lot of walking and hiking when I was younger. And I just, I can't do that anymore . . .

I don't have the breath. I don't have enough air.

Hearing Transcript at 48-49.

undermined by his conclusion, contrary to the administrative law judge's finding, that none of the arterial blood-gas tests produced qualifying values. *See Hansen v.* 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155. We affirm, therefore, the administrative law judge's decision to accord "little probative weight" to Dr. Repsher's opinion and we decline to address employer's additional allegations of error regarding the administrative law judge's weighing of Dr. Repsher's opinion. Decision and Order at 33; *see Searls*, 11 BLR at 1-164 n.5; *Kozele*, 6 BLR at 1-383 n.4.

Because employer has not raised any meritorious allegation of error regarding the administrative judge's weighing of the medical opinions of Drs. James, Zaldivar, and Repsher under 20 C.F.R. 718.204(b)(2)(iv), we affirm his finding that Dr. James's diagnosis of a totally disabling pulmonary impairment is entitled to the greatest weight. We further affirm his finding that when all relevant evidence is considered together, Dr. James's medical opinion, as supported by the arterial blood-gas test evidence, is sufficient to establish that claimant has a totally disabling pulmonary impairment pursuant to 20 C.F.R. 718.204(b)(2). *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479, 13 BLR 2-196, 2-208 (10th Cir. 1989); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). 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 a totally disabling pulmonary impairment at 20 C.F.R. §718.204(b)(2), we also affirm his determination that claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1); *see Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1335, 25 BLR 2-549, 2-554 (10th Cir. 2014)

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

In order to rebut the Section 411(c)(4) presumption, employer must establish that claimant has neither legal[13] nor clinical pneumoconiosis,[14] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §

[13] Legal pneumoconiosis is defined as "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).

[14] "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).

718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Goodin*, 743 F.3d at 1336-7, 25 BLR at 2-556; *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R §718.305(d)(1)(i)(B), but failed to affirmatively establish that claimant does not have legal pneumoconiosis, or that no part of claimant's pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Decision and Order at 40-41, 43. Employer challenges the administrative law judge's finding that it failed to disprove legal pneumoconiosis, and failed to prove that claimant's total disability was not caused by pneumoconiosis.

A. Legal Pneumoconiosis

The administrative law judge initially observed that the Board affirmed Judge Malamphy's findings that the medical opinions of Drs. Cohen and Zaldivar do not assist employer in satisfying its burden of proving that claimant does not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 40, *citing Thompson*, BRB No. 13-321 BLA, slip op. at 10-11 n.18; Employer's Exhibits 12, 13. The administrative law judge then determined that Drs. James and Gagon opined that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, while Dr. Repsher determined that claimant does not have a respiratory or pulmonary impairment related to dust exposure in coal mine employment. Decision and Order at 40; Director's Exhibit 10; Claimant's Exhibits 1, 10, 11; Employer's Exhibits 4, 6, 11. The administrative law judge reiterated his prior finding that Drs. James and Repsher possess "excellent credentials," and characterized Dr. Gagon as "well-credentialed," although he practices, and is Board-certified in, family medicine. Decision and Order at 40. The administrative law judge then found that, although each medical opinion is generally well-documented, Dr. Repsher's opinion is "less well-documented" because he relied on his diagnosis of a cardiovascular defect, "without significant support in the record for his theory." *Id.* The administrative law judge concluded, therefore, that employer failed to establish by a preponderance of the evidence that claimant does not suffer from legal pneumoconiosis. *Id.* at 40-41.

Employer contends that in discounting Dr. Repsher's opinion, the administrative law judge failed to acknowledge the echocardiogram (ECG) performed at Castleview Hospital on October 13, 2009, that supports Dr. Repsher's view that a heart condition caused claimant's impairment. Similarly, employer asserts that the administrative law judge did not address Dr. Gagon's notation on the May 7, 2008 arterial blood-gas test that he observed frequent premature ventricular contractions and multifocal premature ventricular contractions. Employer's arguments lack merit.

The administrative law judge correctly found that Dr. Repsher's opinion that claimant's gas exchange impairment is due solely to a cardiovascular defect was based on his review of Dr. James's medical reports. Decision and Order at 40; Employer's Exhibit 8 at 4. The administrative law judge also observed correctly that Dr. James ordered the October 13, 2009 ECG, and he stated only that it showed left ventricular hypertrophy and mild diastolic dysfunction. Decision and Order at 21; Claimant's Exhibit 1 at 3. The administrative law judge further found, and employer does not dispute, that although Dr. Morgan's records indicate that claimant has undergone multiple cardiac tests between 2004 and 2011, none of the test reports include a physician's recommendation that claimant receive further treatment. Decision and Order at 40. Accordingly, the administrative law judge rationally found that Dr. Repsher's opinion is entitled to little weight because he "points to no medical evidence arising from his own examination of [c]laimant or any additional evidence in the [c]laimant's medical records to support his finding that a heart abnormality caused [c]laimant's impairment." *See Hansen v.* 984 F.2d at 370, 17 BLR at 2-59; *Clark*, 12 BLR at 1-155; Decision and Order at 40. We affirm, therefore, the administrative law judge's determination that Dr. Repsher's opinion is insufficient to satisfy employer's burden to affirmatively prove that claimant does not have legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[15]

B. Total Disability Causation

The administrative law judge considered the opinions of Drs. Repsher, Cohen, and Zaldivar in determining whether employer rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 42-43; Employer's Exhibits 4, 6, 11-13. The administrative law judge discredited Dr. Repsher's opinion, that any impairment suffered by claimant is due to cardiac disease, for the reasons he provided under 20 C.F.R. §§718.204(b)(2) and 718.305(d)(1)(i)(A). *Id*. at 42. He gave "little probative weight" to Dr. Cohen's opinion because he did not identify the source of claimant's abnormal blood-gas exchange results. *Id*. The administrative law judge accorded Dr. Zaldivar's opinion, that claimant's disability was caused by idiopathic pulmonary fibrosis that is unrelated to legal pneumoconiosis, "decreased probative weight," as Dr. Zaldivar based his conclusion on the diagnosis of a disease of unknown origin. *Id*. at 42-43. He also discredited Dr. Zaldivar's opinion because he failed to

[15] Based on our affirmance of the administrative law judge's discrediting of Dr. Repsher's opinion, the only evidence that supports employer's burden to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i)(A), we need not address employer's allegations of error regarding the administrative law judge's crediting of the opinions in which Drs. James and Gagon diagnosed legal pneumoconiosis.

diagnose legal pneumoconiosis, contrary to the administrative law judge's weighing of the evidence under 20 C.F.R. §718.305(d)(1)(i)(A). *Id*.

Employer asserts that the administrative law judge erred in giving little weight to Dr. Repsher's disability causation opinion, reiterating the allegations of error relevant to the issue of legal pneumoconiosis. Employer also maintains that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Cohen and Zaldivar. Employer asserts that Dr. Zaldivar's opinion is supported by the findings of Drs. Wiot and James, who agreed that the fibrosis in claimant's lower lung zones was not caused by exposure to coal dust.[16]

Employer's allegations of error do not have merit. The administrative law judge rationally discounted the opinions of Drs. Repsher, Cohen, and Zaldivar that claimant's disability was not due to pneumoconiosis because these physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Goodin*, 743 F.3d 134, 25 BLR at 2-570; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). We affirm, therefore, the administrative law judge's conclusion that these opinions are insufficient to establish that "no part of [claimant's] pulmonary impairment was caused by pneumoconiosis," as defined in 20 C.F.R. §718.201. 20 C.F.R. §718.305(d)(1)(ii). Based on our affirmance of the administrative law judge's findings under 20 C.F.R. §718.305(d)(1)(A) and (ii), we further affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption.

[16] Employer also argues that the "no part," or "rule out," standard that the administrative law judge applied to determine whether employer rebutted the presumed fact of total disability causation is not valid. We reject employer's contention for the reasons identified by the Tenth Circuit in *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin,* 743 F.3d 1331, 1342, 25 BLR 2-549, 2-556 (10th Cir. 2014) (The rebuttal provisions set forth in 20 C.F.R. §718.305(d)(1) "do not change existing law and are substantially consistent with prior regulations and agency practices.").

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge