BRB No. 12-0352 BLA

GILBERT R. WRISTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 03/27/2013
	)	
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 Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits – on Remand (08-BLA-05488) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case, involving a subsequent claim filed on June 28, 2007, is before the Board for the second time.[1] Director's Exhibit 6.

[1] Claimant's previous claims, filed in 1983, 1987, 2000 and 2002, were all finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on November

In the initial decision, after crediting claimant[2] with sixteen years of coal mine employment, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. 20 C.F.R. §725.309. Consequently, the administrative law judge considered claimant's 2007 claim on the merits. Considering all of the evidence, the administrative law judge found that the x-ray evidence established the existence of clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a)(1), 718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption had not been rebutted. Finally, the administrative law judge found that the evidence established that claimant's total disability was due to both his clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the new medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[3] *Wriston v. U.S. Steel Corp.*, BRB No. 10-0318 BLA, slip op. at 5-6 (Feb. 9, 2011) (unpub.). The Board, therefore, vacated the administrative law judge's

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29, 2002, was denied by an administrative law judge in a Decision and Order dated October 11, 2005, based on claimant's failure to establish the existence of pneumoconiosis or a totally disabling pulmonary impairment. Director's Exhibits 3, 4.

[2] Claimant died on May 16, 2009. Claimant's Response Brief at 2. Claimant's surviving spouse, Darlis Wriston, is pursuing his claim.

[3] Specifically, the Board affirmed, as unchallenged, the administrative law judge's findings that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), but that the new arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Wriston v. U.S. Steel Corp.*, BRB No. 10-0318 BLA, slip op. at 4 (Feb. 9, 2011) (unpub.); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The Board further noted that because there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Wriston*, BRB No. 10-0318 BLA, slip op. at 4. The Board vacated, however, the administrative law judge's finding that the new medical opinion evidence established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv), holding that the administrative law judge failed to resolve the conflicts in the evidence pertaining to the exertional requirements of claimant's coal mine work. *Id.* at 5-6.

finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Id.* The Board also held that the administrative law judge erred in his evaluation of the x-ray evidence relevant to the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board, therefore, vacated the administrative law judge's award of benefits. *Id.*

The Board further noted that Congress had enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 of Public Law Number 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). In light of the potential applicability of the Section 411(c)(4) presumption, the Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption.

Applying Section 411(c)(4) on remand, the administrative law judge found that claimant worked in coal mine employment for 17.81 years, of which at least fifteen years were underground. Additionally, the administrative law judge found that the new medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further contends that the administrative law judge erred in finding that claimant was totally disabled, and therefore erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in weighing the x-ray and medical opinion evidence when he found that employer did not rebut the presumption. Claimant

responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not submit a brief in this appeal.[4]

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.[5] 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).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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(d); *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(d)(2). Claimant's last claim was denied because he did not establish any element of entitlement. Director's Exhibits 3, 4. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing either the existence of pneumoconiosis, or a totally disabling respiratory impairment. 20 C.F.R. §725.309(d)(2), (3). The administrative law judge found that the new evidence established total disability, demonstrating both a change in an applicable condition, and a necessary fact for invocation of the Section 411(c)(4) presumption.

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

Employer contends that retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States

[4] Employer does not challenge the administrative law judge's finding of at least fifteen years of underground coal mine employment. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Claimant's coal mine employment was in West Virginia. Director's Exhibits 7, 9, 10. 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).

Constitution. Employer's Brief at 8. Subsequent to the filing of employer's brief, the United States Supreme Court upheld the constitutionality of the PPACA. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012). Additionally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected employer's argument that retroactive application of the amendments contained in Section 1556 of the PPACA to claims filed after January 1, 2005 constitutes a due process violation and an unconstitutional taking of private property. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Thus, the administrative law judge properly found that the provisions of amended Section 411(c)(4) are applicable to this claim.

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

Employer contends that the administrative law judge erred in finding that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, employer contends that the administrative law judge erred in finding that claimant's usual coal mine work[6] as a dispatcher, was not just sedentary, but included some physical labor. This contention lacks merit.

In considering the evidence as to the exertional requirements of claimant's usual coal mine work, as instructed, the administrative law judge initially acknowledged that, at the May 6, 2005 hearing on his prior claim, claimant testified that his duties as a dispatcher were essentially limited to answering the telephone, and did not involve any physical work beyond occasionally sweeping the office. Decision and Order on Remand at 3; May 6, 2005 Hearing Tr. at 13. However, the administrative law judge found that at the September 24, 2008 hearing in his current claim, when asked to describe his work duties, claimant answered:

> Well, I answered the telephone, you know, inside. Then I'd have to go over the hill and turn the water on to sprinkle the road so it would[n't] be so dusty. Then when a rock dust truck came in I'd go out and help unload rock dust and put up lights when they'd come in of the night. I'd put the lights up. Sometimes, they'd come in and throw their lights in the floor and

[6] "Usual coal mine work" is the most recent job the miner performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

> we'd have to go in there and put them up for them. You know, when one shift come out I'd put the lights up in for them.[7]

Decision and Order on Remand at 4; September 24, 2008 Hearing Tr. at 13. In concluding that claimant's job as a dispatcher included manual labor, the administrative law judge found that claimant's 2008 testimony was not inconsistent with his 2005 testimony, but was a more expansive, complete description of, not just his dispatcher duties, but of his overall duties, given in response to more general questions by counsel. Decision and Order on Remand at 4. The administrative law judge further found that these additional duties were performed by claimant at the behest of his employer, as when asked whether the duties were required or voluntary, claimant answered: "Well, they'd ask me if I would go out there and help them and I told them, yes sir, I'd go and help them do that, if that's what they wanted." Decision and Order on Remand at 4; September 24, 2008 Hearing Tr. at 14. Finally, the administrative law judge noted that claimant's description of his additional duties comported with the information claimant provided to his examining physicians over the past ten years.[8] Decision and Order on Remand at 4. It is the job of the administrative law judge to evaluate the evidence, weigh it, and draw his own conclusions. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d, 21 BLR 2-587 (4th Cir. 1999). Because substantial evidence supports the

[7] The administrative law judge noted claimant's additional testimony that the walk to turn on the water spray was about forty feet up and down a steep hill, that the bags of rock dust he assisted in unloading weighed fifty to sixty pounds, and that the mine lights, which contained a battery, weighed four to five pounds. Decision and Order on Remand at 4; September 24, 2008 Hearing Tr. at 13-16. In addition, the administrative law judge noted claimant's statement that he had to replace broken cables on six to eight pound "come-a-longs," which were left in his office for repair. Decision and Order on Remand at 4; September 24, 2008 Hearing Tr. at 13-16.

[8] The administrative law judge found that in November 2000, claimant reported to Dr. Rasmussen that, even as a dispatcher, he helped unload supplies. Decision and Order on Remand at 4; Director's Exhibit 3. In February 2003, claimant reported to Dr. Rasmussen that, while employed as a dispatcher, he occasionally unloaded rock dust bags weighing fifty pounds, stacked bags, and loaded supplies. Decision and Order on Remand at 4; Director's Exhibit 4 at 21. In a report dated May 10, 2004, Dr. Castle noted that claimant's last job was as a dispatcher, but that he did some manual labor, and in September 2007, claimant reported to Dr. Rasmussen that, while working as a dispatcher, he helped load and unload supplies. Decision and Order on Remand at 4; Director's Exhibits 4, 14.

administrative law judge's discretionary findings, and employer presents no basis to disturb the administrative law judge's determination, we affirm the administrative law judge's finding that claimant's usual coal mine work included physical labor. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. On remand, as instructed, the administrative law judge reconsidered the opinions of Drs. Rasmussen and Zaldivar in light of his finding that the exertional requirements of claimant's usual coal mine work included physical labor. Decision and Order on Remand at 5. Dr. Rasmussen diagnosed a severe lung impairment and, noting that claimant's job duties included loading and unloading supplies in addition to his duties as a dispatcher, opined that claimant did not retain the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 14. The administrative law judge rationally found that as Dr. Rasmussen understood claimant's job duties, and opined that claimant could not perform those duties, Dr. Rasmussen's opinion supported a finding of total disability. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order on Remand at 5; Director's Exhibit 14.

The administrative law judge next considered Dr. Zaldivar's opinion, that claimant's job duties consisted of answering the phone, "without having any other activities," and that, therefore, claimant would be able to do the work of a dispatcher, "but not much work beyond that." Decision and Order on Remand at 6; Employer's Exhibit 1. Medical opinion evidence can support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his usual coal mine work. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). The administrative law judge may infer disability by considering the doctor's description of the miner's condition, together with the exertional requirements of the miner's former coal mine employment. *See Scott*, 60 F.3d at 1142, 19 BLR at 2-263; *McMath*, 12 BLR at 1-9. Here, the administrative law judge rationally found that Dr. Zaldivar's opinion, that claimant could not perform much work beyond answering the telephones, when considered with claimant's work requirements that included physical labor, also supported total disability. *See Scott*, 60 F.3d at 1142, 19 BLR at 2-263; *McMath*, 12 BLR at 1-9.

Because the administrative law judge's evaluation of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed. *See Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997). Further, we affirm

the administrative law judge's finding that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 6.

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 impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order on Remand at 6-7.

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

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order on Remand at 7. The administrative law judge found that employer did not establish rebuttal by either method.[9] Decision and Order on Remand at 7-13.

Employer contends that the administrative law judge erred in his evaluation of the x-ray evidence, in finding that employer did not disprove the existence of clinical pneumoconiosis.[10] The administrative law judge considered six readings of three x-rays

[9] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of legal pneumoconiosis, with his discussion of whether employer proved that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order on Remand at 10-13. Employer does not challenge this aspect of the administrative law judge's decision.

[10] Contrary to employer's contention, the administrative law judge did not err in considering the x-ray evidence submitted with the prior claims without determining whether the prior administrative law judge made a mistake in fact in weighing the x-ray evidence. The instant claim is a subsequent claim, filed pursuant to 20 C.F.R.

dating from 1983-2000, submitted with claimant's first three claims, [11] seven readings of three x-rays taken with his more recent 2003 claim,[12] and two x-rays submitted with claimant's current claim.[13]

The administrative law judge found that while the 1983, 1987 and 2000 x-rays were predominantly negative for pneumoconiosis, by 2003, the x-rays were predominantly positive, with four positive readings of two different x-rays by four dually-qualified readers, consistent with the progressive nature of pneumoconiosis. Decision and Order on Remand at 9. With respect to the most recent x-ray evidence, the administrative law judge rationally found Dr. Rasmussen's 2007 positive x-ray reading and Dr. Zaldivar's 2008 negative reading to be in equipoise, based on the physicians' equal qualifications as B readers. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81, 18 BLR 2A-1, 2A-12 (1994); Decision and Order on Remand at 9-10. The administrative law judge also found that both readings were nonetheless entitled to less weight than the 2003 x-rays, which were uniformly read by

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§725.309(d), and not a request for modification, filed pursuant to 20 C.F.R. §725.310. Employer's Brief at 7.

[11] The administrative law judge found that the 1983 x-ray was read once as negative for pneumoconiosis. Director's Exhibit 1. The x-ray dated August 26, 1987 was read as negative for pneumoconiosis, by Drs. Gaziano and Speiden, both B readers and Board-certified radiologists. Director's Exhibit 2. The x-ray dated November 28, 2000, was read as positive for pneumoconiosis by Dr. Patel, a B reader and Board-certified radiologist, but was read as negative by Dr. Navani, a B reader and Board-certified radiologist, and Dr. Gaziano, a B reader. Director's Exhibit 3.

[12] The administrative law judge found that a February 3, 2003 x-ray was read as positive for pneumoconiosis by Drs. Patel and Cappiello, who are both B readers and Board-certified radiologists, and was read as negative for pneumoconiosis by Dr. Binns, a B reader and Board-certified radiologist. A May 28, 2003 x-ray was read as positive for pneumoconiosis by Drs. Ahmed and Aycoth, who are both B readers and Board-certified radiologists, and was read as negative for pneumoconiosis by Dr. Binns. A July 9, 2003 x-ray was read as negative for pneumoconiosis by Dr. Zaldivar, a B reader. Director's Exhibit 4.

[13] The administrative law judge noted that a September 4, 2007 x-ray was read as positive for pneumoconiosis by Dr. Rasmussen, a B reader. This x-ray was also read for quality only by Dr. Gaziano. Director's Exhibit 14. A May 28, 2008 x-ray was read as negative for pneumoconiosis by Dr. Zaldivar. Employer's Exhibit 1.

more highly qualified readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(en banc); Decision and Order on Remand at 9-10. Thus, the administrative law judge rationally concluded that the preponderance of the more recent x-ray readings by the most highly qualified readers is positive for the existence of clinical pneumoconiosis. *See Ondecko*, 512 U.S. at 280-81, 18 BLR at 2A-12; *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); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). Contrary to employer's contention, the administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the number of x-ray interpretations, along with the readers' qualifications, the dates of the films, the quality of the films and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984); *see generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). In asserting that the profusion of opacities in the 2003 positive x-rays, as compared to the 2007 positive x-rays, does not reflect a strict progression of claimant's disease, employer is essentially asking the Board to reweigh the medical evidence, which we are not authorized to do.[14] *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). Moreover, employer's contention that the x-ray evidence is "at best" in equipoise, is unavailing, as employer must prove by a preponderance of the evidence that claimant does not suffer from pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.32 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43. We, therefore, reject employer's assertions of error and affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis through x-ray evidence.

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence did not disprove the existence of clinical pneumoconiosis, asserting that the administrative law judge should have credited the opinion of Dr. Zaldivar over that of Dr. Rasmussen. Employer's Brief at 7-8. The administrative law judge found that "Dr. Rasmussen diagnosed clinical pneumoconiosis based on his x-ray interpretation and Claimant's occupational history while Dr. Zaldivar found no evidence of clinical pneumoconiosis based on his x-ray interpretations." Decision and Order on Remand at 10. Contrary to employer's argument, the administrative law judge permissibly accorded little weight to opinions of both Drs. Rasmussen and Zaldivar, as

[14] Employer asserts that in 2003, some x-rays were read as positive for pneumoconiosis 1/1, while in 2007, Dr. Rasmussen read an x-ray as positive for pneumoconiosis, but only as 1/0. Employer's Brief at 7.

their conclusions as to the existence of pneumoconiosis were primarily based on their x-ray readings, which he had already found to be in equipoise. *See 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 on Remand at 10. As it is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence fails to rebut the presumption that claimant suffers from clinical pneumoconiosis. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28; Director's Exhibit 14; Employer's Exhibit 1.

Employer next contends that the administrative law judge erred in his evaluation of the medical opinion evidence in finding that employer failed to prove that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). We disagree.

The administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar and Castle, submitted with the more recent 2003 and 2007 claims. Dr. Rasmussen diagnosed a totally disabling respiratory impairment, characterized by a slight restrictive impairment and a marked impairment in oxygen transfer, and opined that coal mine dust exposure was a major and material contributing cause of claimant's disabling chronic lung disease. Decision and Order on Remand at 10; Director's Exhibit 14 at 3. In contrast, Dr. Zaldivar diagnosed a significant restrictive impairment, caused by paralysis of the right diaphragm and cardiac disease, with no contribution from coal mine dust exposure. Decision and Order on Remand at 11; Employer's Exhibit 1. Dr. Zaldivar explained that the pattern of disease exhibited by claimant is not the pattern found with coal workers' pneumoconiosis, which, when it causes an impairment, causes an obstructive and not a restrictive impairment. Decision and Order on Remand at 11; Employer's Exhibit 1 at 8. Dr. Castle also diagnosed restrictive lung disease, due to an elevated or paralyzed right hemidiaphragm and cardiac disease, with no contribution from coal mine dust exposure. Decision and Order on Remand at 11; Director's Exhibit 4. Dr. Castle explained that the pattern of claimant's hypoxemia, which Dr. Rasmussen opined was significant in 2000 and 2003, but Dr. Zaldivar opined was insignificant in 2003, was not consistent with coal mine dust-induced disease, which is permanent and irreversible. Decision and Order on Remand at 11; Director's Exhibit 4.

Contrary to employer's contention, the administrative law judge properly found that, in concluding that claimant's coal mine dust exposure did not contribute to his impairment, Dr. Zaldivar relied, in part, on his view that coal mine dust exposure does not cause restrictive impairment. Decision and Order on Remand at 11-12. The administrative law judge acted within his discretion in discounting this aspect of Dr. Zaldivar's reasoning, as inconsistent with the medical science accepted by the Department of Labor when it revised the definition of pneumoconiosis to include both obstructive and restrictive impairments arising out of coal mine employment. 20 C.F.R. §718.201(a)(2); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313

(4th Cir. 2012)*; Cumberland River Coal Co. v. Banks*, F.3d , 2012 WL 3194224 at *7-8 (6th Cir. 2012)*;Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order on Remand at 12. The administrative law judge also permissibly discounted Dr. Castle's opinion, that the blood gas study results did not support coal mine dust exposure as a cause of claimant's impairment, because Dr. Castle did not have the opportunity to review the most recent 2007 and 2008 blood gas studies, which produced qualifying values on exercise and were interpreted by their administering physicians as revealing significant hypoxemia. *See 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 on Remand at 11-12.

Substantial evidence supports the administrative law judge's finding that employer did not meet its burden to disprove the existence of pneumoconiosis, or to establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 13. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge