U.S. Department of Labor

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

BRB No. 17-0423 BLA

MARY VIRGINIA CLARK (o/b/o LARRY RONALD CLARK, deceased) Claimant-Respondent v. MOUNTAIN MINING COMPANY, INCORPORATED Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/20/2018 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Barry H. Joyner (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2016-BLA-05060) of Administrative Law Judge Daniel F. Solomon, 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 or BLBA). The administrative law judge initially found that employer is the responsible operator. He also found that the miner[1] had at least fifteen years of surface coal mine employment[2] in conditions substantially similar to those in an underground mine and a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator. Employer further asserts that the administrative law judge erred in finding that the miner had at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Finally, employer argues that the administrative law judge erred in finding

[1] The miner died on July 31, 2016, while his claim was pending before the Office of Administrative Law Judges. Decision and Order at 3; Motion to Amend Caption of Claim at 1; Claimant's Exhibit 10. Claimant, the widow of the miner, is pursuing the claim on his behalf. *Id*.

[2] The miner's coal mine employment was in Virginia. Decision and Order at 3; Hearing Transcript at 10; Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes fifteen or more 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

that it failed to rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to affirm the finding that employer is the responsible operator and reject employer's argument that 20 C.F.R. §718.305(d)(2) is invalid. Employer has filed a consolidated reply brief reiterating its arguments.

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. Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). An operator is a "potentially liable operator" if it employed the miner for a cumulative period of not less than one year and is financially capable of assuming liability for the claim.[5] 20 C.F.R §725.494(c), (e). Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another potentially liable operator more recently employed the miner for at least one year and is financially capable of assuming liability for benefits. 20 C.F.R. §725.495(c).

The administrative law judge addressed employer's argument that another operator, Mac Mining, Inc. (Mac Mining), more recently employed the miner for one year. Decision and Order at 5-7; *see also* Order Re: Employer/Carrier Motion to Dismiss, March 24, 2016. The administrative law judge determined that Mac Mining and its insurer, Rockwood Insurance Company (Rockwood), are insolvent. *Id*. He further determined that, contrary to employer's contention, the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA) was not obligated to pay benefits on the claim as a guarantor of Rockwood. *Id*. Specifically, the administrative law judge found that the claim was not a

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] The regulation at 20 C.F.R §725.494 further requires that the miner's disability or death arise at least in part out of employment with that operator; the operator, or any person with respect to which the operator may be considered a successor, was an operator for any period after June 30, 1973; and the miner's employment included at least one working day after December 31, 1969. 20 C.F.R §725.494(a)-(e).

"covered claim" under the Virginia Property and Casualty Insurance Guaranty Association Act (Guaranty Act), based on the filing date of the miner's claim.[6] Decision and Order at 6, *quoting* Va. Code Ann. §§38.2-1603, 1606. Thus, the administrative law judge determined that employer failed to meet its burden to establish that Mac Mining is financially capable of assuming liability for the claim pursuant to 20 C.F.R §§725.494(e), 725.495(c)(2). *Id*.

Employer argues that the administrative law judge erred in finding that VPCIGA did not assume liability for this claim as a guarantor of Rockwood. Employer's Brief at 15-20. Employer asserts that VPCIGA is an insurer under the BLBA and cannot rely on state law to limit its liability under federal law. *Id*. Employer contends that the BLBA requires all insurers and reinsurers to assume full liability for black lung claims, and preempts the Virginia Guaranty Act. *Id*. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected that argument, holding that VPCIGA is not an insurer within the meaning of the BLBA and, thus, is not covered by the BLBA. *RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 285-87, 25 BLR 2-841, 2-853-57 (4th Cir. 2016). For the reasons set forth in *Mullins*, we reject employer's argument.[7]

Employer argues, in the alternative, that the miner's hearing testimony establishes that Habco Enterprises (Habco) is a potentially liable operator that employed the miner more recently for at least one year. Employer's Brief at 20-21. Employer asserts that the administrative law judge erred in failing to address this issue. *Id*.

---

[6] The administrative law judge noted that the Virginia Property and Casualty Insurance Guaranty Association Act limits reinsurance to covered claims, and that a "covered claim shall not include any claim filed with the Guaranty Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer." Decision and Order at 6, *quoting* Va. Code Ann. §§38.2-1603, 1606. The "final date" for claims against Rockwood Insurance Company was August 26, 1992. *See RB & F Coal, Inc. v. Mullins*, 842 F.3d 279, 282, 25 BLR 2-841, 2-843 (4th Cir. 2016). The miner filed his claim on September 30, 2013.

[7] Employer also argues that the administrative law judge erroneously shifted the burden of proof by requiring it to establish that Mac Mining, Inc. (Mac Mining) is not a potentially liable operator. Employer's Brief at 19. Contrary to employer's argument, as the entity identified as the responsible operator, employer has the burden of proving that it is not the "potentially liable operator" that most recently employed the miner. 20 C.F.R. §725.495(c)(2).

We agree with the Director that employer waived this argument, having failed to raise it before the administrative law judge. Director's Brief at 5. Prior to the May 19, 2016 telephonic hearing before the administrative law judge, employer argued that Mac Mining should have been designated as the responsible operator. Motion to Dismiss at 1-6. At the hearing, the miner testified that his Social Security Administration (SSA) earnings records did not reflect all of his earnings and that he worked for Habco for one calendar year.[8] Hearing Transcript at 7, 9-10. Despite the miner's testimony, however, employer argued in its post-hearing brief that the miner "likely did not work for Habco for one year." Employer's Post-Hearing Brief at 5. Thus, even when aware of the miner's testimony, employer did not argue before the administrative law judge that Habco should have been designated as the responsible operator. Accordingly, employer waived the argument, and we decline to address it for the first time on appeal.[9] *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). We therefore affirm the administrative law judge's finding that employer is the responsible operator.

II. Invocation of the Section 411(c)(4) Presumption — Length and Nature of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or "employment in a coal mine other than an underground mine" in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The administrative law judge found that the miner's hearing testimony established that he worked for at least fifteen years in surface

[8] The record reflects that, when the matter was before the district director, the miner alleged that he worked for Habco Enterprises (Habco) for at least one calendar year. Director's Exhibits 3, 5. In naming employer the responsible operator, the district director determined that the miner's Social Security Administration earnings records did not reflect sufficient earnings with Habco to establish one calendar year of employment. Director's Exhibits 31, 47. Thus, well before the hearing, employer was aware of the possibility that Habco could be a potentially liable operator.

[9] Accordingly, we do not address the Director's argument that the miner's hearing testimony regarding his employment with Habco was inadmissible because employer failed to designate the miner as a liability witness when the claim was before the district director. Director's Brief at 5; *but see* Director's Exhibit 33.

coal mine employment in conditions that were substantially similar to those in underground mines. Decision and Order at 7-9.

Employer first argues that the administrative law judge did not adequately explain the basis for his finding on the length of the miner's coal mine employment. Employer's Brief at 21-22. We disagree.

Claimant bears the burden of proof to establish the length of the miner's coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's finding if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *Muncy*, 25 BLR at 1-27.

The administrative law judge determined that the miner's SSA earnings records standing alone established only twelve years and eight months of coal mine employment. Decision and Order at 8; Director's Exhibit 6. Notwithstanding the earnings listed in his SSA records, the administrative law judge noted that the miner alleged that he worked for seventeen years in coal mine employment. Decision and Order at 7. Consistent with his Employment History Form, Director's Exhibit 3, the miner testified that he worked continuously from October 1967 through the end of December 1984. Hearing Transcript at 10-35. Specifically, he testified that he operated and engaged in surface coal mine work for the following companies: Ronnell Coal Corporation (Ronnell) for ten years, beginning in October 1967; Mountain Mining Company, Incorporated, concurrently with Ronnell,[10] from August of 1968 through December of 1978; Mac Mining from January of 1979 "clear through" the end of 1983; and Habco for one calendar year in 1984. *Id*. at 10, 12-17, 27-28. The administrative law judge also noted that the miner testified that his SSA earnings records did not reflect all of his coal mine work because, as the owner of a number of coal mines for which he also performed coal mine work, he typically "did not pay himself his full salary all the time," in order to keep the mines running and pay the other workers.[11] Decision and Order at 7, 9; Hearing Transcript at 25, 27, 34-35.

[10] The miner testified that the Ronnell Coal Corporation and Mountain Mining Company, Incorporated, mine sites were only fifteen minutes apart. Hearing Transcript at 14-17, 27-28.

[11] Specifically, the miner explained that his earnings reported for Habco were only $3,500.00 because "times were tough" and he wasn't "taking paydays," as he first was paying his workers and bills. Hearing Transcript at 25. He testified that, as both an owner and a worker, he wasn't always taking a paycheck and was thus providing free labor. *Id*.

The administrative law judge considered employer's argument that the miner's testimony was not credible and that his SSA earnings records do not reflect income sufficient to establish that he worked every year from 1969 to 1984. Decision and Order at 9. The administrative law judge rejected that argument, however, and permissibly found that the miner's SSA earnings records understate his income and employment, because the miner "is credible that he worked even when he drew no pay." *Id*.; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670, BLR (4th Cir. 2017); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001) (holding that a miner's uncontested testimony on working conditions may be permissibly credited by an administrative law judge); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

Because the miner's testimony, as credited by the administrative law judge, establishes continuous coal mine employment from October 1967 through December 1984, for a total of more than seventeen years, we see no error in the administrative law judge's finding that the miner "established that he worked in excess of" fifteen years in coal mine employment. Decision and Order at 9. The administrative law judge's finding is consistent with the preference for the use of direct evidence under 20 C.F.R. §725.101(a)(32)(ii), which provides that "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony."

Employer next argues that the administrative law judge erred in finding that the miner's hearing testimony was sufficient to establish that his surface coal mine employment occurred in conditions substantially similar to those in underground mines. Employer's Brief at 21-22. We disagree. The conditions in a mine other than an underground mine will be considered "substantially similar" to those in an underground mine "if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The miner testified that he worked as a surface miner engaged in either mountaintop removal or contour coal mining. Hearing Transcript at 10. According to the miner, he spent a typical work day maintaining and operating the equipment at the surface mine, as well as drilling holes through limestone and sandstone to load explosives. *Id*. at 11. He testified that he would drill twenty holes each day and load each hole with five bags of fertilizer weighing fifty pounds each. *Id*. at 11-12. He stated further that the holes he

---

at 25, 34. He stated that the same situation occurred with Mac Mining, where he was paid only $6,000.00 in some years. *Id*. 27. The miner further stated that he "never took any money out" for his own pay for which he did not pay taxes. *Id*. at 35.

drilled were large, that they measured six and three-quarter inches, and that there would be "lots of dust." *Id*. at 11-12. The miner testified that at the end of each day, he was "dirty and dusty and greasy," and had dirt and dust all over him. *Id*. at 18. He stated that he rented clothes because he did not want to "ruin [his] wife's washing machine." *Id*.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Here, the administrative law judge recognized that the miner testified that there was "lots of dust" when he drilled to place the explosives, that he drilled through limestone and sandstone,[12] that there was dirt and dust all over him, and that he was so dirty when he came home that he rented clothes because he did not want to ruin his wife's washing machine. Decision and Order at 9. Contrary to employer's argument, the administrative law judge permissibly found that the miner's uncontradicted testimony was credible and established that he worked in conditions substantially similar to those in underground mines. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014) (holding that claimant's testimony that the conditions throughout his employment were "very dusty" met claimant's burden to establish that he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-274 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment.[13] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 664, 25 BLR at 2-735-36 (6th Cir. 2015).

[12] As the Director notes, evidence of regular exposure to any kind of coal mine dust in surface mining, if credited, may establish substantial similarity. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 25 BLR 2-725 (6th Cir. 2015); *Garrett v. Cowin & Co.*, 16 BLR 1-77 (1990); Director's Brief at 5. The definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses "the various dusts around a coal mine," which include, among other substances, limestone and sandstone. *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990). Therefore, we reject employer's argument that the regulation at 20 C.F.R. §718.305(b)(2) is invalid because it "eliminates the distinction between underground and surface exposure . . . ." Employer's Brief at 22 n. 1; *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 297-99, BLR (6th Cir. 2018) (Kethledge J. concurring).

[13] The administrative law judge also found that the miner's hearing testimony was buttressed by statements he made to medical professionals. Decision and Order at 9. In

In light of our affirmance of the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[14] 20 C.F.R. §718.305(d)(1)(i), 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer does not challenge the finding that it failed to disprove clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). Decision and Order at 14-26. Accordingly, we affirm that finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address the administrative law judge's finding that employer also failed to disprove legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To prove that the miner did not have legal pneumoconiosis, employer must demonstrate that he did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine

---

his medical report, Dr. McSharry noted that the miner informed him that he was exposed to "large amounts of coal dust and rock dust." Director's Exhibit 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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

employment."[15] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8. In determining that employer failed to establish that the miner did not have legal pneumoconiosis, the administrative law judge considered the pathology report of Dr. Caffrey and the medical opinions of Drs. McSharry and Rosenberg.[16] Decision and Order at 14-29.

Dr. Caffrey reviewed fifteen surgical pathology slides and opined that they revealed the presence of mild emphysema and mild interstitial fibrosis. Director's Exhibit 12 at 3-4. He excluded coal mine dust exposure as a cause of the emphysema because no "associated anthracotic pigment" appeared with the emphysema. *Id*. Dr. Caffrey also opined that the interstitial fibrosis was not related to coal mine dust exposure because the pathology slides did not reveal any coal dust particles in proximity to the interstitial fibrosis. Director's Exhibit 23 at 3-4.

Based on a review of the miner's medical records, Dr. McSharry opined that the miner had usual interstitial pneumonitis. Director's Exhibit 20. He explained that "pneumonitis is unrelated to coal mining or coal [mine] dust exposure and is a sporadic disease [of] the general population." *Id*. Dr. McSharry also excluded legal pneumoconiosis because "there is no evidence of an additional chronic [lung] disease that [was] either caused or worsened by coal [mine] dust exposure" in the miner. *Id*. Dr. McSharry concluded that the miner had disabling restrictive lung disease with arterial desaturation, and that coal mine dust exposure had no influence on his symptoms or respiratory impairment. *Id*.

[15] Contrary to employer's argument, the administrative law judge set forth the correct rebuttal standard when addressing whether employer was able to rebut the presumed fact of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting); Decision and Order at 14-26; Employer's Brief at 29-30.

[16] The administrative law judge also considered Dr. Perper's opinion that the miner had legal pneumoconiosis. Decision and Order at 16; Director's Exhibit 22; Employer's Exhibit 12. He noted that Dr. Perper diagnosed centrilobular emphysema, and opined that centrilobular emphysema "in coal miners is considered a form of legal pneumoconiosis." *Id*. The administrative law judge also noted that Dr. Perper diagnosed an "interstitial fibro-anthracotic type of coal workers' pneumoconiosis" and indicated that this "recognized as a type of coal workers' pneumoconiosis resulting from significant longstanding occupational exposure to coal mine dust. Its features are very similar to diffuse interstitial fibrosis (DIF) seen in non-coal miners." *Id*.

Dr. Rosenberg diagnosed the miner with idiopathic pulmonary fibrosis, which he opined was the cause of the miner's severe restrictive lung impairment associated with a low diffusing capacity and disabling oxygenation. *Id*. He excluded a diagnosis of legal pneumoconiosis because the miner had no obstructive respiratory impairment. *Id*.

In a supplemental report, Dr. Rosenberg indicated that he reviewed the pathology reports of Drs. Perper and Caffrey, and the medical report of Dr. McSharry. Director's Exhibit 23. He disagreed with Dr. Perper that the miner's interstitial fibrosis was legal pneumoconiosis, because coal mine dust was not associated with the observed scarring. *Id*. at 3-4. He explained that "no reliable medical studies show that coal [mine] dust causes primary linear interstitial lung disease without some micronodular changes." *Id*. Dr. Rosenberg acknowledged that the miner had emphysema, but opined that the emphysema was unrelated to coal mine dust exposure because the pathology evidence did not demonstrate that the disease was associated with coal dust deposition. *Id*. at 5. He reiterated that the miner's "restriction and oxygenation problems [were] related solely to this interstitial fibrosis, namely [idiopathic pulmonary fibrosis], a disorder of the general public." *Id*. at 5-6. Dr. Rosenberg further cited the "deterioration of [the miner's] respiratory function over a short time frame" as a basis to exclude legal pneumoconiosis. *Id*. Dr. Rosenberg reiterated his conclusions in additional supplemental reports. Employer's Exhibits 17, 20, 21.

The administrative law judge found that the opinions of Drs. Caffrey, McSharry, and Rosenberg were unpersuasive. Decision and Order at 14, 20-24. Employer argues that the administrative law judge substituted his opinion for those of the medical experts and otherwise erred in rejecting the opinions of Drs. Caffrey, McSharry, and Rosenberg on the issue of legal pneumoconiosis. Employer's Brief at 22-29. We disagree.

In weighing Dr. Caffrey's opinion, the administrative law judge noted that Dr. Caffrey "admitted that he had no work history" or "medical history at the time" he rendered his opinion. Decision and Order at 20. The administrative law judge noted, however, that as a surface miner, the miner "was exposed to more than coal dust," but was also "exposed to silica, a/k/a rock dust." *Id*. The administrative law judge permissibly rejected Dr. Caffrey's opinion based on Dr. Caffrey's lack of knowledge of the miner's work or medical history. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); Decision and Order at 21.

Further, the administrative law judge acknowledged that Drs. Caffrey, McSharry, and Rosenberg cited the miner's rapid decline in pulmonary function as a basis for attributing the restrictive impairment to his idiopathic pulmonary fibrosis. Decision and

Order at 17-19. The administrative law judge noted, however, that even if the miner's idiopathic pulmonary fibrosis caused him to develop the restrictive lung impairment, as asserted by employer's physicians, the idiopathic pulmonary fibrosis could still "be aggravated by the effects of mining." *Id*. at 27-28. Contrary to employer's argument, the administrative law judge permissibly found that Drs. Caffrey, McSharry, and Rosenberg did not adequately explain why the miner's restrictive lung impairment was not aggravated by his more than fifteen years of coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 21-24.

Substantial evidence supports the administrative law judge's decision to discredit the opinions of Drs. Caffrey, McSharry, and Rosenberg, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis at 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); Decision and Order at 27-28. The administrative law judge rationally rejected the opinion of Dr. McSharry that the miner's disability was not due to pneumoconiosis because he did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 28.

With respect to Drs. Caffrey and Rosenberg, the administrative law judge acknowledged that both physicians identified "minimal" clinical pneumoconiosis on the miner's lung biopsy. Decision and Order at 19. Specifically, Dr. Caffrey conceded that the miner had a two millimeter lesion consistent with a silicotic nodule in the right upper lobe which meets the criteria for clinical pneumoconiosis. Director's Exhibit 23. Dr. Caffrey opined that a single nodule of clinical pneumoconiosis "would not cause any impairment in lung function." *Id*. Dr. Rosenberg agreed with Dr. Caffrey that the pathology evidence reflected that the miner had a single nodule of clinical pneumoconiosis, which was too "minimal" to cause any impairment of lung function. Employer's Exhibits 17, 20, 21.

In weighing Dr. Caffrey's opinion, the administrative law judge noted that he identified additional areas of black pigment in the miner's right upper lobe, but excluded the possibility that these black pigments were clinical pneumoconiosis because they were

"not associated with any lesions, fibrosis, or birefringent crystals." Decision and Order at 17; *see* Director's Exhibit 23. The administrative law judge noted, however, that the "other biopsy readers found significant crystals in the right upper lobe" and all "of the x-ray readers and other pathologists in the record [found] fibrosis." Decision and Order at 17. The administrative law judge rationally rejected Dr. Caffrey's opinion as to the degree of clinical pneumoconiosis that the miner suffered because Dr. Caffrey's opinion was inconsistent with the weight of the biopsy and x-ray evidence. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 20.

With respect to Dr. Rosenberg, the administrative law judge correctly noted that he assumed that the miner had no x-ray evidence of clinical pneumoconiosis when opining that the miner only had a "minimal" degree of clinical pneumoconiosis.[17] Decision and Order at 23. The administrative law judge permissibly rejected Dr. Rosenberg's opinion because it was based "on a false assumption that the x-ray evidence in this case is negative for pneumoconiosis and that factor, standing alone, undermine[d] the logic" of Dr. Rosenberg's conclusions. *Id*.; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because Drs. Caffrey and Rosenberg were not persuasive as to the severity of the miner's clinical pneumoconiosis, the administrative law judge permissibly found their opinions to be unpersuasive regarding whether no part of the miner's disability was caused by clinical pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Further, the administrative law judge permissibly relied on his finding that employer failed to disprove legal pneumoconiosis when he weighed the opinions of Drs. Caffrey, McSharry, and Rosenberg that the miner's disability was not due to legal pneumoconiosis. Decision and Order at 27-28. The Fourth Circuit has held that if an administrative law judge finds that a miner has pneumoconiosis, he may "only give weight to the causation opinions of the physicians who [did] not diagnose[] pneumoconiosis 'if he provide[s] specific and persuasive reasons for doing so, and those opinions could carry little weight

[17] In his May 22, 2014 report, Dr. Rosenberg noted that Dr. Crum diagnosed clinical pneumoconiosis, but disputed Dr. Crum's conclusion because the x-ray and CT scan evidence was negative for clinical pneumoconiosis. Director's Exhibit 11 at 4. In his June 25, 2015 report, Dr. Rosenberg conceded that the miner had a minimal degree of clinical pneumoconiosis because Dr. Caffrey identified a single nodule of pneumoconiosis in the right upper lung biopsy. Director's Exhibit 23 at 3. However, Dr. Rosenberg opined that the miner's pulmonary disability was unrelated to clinical pneumoconiosis because "[o]nly one nodule would not cause or contribute to disabling oxygenation." *Id*. at 5. He explained that the CT scans and x-rays "confirm that even if there were additional sub-radiographic lesions, they are too small and too few to have had any clinical effects." *Id*.

at the most.'" *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006), *quoting Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002). Consequently, the administrative law judge rationally discounted the disability causation opinions of Drs. Caffrey, McSharry, and Rosenberg because they did not diagnose the miner with legal pneumoconiosis.[18] *See Epling*, 783 F.3d at 504-05, 25 BLR at 2-721. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of the miner's total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

[18] Employer argues that the administrative law judge ignored the qualifications of its physicians. Employer's Brief at 26. Contrary to employer's argument, the administrative law judge acknowledged the qualifications of Drs. Caffrey, McSharry, and Rosenberg. Decision and Order at 16-18. However, because he found that their opinions were not well-reasoned, he was not required to address whether they were more qualified than the other physicians of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.[19]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[19] The administrative law judge stated that he also awarded survivor's benefits to claimant pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012), based on the award of benefits in the miner's claim. Decision and Order at 33-34. As the Director notes, however, claimant's survivor's claim was still pending before the district director at the time of the administrative law judge's April 19, 2017 decision. Director's Brief at 1 n. 1. According to the Director, the district director awarded survivor's benefits to claimant on July 25, 2017 and, at employer's request, referred the survivor's claim to the Office of Administrative Law Judges (OALJ) for a hearing on October 2, 2017. *Id*. The Director reports that, to her knowledge, no hearing on the survivor's claim has yet been scheduled. *Id*.