U.S. Department of Labor

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

BRB No. 17-0435 BLA

STEVE B. CONLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 06/20/2018
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits in a Subsequent Claim of Joseph E. Kane, 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/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits in a Subsequent Claim (2013-BLA-05755) of Administrative Law Judge Joseph E. Kane, 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). Claimant filed this claim on February 21, 2012.[1]

Based on the parties' stipulation, the administrative law judge credited claimant with at least fifteen years of coal mine employment.[2] Based on claimant's hearing testimony, the administrative law judge found that all of claimant's coal mine employment took place at underground coal mines. Additionally, the administrative law judge found that claimant has a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] He therefore 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).[4] The administrative law judge further found that employer did not rebut the presumption, and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment and total disability, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that

[1] Claimant filed three previous claims for benefits, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent previous claim, filed on February 8, 2010, was denied by the district director on October 21, 2010, because the evidence did not establish any element of entitlement. Director's Exhibit 3 at 7.

[2] Claimant's coal mine employment was in Kentucky. Decision and Order at 4; Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 8-12.

[4] 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.

it failed to rebut the presumption. Employer further challenges the administrative law judge's determination regarding the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

A. Coal mine employment

Employer argues that the evidence does not establish at least fifteen years of coal mine employment. Employer's Brief at 12-13. The administrative law judge noted correctly, however, that employer stipulated to fifteen years of coal mine employment at the hearing.[5] Decision and Order at 4; Hearing Transcript at 12. Because employer is bound by its stipulation, we decline to address its argument that the evidence does not establish at least fifteen years of coal mine employment. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730, 25 BLR 2-405, 2-418 (7th Cir. 2013); *Richardson v. Director, OWCP*, 94 F.3d 164, 167, 21 BLR 2-373, 2-378-79 (4th Cir. 1996).

Employer also argues that the administrative law judge erred in finding that all fifteen years of claimant's coal mine employment were qualifying for purposes of invoking the presumption. Employer's Brief at 13. Employer's argument lacks merit. The administrative law judge noted correctly that claimant testified that "all of his work occurred at an underground mine." Decision and Order at 8; Hearing Transcript at 14-15. Although claimant testified that eighty to eighty-five percent of his work time was spent underground, Hearing Transcript at 14-15, he clarified that when he worked aboveground, he was working at the site of an underground mine. *Id*. Based on this testimony, the

[5] At the hearing, employer's counsel stated as follows:

> Employer continues to contest timeliness. The miner issue can be withdrawn, Your Honor. Post-'69 employment can be withdrawn. Length of coal mine employment, we can agree to the 16 – or, I mean, the 15. Pneumoconiosis remains an issue.

Hearing Transcript at 12.

administrative law judge found that claimant worked for at least fifteen years in underground coal mine employment. Decision and Order at 8.

Employer specifically argues that the administrative law judge erred in failing to assess whether "the conditions on the surface where [claimant] worked were substantially similar to conditions underground." Employer's Brief at 13. Contrary to employer's argument, an aboveground worker at the site of an underground mine is not required to show comparability of environmental conditions in order to invoke the Section 411(c)(4) presumption.[6] *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011). Further, the administrative law judge permissibly determined that claimant's hearing testimony was credible and established that all of his work occurred at underground coal mines.[7] *See Ramage*, 737 F.3d at 1058, 25 BLR at 2-468; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We therefore affirm the administrative law judge's determination that claimant established at least fifteen years of underground coal mine employment.

B. 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

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[6] It is the type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), which determines whether a claimant is required to show comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011).

[7] In the current proceedings, claimant's fourth claim, claimant testified that all of his work occurred at an underground mine. Hearing Transcript at 14-15. Although claimant testified that eighty-percent of his work was spent underground, *Id*. at 14-15, he clarified that when he worked aboveground, he was working at the site of an underground mine. *Id*. Citing claimant's March 22, 2010 deposition testimony from his third claim, employer notes that claimant estimated he spent approximately two years of his mining career working aboveground. Employer's Brief at 13, *citing* Director's Exhibit 3 at 60. The record, however, reflects that when claimant was deposed in his third claim, he did not specify whether he worked aboveground at the site of an underground mine or at a surface coal mine. Director's Exhibit 3 at 60. Thus, to the extent employer argues that claimant's 2010 testimony contradicts his testimony in the current claim that all of his aboveground work was at the site of an underground mine, its argument lacks merit.

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).

The administrative law judge found that claimant established total disability[8] based on the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[9] Decision and Order at 11-12. Employer contends that the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence. We disagree.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five new pulmonary function studies, dated April 5, 2012, November 29, 2012, December 10, 2012, June 20, 2013, and December 5, 2013. Decision and Order at 6-7, 11; Director's Exhibit 15; Claimant's Exhibits 3, 4; Employer's Exhibits 4, 5. The administrative law judge found that the April 5, 2012 and December 5, 2013 studies were qualifying[10] for total disability, while the remaining studies were non-qualifying. Decision and Order at 6-7, 11. He rejected employer's argument that the December 5, 2013 study was invalid based on Dr. Vuskovich's opinion that it produced invalid results. *Id*. at 11.

[8] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

[9] The administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 11. He also found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[10] A "qualifying" pulmonary function study yields values 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).

Because the December 5, 2013 pulmonary function study was the most recent and came six months after the non-qualifying June 20, 2013 study, the administrative law judge found that it was the "most indicative" of claimant's current condition and assigned it the most weight. *Id*. Therefore, he concluded that the pulmonary function study evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer argues that the administrative law judge did not adequately explain his decision to rely on the December 5, 2013 pulmonary function study in light of Dr. Vuskovich's invalidation. Employer's Brief at 13-14. We disagree. Dr. Vuskovich completed a form that asked whether the December 5, 2013 pulmonary function study's "FVC-FEV_1 results" and "MVV results" were acceptable. Employer's Exhibit 15. Dr. Vuskovich answered "No," and wrote that claimant "did not put forth the effort required to generate valid spirometry results."[11] *Id*. The administrative law judge noted, however, that Dr. Al Jaroushi administered the December 5, 2013 pulmonary function study, and indicated "in his report that [c]laimant put forth good effort, cooperation, and understanding." Decision and Order at 11; Claimant's Exhibit 4. The administrative law judge also noted that Dr. Al Jaroushi relied on the study to assess total disability.[12]

Contrary to employer's argument, the administrative law judge permissibly credited Dr. Al Jaroushi's opinion over that of Dr. Vuskovich because Dr. Al Jaroushi administered the December 5, 2013 study.[13] *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-212 (6th Cir. 1997) (holding that an administrative law judge may rely on the opinion of the physician who actually administered the ventilatory study over those

[11] In another portion of the form addressing "Other tests of pulmonary and cardiopulmonary function," Dr. Vuskovich responded "No" to whether the December 5, 2013 lung volume determinations and carbon monoxide diffusion capacity tests were technically acceptable. Employer's Exhibit 15.

[12] The administrative law judge noted further that employer's physicians, Drs. Rosenberg and Jarboe, relied on the December 5, 2013 pulmonary function study to opine that claimant is totally disabled. Decision and Order at 11.

[13] Dr. Vuskovich provided no explanation for his assessment that claimant provided insufficient effort on the December 5, 2013 pulmonary function study. Employer's Exhibit 15. Because Dr. Vuskovich did not explain the basis upon which he concluded that claimant provided insufficient effort, the administrative law judge reasonably relied upon the administering physician's opinion that claimant provided good effort on the study. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Shrader v. Califano*, 608 F.2d 114, 118 (4th Cir. 1979) (holding that the administrative law judge erred in accepting an unexplained invalidation of a pulmonary function study).

who reviewed the results); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); Decision and Order at 11. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the new pulmonary function study evidence "weigh[s] in favor of a finding of total disability" under 20 C.F.R. §718.204(b)(2)(i). *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Coal Co.*, 23 BLR 1-29, 1-35 (2004).

Employer next argues that the administrative law judge erred in his consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Klayton, Wooten, Al Jaroushi, Jarboe, and Rosenberg.[14] Decision and Order at 11-12; Director's Exhibit 15; Claimant's Exhibits 3, 4; Employer's Exhibits 4-7. He noted that all of the physicians opined that claimant is totally disabled by a respiratory or pulmonary impairment. The administrative law judge therefore found that the medical opinion evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We reject employer's argument that the claim must be remanded because the administrative law judge did not render a finding as to the exertional requirements of claimant's usual coal mine employment. Employer's Brief at 15. Although the administrative law judge did not specifically identify the exertional requirements of claimant's usual coal mine work, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), he accurately found that claimant "last worked at the face of the mine operating a loader and hauling coal." Decision and Order at 4. Furthermore, all five of the physicians credited by the administrative law judge correctly

[14] Dr. Klayton opined that claimant is totally disabled by a moderate restrictive lung disease which meets the Department of Labor criteria for total disability, as evidenced by the values of the April 5, 2012, qualifying pulmonary function study. Director's Exhibit 15 at 33. Dr. Wooten indicated that claimant is unable to walk up two flights of stairs and suffers from shortness of breath, and she opined that claimant is totally disabled by a moderate restrictive lung impairment reflected by the values of the June 20, 2013, non-qualifying pulmonary function study. Claimant's Exhibit 3 at 1, 3-4. Dr. Al Jaroushi noted that claimant must stop and rest when walking up one flight of stairs, and that he is limited to mild activity. Claimant's Exhibit 4 at 1. He opined that claimant is totally disabled by a severe pulmonary impairment evidenced by his reduced FVC, FEV_1, and MVV values on the December 5, 2013, qualifying pulmonary function study. *Id*. at 2-3. Dr. Jarboe opined that, based on the December 5, 2013 pulmonary function study, claimant has a disabling level of lung function. Employer's Exhibit 7 at 9. Dr. Rosenberg also opined that claimant is totally disabled based on the most recent pulmonary function testing. Employer's Exhibit 6 at 5.

identified claimant's usual coal mine employment as the operator of a coal loader, discussed the exertional requirements of that job, and, as the administrative law judge found, are in agreement that he is unable to perform that work.[15] Employer has not pointed to any specific evidence in the record that contradicts the assumptions of Drs. Klayton, Wooten, Al Jaroushi, Rosenberg, and Jarboe regarding the nature of claimant's usual coal mine employment. As these physicians correctly identified claimant's usual coal mine employment when opining that he is totally disabled by a respiratory or pulmonary impairment,[16] we reject employer's argument that the administrative law judge erred in finding that these medical opinions "support[] a finding of total disability."[17] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-552-53 (6th Cir. 2002);

[15] Dr. Klayton indicated that claimant last worked as a "loader operator at the face" and drove a tractor trailer to the dump, which required him to lift twenty-five pounds of heavy coal and rock dust. Director's Exhibit 15 at 30. Dr. Wooten specified that claimant "ran loading machines at the base of the mines" and that he would lift sixty to seventy pounds on any given day. Claimant's Exhibit 3 at 2. Dr. Al Jaroushi stated that claimant's last job that he held from 1972 to 1986 was running a loading machine at the face of the mines, which required him to lift sixty to seventy pounds. Claimant's Exhibit 4 at 1. Dr. Rosenberg noted that claimant "worked at the face as a coal loader and operated a tractor, loading coal at the face and taking it to the belt" and "had to do some manual labor pulling cables, using as much force as possible." Employer's Exhibit 4 at 2. Dr. Jarboe indicated that claimant "worked as a loader operator and drove a tractor," and that his "last job was operating a joy loader" which required him to "pull cable in low coal which was strenuous work." Employer's Exhibit 5 at 26.

[16] We reject employer's argument that Dr. Jarboe did not opine that claimant is totally disabled. Employer's Brief at 16. Although Dr. Jarboe questioned whether claimant had a permanent loss of pulmonary function, he opined that if claimant's pulmonary function "gradually worsened and if these changes are permanent, it is reasonable to assume that [claimant] is totally and permanently disabled." Employer's Exhibit 7 at 9.

[17] Employer argues that the administrative law judge erred in failing to consider Dr. Rosenberg's opinion that claimant's pulmonary function results can be attributed to his heart disease, and further contends that claimant's medical treatment records support a determination that claimant's test results are due to heart disease. Employer's Brief at 14-16. Employer's argument lacks merit. The relevant inquiry at 20 C.F.R. §718.204(b) is whether the miner's respiratory or pulmonary impairment precludes the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). The cause of the miner's pulmonary impairment relates to the issue of disability causation, which is addressed either at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii).

Cornett, 227 F.3d at 578, 22 BLR at 2-124; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-362, 2-374 (6th Cir. 1996); Decision and Order at 12.

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 12. 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 v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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),[18] we affirm his determination that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

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,[19] 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 disprove the presumption that claimant has 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

[18] The administrative law judge additionally considered the evidence from claimant's prior claims and found that it merited less weight due to its age. Decision and Order at 12. That finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[19] "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).

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 rebut the presumption, the administrative law judge considered the medical opinions of Dr. Jarboe, who diagnosed claimant with a restrictive lung impairment caused by asthma unrelated to coal mine dust exposure, and Dr. Rosenberg, who agreed that claimant has a restrictive impairment but attributed it to claimant's two heart surgeries.[20] Decision and Order at 15-18; Employer's Exhibit 5 at 6; Employer's Exhibits 4, 6. The administrative law judge discredited both physicians' opinions because he was not persuaded by their explanations for excluding legal pneumoconiosis and because he found that their opinions were inconsistent with the preamble to the 2001 revised regulations. Decision and Order at 15-18.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Jarboe and Rosenberg. Employer's Brief at 16-18. We disagree. Dr. Jarboe excluded coal mine dust exposure as a cause of claimant's restrictive lung impairment because he explained that the November 29, 2012 pulmonary function study evidenced reversibility of the FEV_1 and FVC values post-bronchodilator, implicating asthma as a cause of the impairment. Employer's Exhibit 5 at 4-6. He opined that a coal mine dust-related lung impairment would not be reversible after bronchodilators. *Id*. However, he conceded that the post-bronchodilator results of the November 29, 2012 pulmonary function study still "indicate[d] a mild restrictive process" and, in a supplemental report, opined that the December 5, 2013 pulmonary function study revealed "severe restriction." Employer's Exhibit 5 at 4; Employer's Exhibit 7 at 7-8. The administrative law judge correctly noted that the FEV_1 and FVC values on the December 5, 2013 pulmonary function study "continued to yield qualifying results" post-bronchodilator. Decision and Order at 17; Claimant's Exhibit 4. In light of this evidence, the administrative law judge permissibly found Dr. Jarboe's opinion to be unpersuasive because "the fact that [c]laimant may have experienced some relief from bronchodilators does not address the etiology of the fixed portion of [c]laimant's condition that did not benefit from bronchodilator treatment." Decision and Order at 17; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

With respect to Dr. Rosenberg, the administrative law judge fully summarized his rationale for concluding that claimant's restrictive lung impairment was caused by prior heart surgeries, and not coal mine dust exposure. Decision and Order at 15-16. Specifically, the administrative law judge noted that "Dr. Rosenberg continued to relate [c]laimant's pulmonary issues to [c]laimant's heart condition" based on claimant's "normal

[20] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 15, 18.

diffusing capacity and gas exchanges."[21] *Id*. at 16. Contrary to employer's argument, the administrative law judge permissibly found Dr. Rosenberg's opinion unpersuasive because he "does not discuss how he determined that coal [mine] dust did not at least contribute to the restrictive defect, which would then constitute legal pneumoconiosis." *Id*.; *see* 20 C.F.R. §718.201(b); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-739-40 (6th Cir. 2015); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove that claimant has legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), and thus employer was unable to establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).[22]

The administrative law judge next addressed whether employer established that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 18-10. The administrative law judge rationally discounted the disability causation opinions of Drs. Jarboe and Rosenberg because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Ramage*, 737 F.3d at 1062, 25 BLR at 2-473; Decision and Order at 18-10. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused

[21] Dr. Rosenberg opined that although claimant "has had a reduction in FVC measurement, any reduction is 'extrinsic' in nature related to his previous sternotomies for his heart surgery." Employer's Exhibit 6 at 4. Dr. Rosenberg explained that this conclusion is supported by claimant's "normal diffusing capacity correlated for lung volumes and gas exchange in association with exercise which is normal." *Id*. He further explained that the diffusion capacity results support the conclusion "that the alveolar capillary bed within [claimant's] lungs is intact and unrelated to [sic] interstitial fibrotic changes related to past coal mine dust exposure." *Id*. at 4-5.

[22] Because we affirm the administrative law judge's decision to discount the opinions of Drs. Jarboe and Rosenberg for the reasons set forth above, we need not address employer's additional challenges to the administrative law judge's analysis of those opinions, or its argument that the administrative law judge failed to determine the length of claimant's smoking history. *See Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 16-18.

by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).[23] Consequently, we affirm the award of benefits.

III. BENEFITS COMMENCEMENT DATE

Once entitlement to benefits is established, benefits commence in the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If that date is not ascertainable from all the relevant evidence of record, benefits will commence in the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990). Furthermore, in a subsequent claim such as this, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge found that the evidence does not establish when claimant became totally disabled due to pneumoconiosis, and awarded benefits as of February 2012, the month in which this subsequent claim was filed. Decision and Order at 19. Employer contends that the administrative law judge erred, because the record reflects that claimant was not totally disabled as late as June 20, 2013, based on the non-qualifying pulmonary function study conducted on that date. Employer's Brief at 18-19. Employer argues that total disability was first established based on Dr. Al Jaroushi's December 5, 2013 pulmonary function study. *Id.*

Employer's argument lacks merit. The administrative law judge accurately noted that the April 5, 2012 pulmonary function study, which preceded the June 20, 2013 non-qualifying study, was qualifying for total disability. Decision and Order at 6. Further, the

[23] Employer argues that the administrative law judge failed to consider that claimant had a disabling heart condition that prevented him from returning to work. Employer's Brief at 13, *citing Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994). Contrary to employer's argument, the Sixth Circuit has held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See e.g., Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216-17, 20 BLR 2-362, 2-370-71 (6th Cir. 1996). Moreover, in claims such as this one, filed after January 19, 2001, the applicable regulation states that a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

administrative law judge's finding of total disability was based in part on Dr. Klayton's April 5, 2012 opinion that claimant is totally disabled. Decision and Order at 11-12; Director's Exhibit 15. Substantial evidence supports the administrative law judge's finding that "the record does not contain medical evidence establishing exactly when [c]laimant became totally disabled." Decision and Order at 19.

Because employer failed to rebut the Section 411(c)(4) presumption, claimant established that he is totally disabled due to pneumoconiosis. The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Consequently, we affirm the finding that benefits shall commence as of February 2012. *See* 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Granting Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge