U.S. Department of Labor

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

BRB No. 15-0245 BLA

RETA BLAIR (On Behalf of the Estate of THURMAN E. BLAIR)	)	
Claimant-Respondent	)	
v.	)	
MIDWEST COAL COMPANY	)	DATE ISSUED: 03/30/2016
and	)	
AMAX COAL COMPANY c/o WELLS FARGO DISABILITY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in a Subsequent Claim of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2010-BLA-05833) of Administrative Law Judge Peter B. Silvain, Jr., rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Based on the filing date of the claim, and his determinations that the miner worked for at least twenty-one years in underground coal mine employment and suffered from a totally disabling respiratory or pulmonary impairment, the administrative law judge found 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).[2] Because claimant established the miner's total disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement that the miner failed to prove in his prior claim, the administrative law judge also found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Further, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in concluding that claimant invoked the Section

[1] The miner filed an initial claim for benefits on August 7, 2003, which was denied by the district director on April 23, 2004, because the miner did not establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner filed a second claim on May 24, 2005, which was denied by the district director on March 22, 2006, because the miner did not establish total disability. Director's Exhibit 2. The miner took no further action until he filed this subsequent claim on June 1, 2009. Director's Exhibit 4. A hearing was held before the administrative law judge on July 18, 2012, at which time the miner testified. While the case was pending, the miner died on April 11, 2014. Decision and Order at 3. Claimant, the widow of the miner, is pursuing the claim on his behalf. *Id*.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis where the record 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.

411(c)(4) presumption and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer further challenges the administrative law judge's evidentiary rulings pursuant to 20 C.F.R. §725.414. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its arguments on appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption – Total Disability

Employer contends that the administrative law judge erred in weighing the evidence on the issue of total disability.[4] Employer specifically challenges the administrative law judge's finding that claimant established total disability, based on the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

[3] The record reflects that the miner's last coal mine employment was in Illinois. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] When 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). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's prior claim was denied for failure to establish total disability, and there was no evidence of complicated pneumoconiosis, claimant had to establish this element in order to obtain review of the claim. 20 C.F.R. §725.309(c)(2), (3); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Exhibit 2.

A. Pulmonary Function Studies

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge weighed four pulmonary function studies, dated May 6, 2008, May 12, 2009, June 30, 2009, and October 11, 2010.[5] Director's Exhibit 13; Employer's Exhibits 2, 9. The May 6, 2008 and May 12, 2009 pulmonary function studies were conducted in the course of the miner's treatment at Muhlenberg Community Hospital. Employer's Exhibit 9. The administrative law judge found that the May 6, 2008 study was administered by Dr. Baker and produced qualifying values for total disability.[6] Decision and Order at 11; Employer's Exhibit 9. Dr. Baker noted good patient effort, comprehension, and cooperation, but did not attach tracings or a flow-volume loop to this study. Employer's Exhibit 9. The May 12, 2009 pulmonary function study had non-qualifying values for total disability. *Id*. The administrative law judge noted that this test was administered by a physician "whose name and credentials are unascertainable from the record" and that the "physician noted a good degree of patient effort, comprehension, and cooperation, but did not attach tracings or a flow-volume loop." Decision and Order at 11; *see* Employer's Exhibit 9.

The June 30, 2009 pulmonary function study was administered by Dr. Chavda, as part of the evaluation he conducted of the miner on behalf of the Department of Labor (DOL), and produced qualifying values for total disability. Director's Exhibit 13. On the DOL Form CM-2907 entitled "Report of Ventilatory Study," Dr. Chavda indicated that the miner's cooperation was "Good" and his ability to understand instructions and follow directions in performing the study was also "Good." *Id*. However, on the attached medical report, DOL Form CM-988, Dr. Chavda stated that the "[v]ent study compliance was not good." *Id*. Dr. Chavda attached three tracings with a flow-volume loop to this study. *Id*. Dr. Mettu prepared a validation report on behalf of the DOL, and indicated

[5] Employer asserts that the administrative law judge failed to discuss a March 15, 2012 pulmonary function study. Contrary to employer's contention, the administrative law judge identified the pulmonary function study conducted by Dr. Koirala on March 15, 2012, but correctly did not weigh it on the issue of total disability under 20 C.F.R. §718.204(b)(2)(i) because it "only reported [a qualifying] FEV1 value," but did not record values for FVC, MVV, or FEV1/FVC. Decision and Order at 11; *see* 20 C.F.R. §718.204(b)(2)(i); Employer's Exhibit 13.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

that the "[v]ents are acceptable." *Id*. Dr. Zaldivar also reviewed the results of this study and stated that "[t]he tracings of the ventilatory study reproduced poorly in the copy that I received[,] but it is evident that the tracings are not reproducible." Employer's Exhibit 4.

The administrative law judge found that the October 11, 2010 pulmonary function study was administered by Dr. McCartney and produced qualifying values for total disability. Decision and Order at 11; Employer's Exhibit 2. He also noted that Dr. McCartney attached one tracing and a flow-volume loop, but did not identify the miner's cooperation or comprehension. *Id*. Dr. Zaldivar reviewed the results of this study and stated:

> The flow-volume loops submitted show a terribly poor effort. This study cannot be used for any purpose. The lung volumes measured at that time show a total lung capacity of 43% of the predicted and the residual volume was 52% of the predicted. The tracings were not submitted. The tracings are hardly visible at all because the copy was very poor. It seems that volume vs. time curves were not submitted. As noted this study shows extremely poor effort.

Employer's Exhibit 4.

In determining the weight to accord the pulmonary function study evidence, the administrative law judge assigned more weight to the more recent pulmonary function studies, and noted that three pulmonary function studies were qualifying for total disability, while one pulmonary function study was non-qualifying for total disability. Decision and Order at 24. The administrative law judge rejected Dr. Zaldivar's invalidation of the June 30, 2009 and October 11, 2010 pulmonary function studies. Decision and Order at 23-24 n. 44, 45. Notwithstanding the contradictory statements from Dr. Chavda regarding the miner's "cooperation" in performing the June 30, 2009 pulmonary function study, the administrative law judge found that it was "valid and [of] acceptable quality for interpretation." *Id*. 23-24 n. 44. Although Dr. McCartney did not indicate the miner's comprehension and cooperation with regard to the October 11, 2010 pulmonary function study, the administrative law judge found that it was of acceptable quality, given that Dr. McCartney "interpreted the results of the study and used their values in forming the basis for his medical opinion." *Id*. 24 n. 45. The administrative law judge found that claimant established total disability under 20 C.F.R. §718.204(b)(2)(i), because "the majority of the [pulmonary function studies] and the most recent [pulmonary function study] were qualifying for total disability." *Id*. at 24.

Employer contends that the administrative law judge erred in considering the May 6, 2008 and May 12, 2009 pulmonary function studies, developed in conjunction with the miner's treatment at Muhlenberg Community Hospital and contained in the miner's

treatment records. Employer asserts that these studies do not comply with the quality standards applicable to pulmonary function studies set forth at 20 C.F.R. §718.103. Contrary to employer's contention, the quality standards set forth in 20 C.F.R. §718.103 are not applicable to these pulmonary function studies, as the standards apply only to evidence developed in connection with a claim for benefits. *See* 20 C.F.R. §718.101(b); *accord J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008) (holding that quality standards are not applicable to hospitalization and treatment records).

Employer challenges the administrative law judge's finding that the June 30, 2009 and October 11, 2010 qualifying pulmonary function studies were acceptable and valid. Specifically, employer contends that the administrative law judge failed to provide a scientific explanation for why Dr. Chavda's statement, that the June 30, 2009 "[v]ent study compliance was not good," does not render that study invalid. Employer's Brief in Support of Petition for Review at 13. Employer contends that the administrative law judge did not sufficiently explain why Dr. Zaldivar's invalidation of both of these studies was unpersuasive. Employer's arguments have no merit.

An administrative law judge is tasked with "weigh[ing] conflicting evidence and draw[ing] inferences from it, and a reviewing court may not set aside an administrative law judge's inference merely because it finds another more reasonable or because it questions the factual basis." *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). In this case, the administrative law judge acknowledged the "contradictory" statements with respect to the miner's cooperation in Dr. Chavda's June 30, 2009 pulmonary function study and medical report. Decision and Order at 23-24 n. 44. However, the administrative law judge acted within his discretion as a fact-finder in concluding that Dr. Chavda's conflicting statements do not invalidate the June 30, 2009 study because "Dr. Chavda interpreted the results of the study and *used [its] values in forming the basis for his medical opinion*." *Id*. (emphasis added); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Poole*, 897 F.2d at 893-94, 13 BLR at 2-355-56. The administrative law judge buttressed this finding by explaining that the June 30, 2009 pulmonary function study was "in substantial compliance with the regulatory requirements" at 20 C.F.R. §718.103 and by noting that "Dr. Mettu performed a quality reading of this test on July 22, 2009, and found the test acceptable and valid."[7] Decision

[7] Employer maintains that the administrative law judge rendered inconsistent findings as to whether the June 30, 2009 pulmonary function study is qualifying for total disability. Specifically, employer identifies that, in his Order Denying Claimant's Motion to Cancel Hearing and Remand the Claim, the administrative law judge found that "the results of Dr. Chavda's pulmonary function exam were ultimately non-qualifying, as the FVC value was greater than the applicable table values and the FEV1/FVC value was greater than 55%." July 6, 2012 Order at 4. We conclude that the

and Order at 23-24 n. 44. Furthermore, the administrative law judge permissibly concluded that Dr. Zaldivar's explanation for why the study is invalid was entitled to no probative weight because it is "undercut by his own comments on the quality of the tracings" and because it is not well-reasoned. *Id.*; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Poole*, 897 F.2d at 893-94, 13 BLR at 2-355-56.

We also reject employer's contention that the administrative law judge failed to explain his basis for resolving the conflict in the evidence with respect to the October 11, 2010 pulmonary function study. The administrative law judge rationally inferred that the October 11, 2010 pulmonary function study was valid and acceptable because Dr. McCartney "interpreted the results of the study and used [its] values in forming the basis for his medical opinion." Decision and Order at 24 n.45; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Poole*, 897 F.2d at 893-94, 13 BLR at 2-355-56. Moreover, the administrative law judge permissibly found that Dr. Zaldivar's criticisms of this study were contradictory, "undercut by his own comments on the tracings," and not well-reasoned, and therefore that his opinion was not entitled to probative weight. *Id.* We affirm the administrative law judge's conclusion that the June 30, 2009 and October 11, 2010 qualifying pulmonary function studies are acceptable and valid,[8] and that the preponderance of the pulmonary function study evidence is sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i), because it is supported by substantial evidence. *Poole*, 897 F.2d at 893-94, 13 BLR at 2-355-56; *Smith v. Director, OWCP*, 843 F.2d 1053, 11 BLR 2-125 (7th Cir. 1988).

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finding in the July 6, 2012 Order is harmless error, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge subsequently corrected it in his March 31, 2015 Decision and Order, wherein he noted that this study was qualifying, based on MVV values that fell below the applicable table values listed in Appendix B. Decision and Order at 23.

[8] We reject employer's contention that the administrative law judge erred in failing to consider Dr. Houser's invalidation of the June 30, 2009 and October 11, 2010 pulmonary function studies. Dr. Houser's opinion was attached to claimant's June 21, 2012 Motion to Cancel Hearing and Remand the Claim. As neither party designated Dr. Houser's opinion as part of their affirmative or rebuttal evidence, or argued good cause for the admission of this evidence, the administrative law judge was precluded from weighing Dr. Houser's opinion in conjunction with the pulmonary function study evidence. 20 C.F.R. §725.414; *see* Employer's and Claimant's Black Lung Evidence Summaries.

B. Medical Opinions

Employer next argues that the administrative law judge erred in determining the weight to accord the conflicting medical opinions as to whether the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Before weighing the relevant medical opinions, the administrative law judge found that the miner's usual coal mine employment "was primarily that of a mine examiner and mine foreman," and summarized the relevant duties of those positions. Decision and Order at 4.

The administrative law judge then considered the medical opinions of Drs. Chavda, Baker, McCartney, Koirala and Zaldivar on the issue of total disability. Decision and Order at 25-27. Dr. Chavda identified the miner's last coal mine employment as a "foreman, mine examiner and communication [director]," and indicated that the miner "walked [six] miles a shift as a mine examiner [and] . . . did some heavy lifting." Director's Exhibit 13. He indicated that the miner suffered from "[s]evere obstructive and restrictive airway disease," and that the airway disease "severe[ly]" impaired the miner from performing his current or last coal mine job, as the miner exhibited "severe shortness of breath on slightest exertion" and pulmonary function studies showed an FEV1 of 47%. *Id*. Dr. Baker reported that the miner suffered from a mild obstructive and restrictive impairment, and Drs. McCartney and Koirala reported that the miner suffered a severe pulmonary impairment. Employer's Exhibits 2, 9, 13. None of these doctors identified the miner's usual coal mine employment, or stated if the miner was restricted from performing the tasks of his usual coal mine employment. *Id*. Dr. Zaldivar stated that the miner was not totally disabled from a pulmonary or respiratory standpoint at the time that Dr. Rasmussen performed the "last valid ventilatory study" on record on August 23, 2005, but that the miner later developed cardiac disease and became obese, and these conditions "[affected] his ability to do adequate breathings tests and exercise tests." Employer's Exhibit 4.

Finding no indication that Drs. Baker, McCartney, Koirala and Zaldivar were aware of, or even considered, the exertional requirements of the miner's usual coal mine employment, the administrative law judge assigned less weight to their opinions. Decision and Order at 25-27. The administrative law judge further rejected Dr. Zaldivar's opinion because he relied on "a substantial amount of stale medical evidence[.]" *Id.* at 26. In contrast, the administrative law judge assigned "great probative weight" to Dr. Chavda's opinion because his findings were "consistent with the evidence available to him" and his opinion was "documented and reasoned." *Id*. at 25. The administrative law judge further found that Dr. Chavda's opinion is based on "an accurate assessment of the [m]iner's usual coal mine employment." *Id*. Therefore, the administrative law judge found that Dr. Chavda's opinion was sufficient to meet claimant's burden of establishing the miner's total disability at 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that the administrative law judge erroneously found that Dr. Zaldivar's opinion is supportive of a finding of total disability, and that he erred in rejecting Dr. Zaldivar's contrary opinion based on his reliance on "stale medical evidence." Employer's Brief in Support of Petition for Review at 19-20. Employer also suggests that the administrative law judge improperly discredited Dr. Zaldivar's opinion based on his reliance on inadmissible evidence. *Id*. at 20-21. Notwithstanding these arguments, employer concedes that the administrative law judge "could reasonably discount Dr. Zaldivar's opinion because there was no evidence he considered the exertional requirements of [the miner's] job." *Id*. at 20. Because this finding is unchallenged, and because the administrative law judge provided at least one valid reason for according less weight to Dr. Zaldivar's opinion, we need not address employer's remaining arguments. Thus, we affirm the administrative law judge's rejection of Dr. Zaldivar's opinion. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000).

Employer also challenges the administrative law judge's decision to credit Dr. Chavda's opinion. Employer's only argument, however, is that Dr. Chavda's opinion is not reasoned because Dr. Chavda relied on an invalid pulmonary function study and made inconsistent statements with respect to the miner's cooperation. As discussed *supra*, we have affirmed the administrative law judge's finding that Dr. Chavda's June 30, 2009 pulmonary function study was acceptable and valid. Therefore, we affirm the administrative law judge's finding that Dr. Chavda's opinion is documented and reasoned, and sufficient to establish that the miner was totally disabled from his usual coal mine employment[9] pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10] *See Beeler*, 521 F.3d

[9] In determining whether a miner is totally disabled, the administrative law judge must compare the exertional requirements of the miner's usual coal mine work with the doctor's description of the pulmonary impairment and physical limitations. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir 1996); *see also Manning Coal Corp. v. Wright*, 257 F.Appx. 836, 842 (6th Cir. 2007) (explaining that the administrative law judge may make a finding of total disability based on a medical opinion that "provide[s] a *medical assessment of physical abilities or exertional limitations* which lead to that conclusion.") (emphasis added).

[10] Employer contends that the administrative law judge erred in finding that the opinions of Drs. Baker, McCartney, and Koirala were supportive of a finding of total disability, as employer asserts that these physicians "provided no opinion as to whether [the miner] was totally disabled." Employer's Brief in Support of Petition for Review at 16 n. 9, 18, 21-22. Moreover, because the administrative law judge assigned little weight to the opinions of these physicians, and because we affirm his reliance on Dr. Chavda's

at 726, 24 BLR at 2-103; *Poole*, 897 F.2d at 893, 13 BLR at 2-355; *Peabody Coal Co. v. Helms*, 859 F.2d 486 (7th Cir. 1988).

We also affirm the administrative law judge's determination that all of the relevant evidence, when considered together, was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 27. As claimant established that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment,[11] we affirm the administrative law judge's finding that claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 20 C.F.R. §718.305(b)

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

In order to rebut the presumption of total disability due to pneumoconiosis under Section 411(c)(4), employer must affirmatively establish that the miner did not have either legal[12] or clinical[13] pneumoconiosis, or that "no part of the miner's respiratory or

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opinion as sufficient to meet claimant's burden of establishing the miner's total disability at 20 C.F.R. §718.204(b)(2)(iv), we need not address employer's arguments with respect to Drs. Baker, McCartney and Koirala. *See Larioni*, 6 BLR at 1-1277.

[11] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner worked at least twenty-one years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[12] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[13] Clinical pneumoconiosis is defined as:

> [T]hose 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726-27, 25 BLR 2-405, 2-413 (7th Cir. 2013); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to disprove that the miner had clinical pneumoconiosis, based on his consideration of the x-ray, CT scan and medical opinion evidence. Decision and Order at 30-34. On the issue of legal pneumoconiosis, the administrative law judge weighed Dr. Zaldivar's opinion, that the miner did "not have any disease [or] condition arising from his work as a coal miner," against the opinions of Drs. Chavda and McCartney, that the miner's obstructive respiratory impairment was due, in part, to coal dust exposure. Decision and Order at 35-39; *see* Director's Exhibit 13; Employer's Exhibits 2, 4. The administrative law judge assigned less probative weight to Dr. Zaldivar's opinion because he did not report the coal mine employment history on which he relied. Decision and Order at 37. Furthermore, the administrative law judge found that Dr. Zaldivar relied on a rationale that was inconsistent with the definition of legal pneumoconiosis as set forth at 20 C.F.R. §718.201, and that Dr. Zaldivar did not credibly explain why he excluded coal dust exposure as a contributing factor to the miner's pulmonary impairment. *Id.* at 37-38. The administrative law judge assigned less probative weight to the opinions of Drs. Chavda and McCartney because they relied on an inaccurate coal mine employment and smoking history, but found that their opinions were entitled to more weight than Dr. Zaldivar's opinion. *Id*. at 37-38.

Employer contends that the administrative law judge did not properly address whether Dr. Zaldivar's opinion is sufficient to disprove the existence of legal pneumoconiosis, as defined in 20 C.F.R. §718.201. Employer argues that the administrative law judge erroneously required Dr. Zaldivar to "rule out that coal dust caused the pulmonary impairment," rather than showing that there was no "significant relationship or substantial aggravation" by coal mine dust exposure to the miner's respiratory or pulmonary impairment. Employer's Brief in Support of Petition for Review at 32-33. Employer asserts that Dr. Zaldivar's opinion was based on an accurate analysis of the objective testing and the miner's treatment records, was "the only opinion based on a correct smoking history, and further, was the only opinion that addressed the [m]iner's coal mine employment[.]" *Id*. at 30-31. Employer's arguments with respect to Dr. Zaldivar have no merit.

Before beginning his analysis of the medical evidence on rebuttal, the administrative law judge correctly stated that employer must "disprove the existence of

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20 C.F.R. §718.201(a)(1).

legal pneumoconiosis" and that legal pneumoconiosis "is broadly defined to include 'any chronic [restrictive or obstructive] pulmonary disease or respiratory or pulmonary impairment *significantly related to, or substantially aggravated by*, dust exposure in coal mine employment." Decision and Order at 35, *quoting* 20 C.F.R. §718.201(b) (emphasis added). Moreover, the administrative law judge did not reject Dr. Zaldivar's opinion as insufficient to meet a "rule out" standard. Decision and Order at 35-38. The administrative law judge considered the explanations given by Dr. Zaldivar for excluding a diagnosis of legal pneumoconiosis, and ultimately concluded that Dr. Zaldivar's opinion was not credible on the etiology of the miner's respiratory impairment. *Id*. Because the administrative law judge correctly stated employer's burden to establish that the miner does not have pneumoconiosis and found that Dr. Zaldivar's opinion was not credible, we reject employer's argument that the administrative law judge applied an improper standard. *Minich*, 25 BLR at 1-154-56.

Furthermore, we see no error in the administrative law judge's conclusion that Dr. Zaldivar's opinion is not well-reasoned and is entitled to little probative weight on the issue of legal pneumoconiosis. In his deposition, taken on February 22, 2011, Dr. Zaldivar explained the conditions he required in order to diagnose legal pneumoconiosis in the case of an individual miner:

> Now, the legal pneumoconiosis, as I understand it, *is a diagnosis almost of exclusion*. When one cannot best explain the abnormalities in the lung capacity to the breathing gases and functional capacity of the individual with a disease entity that would easily and fully explain the condition. And if the individual was a coal miner[,] in the absence of any radiographic pneumoconiosis or any other indication other than work in a coal [mine], such an individual will be said to have legal pneumoconiosis. *But if there is a full explanation for the medical condition by a disease entity, then the individual would not [qualify] for a diagnosis of legal pneumoconiosis even if they had worked in the coal [mine]*.

Employer's Exhibit 5 at 12-13.

In this case, Dr. Zaldivar concluded that the miner did not suffer from legal pneumoconiosis because he was able to attribute the pulmonary impairments to other causes. Specifically he "attribut[ed] the sudden apparent drop in pulmonary function capacity since 2005 to the obvious poor quality of the breathing tests," and the impairments seen on the miner's arterial blood gas testing to his obesity and cardiac dysfunction. Employer's Exhibit 4. The administrative law judge rationally found Dr. Zaldivar's reasoning to be unpersuasive because "the definition of pneumoconiosis . . . does not provide that legal pneumoconiosis is a diagnosis of exclusion" and "includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly

related to, or substantially aggravated by, dust exposure in coal mine employment."[14] Decision and Order at 35, 38, *quoting* 20 C.F.R. §718.201(b); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Poole*, 897 F.2d at 893, 13 BLR at 2-355. We consider employer's remaining arguments with regard to Dr. Zaldivar's opinion to be a request that the Board reweigh the evidence, which we are not empowered to do. *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 prove that the miner did not have legal pneumoconiosis and is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[15] *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990).

Furthermore, based on the administrative law judge's determination that Dr. Zaldivar's opinion is not adequately reasoned as to the etiology of the miner's disabling obstructive respiratory impairment, he rationally found that employer failed to affirmatively establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201.[16] *See Burris*, 732 F.3d at 735,

[14] Employer argues that the administrative law judge erroneously relied on the preamble to the 2001 revised regulations in weighing Dr. Zaldivar's opinion because the preamble "is not a regulation promulgated pursuant to regulatory authority[.]" Employer's Brief in Support of Petition for Review at 31-32. Contrary to employer's assertion, the administrative law judge did not rely on the preamble to the regulations, but specifically found Dr. Zaldivar's opinion to be inconsistent with the regulation at 20 C.F.R. §718.201, which sets forth the definition of legal pneumoconiosis.

[15] Employer argues that the administrative law judge erred in finding good cause established for the admission of x-ray evidence by claimant within twenty days of the hearing in this case. Employer's Brief in Support of Petition for Review at 5-10. Employer also argues that the administrative law judge erred in weighing the relevant evidence on the issue of clinical pneumoconiosis. *Id*. at 25-29; *see* Decision and Order at 30-34. Insofar as employer has failed to rebut the presumption of legal pneumoconiosis, we need not reach employer's arguments with respect to the issue of clinical pneumoconiosis, as employer must disprove the existence of both clinical *and* legal pneumoconiosis in order to rebut the presumption under 20 C.F.R. §718.305(d)(1)(i). *See Larioni*, 6 BLR at 1-1277.

[16] Employer argues that the administrative law judge erred in considering the opinions of Drs. Chavda and McCartney, that the miner had legal pneumoconiosis. However, because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that the miner did not have legal pneumoconiosis, it is not

25 BLR at 2-425; *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013). Thus, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii) by establishing that no part of claimant's respiratory disability is due to pneumoconiosis. Decision and Order at 32-33.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).