U.S. Department of Labor

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

BRB Nos. 15-0091 BLA
and 15-0092 BLA

DELMA RATLIFF (Widow of, and on behalf of the Estate of, JAMES RATLIFF)	
Claimant-Respondent	
v.	
T & W COAL COMPANY, INCORPORATED	DATE ISSUED: 03/29/2017
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 Awarding Benefits in the Miner's and Survivor's Claims of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in the Miner's and Survivor's Claims (2011-BLA-06271 and 2011-BLA-05406) of Administrative Law Judge Joseph E. Kane (the administrative law judge), rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a consolidated miner's subsequent claim and a survivor's claim.[1] In the miner's subsequent claim, the administrative law judge found that the miner worked for 16.75 years in either underground coal mine employment, or in coal mine employment in conditions substantially similar to those in an underground mine. The administrative law judge further found that the miner suffered from a totally disabling respiratory or pulmonary impairment. Based on these determinations and the filing date of the claim, the administrative law judge found that claimant was entitled to invoke 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] The administrative law judge also found that claimant established a change in an applicable

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[1] The miner first filed a claim for benefits on January 6, 1992, which was denied by Administrative Law Judge Paul H. Teitler in a Decision and Order issued on September 16, 1996. Director's Exhibit 1. Judge Teitler determined that the miner established the existence of pneumoconiosis, but failed to establish total disability. *Id*. The miner filed a second claim on May 10, 2001. Director's Exhibit 2. In a Decision and Order issued on October 23, 2003, Administrative Law Judge Daniel J. Roketenetz found that the miner was totally disabled but, after review of the newly submitted evidence, found that the miner did not have pneumoconiosis. Director's Exhibit 2-42. The miner filed a third claim on January 27, 2009. Director's Exhibit 42. While his case was pending, the miner died on October 8, 2009. *Id*. Claimant, the miner's widow, filed a survivor's claim on October 14, 2009, and is also pursuing the miner's subsequent claim on behalf of his estate. Director's Exhibits 34, 81-10. Administrative Law Judge Joseph E. Kane (the administrative law judge) consolidated the cases for hearing on May 2, 2012.

[2] Under Section 411(c)(4), claimant is entitled in the miner's claim 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.

condition of entitlement under 20 C.F.R. §725.309.[3] Furthermore, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption. Based on the award of benefits in the miner's claim, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

On appeal, employer challenges the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's findings on rebuttal. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.[5]

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,

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[3] If 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). The miner's most recent prior claim, filed on May 10, 2001, was denied because he failed to establish the existence of pneumoconiosis. Thus, in order to obtain review of the merits of the miner's current subsequent claim, claimant had to establish this element. 20 C.F.R. §725.309(c)(3), (4). By invoking the Section 411(c)(4) presumption, claimant satisfies the requirements of 20 C.F.R. §725.309, as the existence of pneumoconiosis is presumptively established.

[4] Section 422(*l*) provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

and in accordance with applicable law.[6] 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. The Miner's Subsequent Claim

A. Length of Qualifying Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must establish that the miner worked for at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). The conditions in a mine other than an underground mine will be considered "'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant need not directly compare the miner's above-ground work environment to conditions underground, but can establish substantial similarity by offering sufficient evidence of the surface mining conditions in which the miner worked. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

Employer initially argues that the administrative law judge erred in revisiting the issue of the length of the miner's coal mine employment because Administrative Law Judge Daniel J. Roketenetz, in his October 23, 2003 Decision and Order denying the miner's 2001 claim, accepted the parties' stipulation to 12.75 years of coal mine employment, and the miner did not return to work after that decision.[7] Employer's

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[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 5.

[7] Employer's position on whether a stipulation is binding has not been consistent in this case. In conjunction with the miner's second claim, employer specifically *argued against* the binding effect of the stipulation it made in the miner's initial 1992 claim to 28 years of coal mine employment, and maintained that the Social Security Administration (SSA) earnings statements supported a finding of only 12.65 years of coal mine employment. Hearing Transcript at 9-10. Judge Roketenetz did not hold employer to the earlier 28-year stipulation and accepted the parties' stipulation of 12.75 years of coal mine employment. Director's Exhibit 2.

argument is without merit. Fundamental fairness and due process require relief from a stipulation made prior to the change in law effectuated by the amendments to Section 411(c)(4), and the resulting reallocation of the burden of proof when at least fifteen years of qualifying coal mine employment is established. *See Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Sturgill v. Old Ben Coal Co.*, 22 BLR 1-314, 1-318 (2003) (relitigation of an issue is not barred when the allocation of the burden of proof and/or the substantive legal standards have changed). In this case, we conclude that the administrative law judge permissibly reconsidered the issue of the length of the miner's coal mine employment to determine if claimant was eligible to invoke the Section 411(c)(4) presumption and was not bound by the prior stipulation.

The administrative law judge found the miner had a combined total of 16.75 years of underground and qualifying above-ground coal mine employment, from 1961 to 1991. Decision and Order at 9. The administrative law judge described separate periods of the miner's coal mine employment as follows.

For the years prior to 1978, the administrative law judge credited the miner for any quarter in which the miner's itemized statement of earnings record from the Social Security Administration (SSA) showed that he earned at least $50.00 in coal mine employment. Decision and Order at 8. Finding that the pre-1978 SSA record showed twenty-nine quarters where the miner earned more than $50.00, the administrative law judge credited the miner with 7.25 years of coal mine employment. *Id*.

For the period of January 1, 1979 to December 31, 1982, the administrative law judge determined that the miner was self-employed as a coal truck driver. Decision and Order at 8. Finding that claimant's testimony established that the miner worked in conditions that were substantially similar to those in an underground mine, he credited the miner with four years of coal mine employment for that period. *Id.*

For the period of January 1, 1986 to December 31, 1990, the administrative law judge determined that the miner was "continuously employed with T&W Coal." Decision and Order at 9. Therefore, the administrative law judge credited the miner with five years of coal mine employment for this period. *Id*.

Additionally, the administrative law judge indicated that he could not determine the beginning and ending dates of the miner's coal mine employment in each of the individual years of 1978, 1983, 1985, and 1991. Decision and Order at 8-9. The administrative law judge decided to calculate the miner's employment for those years by dividing the miner's earnings for each year by the yearly wage base, as reported in Exhibit 609 of the Office of Workers' Compensation Programs' *Coal Mine ([Black Lung*

Benefits Act]*) Procedure Manual (BLBA Procedure Manual)*.[8] *Id*. Based on this formula, the administrative law judge credited the miner with 0.14 years of coal mine employment in 1978, 0.21 years in 1983, 0.12 years in 1985, and 0.03 years in 1991, for a total of 0.50 years of coal mine employment. *Id*.

After adding the totals for the respective periods together, the administrative law judge determined that the miner worked for a total of 16.75 years in either underground coal mine employment or above-ground employment in conditions that were substantially similar to those found in an underground mine. Decision and Order at 9. Finding that claimant established at least fifteen years of qualifying coal mine employment and that the miner had a totally disabling respiratory or pulmonary impairment, the administrative law judge concluded that claimant was entitled to invocation of the Section 411(c)(4) presumption.

Employer's overall challenge to the finding of 16.75 years of qualifying coal mine employment is that the administrative law judge did not apply a "consistent methodology." Employer's Brief at 17. Employer asserts that the administrative law judge is not permitted "to pick and choose among various methods of calculations to manipulate the case to apply the fifteen year presumption." *Id*. Contrary to employer's argument, because the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination on the length of the miner's coal mine employment if it is based on a "reasonable method" and is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP,* 8 BLR 1-430, 432 (1986).

Employer also argues that the administrative law judge should have applied the formula at 20 C.F.R. §725.101(a)(32)(iii), in conjunction with Table 10 of Exhibit 610 of the *BLBA Procedure Manual*, when determining the miner's pre-1978 coal mine employment.[9] We disagree. The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides:

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[8] The table at Exhibit 609, entitled *Wage Based History*, reports the SSA's wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax.

[9] The table at Exhibit 610, entitled *Average Earnings of Employees in Coal Mining* contains the average daily earnings and the yearly earnings for miners who worked 125 days at a mine site, as reported by the Bureau of Labor Statistics (BLS).

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer *may use* the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added). The plain language of the regulation makes clear that the administrative law judge has discretion to use the formula in calculating the length of a miner's coal mine employment.

For income earned *prior to 1978*, the Board has long held that it is reasonable for an administrative law judge to credit a miner with a full quarter of employment for each quarter in which the miner's SSA earnings statements show earnings of $50.00 or more. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984); *Combs v. Director, OWCP*, 2 BLR 1-904, 1-907 (1980). Although the administrative law judge could have calculated the miner's pre-1978 employment using a different method, he was not required to adopt employer's approach relying on Exhibit 610. 20 C.F.R. §725.101(a)(32)(iii); *see Muncy*, 25 BLR at 1-27. As the administrative law judge applied a permissible method in calculating the miner's employment from 1961 to 1977, we affirm his finding that claimant established 7.25 years of qualifying coal mine employment for that period.[10]

Notwithstanding, we agree with employer that the administrative law judge did not adequately explain his decision to credit the miner with four years of qualifying coal mine employment from 1979 to 1983. The administrative law judge stated that "it was unclear whether the miner's self-employment [as a coal truck driver] was at underground or above-ground mines." Decision and Order at 8. However, the administrative law judge found that claimant's testimony established that the miner was regularly exposed to coal dust in his above-ground employment as a coal truck driver, noting that she

[10] The administrative law judge did not address he miner's earnings prior to 1961, and therefore may have underestimated the length of the miner's pre-1978 coal mine employment. The SSA earnings statements show that the miner earned $123.00 in the fourth quarter of 1958 and $156.50 in the first quarter of 1959, while working for Bartley & Clevinger Coal Company. Director's Exhibit 8-1. The administrative law judge did not consider whether these quarters should have been included in his calculation of the length of the miner's coal mine employment. Decision and Order at 8. Because we are remanding this case for further consideration, as discussed *infra*, the administrative law judge must address whether claimant is entitled to .5 years of coal mine employment for the years of 1958-1959.

specifically testified that the miner was "very, very dirty" when he returned home from work. Decision and Order at 6, *quoting* May 2, 212 Hearing Transcript at 15-16. The administrative law judge overlooked, however, that claimant's statement that the miner appeared "very, very dirty" was in response to counsel's question of how the miner looked when he returned home from working in *underground* mines, and not how he looked after driving a coal truck.[11] To the extent that the administrative law judge has failed to fully consider the context of claimant's description, and whether it is sufficient to establish that the miner's working conditions as a coal truck driver were substantially similar to those in an underground mine, we vacate the administrative law judge's finding of four years of qualifying coal mine employment from January 1, 1979 to December 31, 1982. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 8.

Regarding the administrative law judge's decision to credit the miner with 0.12 years of coal mine employment for 1985, and a full year of employment in 1986, employer argues that the administrative law judge should not have relied on the yearly wage base as reported by Exhibit 609 of the *BLBA Procedure Manual*, as there is evidence in the record pertaining to the miner's daily earnings, relevant for application of Exhibit 610. Employer's argument has merit, in part.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Board addressed whether an administrative law judge could rely upon Exhibit 609 to calculate the length of a miner's coal mine employment. In *Osborne v. Eagle Coal Co.*, BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016) (pub.), the Board observed that Exhibit 609 of the *BLBA Procedure Manual*, entitled "Average Wage Base," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R.

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[11] Claimant testimony regarding the miner's dust exposure appears to relate only to his underground coal mine employment:

> Q. Now, could you when he [the miner] was working *underground* at T&W, could you describe the condition he would come home in?
> A. He was always very, very dirty, and he was so tired and he would come in the back door and lay down and go to sleep for a couple of hours . . .
> Q. Was there any other reason why he laid down on the floor?
> A. Well, he was dirty. So therefore, he didn't want to go through the house, and as I said he was tired, you know, he worked hard, he was tired.

Hearing Transcript at 15-16 (emphasis added). After discussing her knowledge of the miner's work as a foreman and electrician for employer, claimant was again asked to describe the miner's clothes and she indicated they were covered in coal dust. *Id*. at 17.

§725.101(a)(32)(iii). Rather, the Board noted that Exhibit 609 reports the SSA's wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax. *Id.* The Board therefore held that reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry.[12] *Id.* In contrast, the Board noted that the table at Exhibit 610 of the *BLBA Procedure Manual*, entitled Average Earnings of Employees in Coal Mining, contains the information specified in 20 C.F.R. §725.101(a)(32)(iii), i.e., "the coal mine industry's average daily earnings for that year." *Id.* Because the administrative law judge's length of coal mine employment findings for the years 1978, 1983, 1985, and 1991 were calculated by relying on Exhibit 609, we vacate the administrative law judge's findings for those individual years, which he found totaled 0.50 years of coal mine employment. *Id.*

For the foregoing reasons, we are unable to affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption.[13] Thus, we vacate the

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[12] Although Exhibit 609 is not appropriate for use in the formula at 20 C.F.R. §725.101(a)(32)(iii), the Board noted the following explanation by the Director for why it exists:

> Exhibit 609 actually sets out the limit on income subject to Social Security tax for each year since 1937. As explained in the [BLBA] Procedure Manual, this table's purpose is to caution that the Social Security earnings record may underreport a miner's true wages because the earnings record "will not normally show income greater than the wage base amount for a given year."

Osborne v. Eagle Coal Co., BRB No. 15-0275 BLA, slip op. at 8 n.10 (Oct. 5, 2016) (pub.).

[13] We have affirmed 7.25 years of qualifying pre-1978 coal mine employment for the period of 1961 to 1977. We also affirm, as unchallenged by employer, the administrative law judge's crediting of 5 years of coal mine employment while the miner worked continuously for employer from 1986-1990. *See Skrack*, 6 BLR at 1-711. Thus, claimant has established 12.25 years of qualifying coal mine employment, independent of the time the administrative law judge determines qualifies toward coal mine employment pursuant to our remand instructions in footnote 14.

administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and that she demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. 20 C.F.R. §718.305(b)(1)(i); *see Muncy*, 25 BLR at 1-27; Decision and Order 9, 24. Accordingly, we remand this case to the administrative law judge for recalculation of the years of the miner's qualifying coal mine employment.[14]

On remand, the administrative law judge may use any reasonable method of computation in determining the length of the miner's qualifying coal mine employment, consistent with the instructions herein and the Board's decision in *Osborne*.[15] *See Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003); *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11. The administrative law judge must consider all of the relevant evidence and explain the bases for his findings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[16]

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

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[14] On remand, the administrative law judge should consider whether claimant is entitled to .5 years of coal mine employment for two quarters in 1958-1959, in which the miner earned more than $50.00. The administrative law judge should also consider the tax returns submitted by claimant to determine if they show earnings by the miner under his business name "R&R Trucking" that may not have been included on the SSA earnings record. Director's Exhibit 37. Finally, the administrative law judge must reconsider whether the miner's work as a coal truck driver is qualifying for purposes of invocation of the Section 411(c)(4) presumption. Director's Exhibit 6 (Description of Employment as a Coal Truck Driver, wherein the miner describes hauling coal from a "deep mine"); May 2, 2012 Hearing Transcript at 23 (claimant's testimony that the miner hauled coal for employer's underground mining operation).

[15] If the administrative law judge on remand applies the formula at 20 C.F.R. §725.101(a)(32)(iii), he must comply with the requirement that a copy of Exhibit 610 "be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history." 20 C.F.R. §725.101(a)(32)(iii).

[16] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Although we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, in the interest of judicial economy, we address employer's arguments as they pertain to rebuttal of that presumption. Once the Section 411(c)(4) presumption has been invoked, the burden of proof shifts to employer to rebut the presumption by establishing that the miner had neither legal[17] nor clinical[18] pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *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 rebut the presumption of clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(B) because the autopsy evidence, which established that the miner suffered from the disease, outweighed the negative x-rays and CT scans of record. Decision and Order at 28-29.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the opinions of employer's experts, Drs. Jarboe and Rosenberg, each of whom opined that the miner suffered from an obstructive respiratory

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[17] 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). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated *by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). .

[18] 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.

20 C.F.R. §718.201(a)(1).

impairment due to cigarette smoking, unrelated to coal dust exposure. Decision and Order at 16-21; Director's Exhibit 14; Employer's Exhibits 6-9. The administrative law judge rejected their opinions that coal dust exposure was not a contributing factor in the miner's respiratory impairment, as unpersuasive and inconsistent with the medical science credited by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. Decision and Order at 30-32. Therefore, the administrative law judge found that employer failed to rebut the presumed fact of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). *Id.*

Employer asserts that the administrative law judge erred in referring to the preamble when determining the credibility of the medical opinion evidence on the issue of legal pneumoconiosis, in violation of the APA. Employer's Brief at 19-23. Employer's argument is without merit.

The United States Court of Appeals for the Sixth Circuit, in addition to other Federal circuit courts and the Board, have held that an administrative law judge may permissibly evaluate expert opinions in conjunction with the DOL's discussion of the prevailing medical science set forth in the preamble to the 2001 revised regulations, as part of the deliberative process. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A&E Coal Co. v. Adams*, 694 F.3d 798, 801 25 BLR 2-203, 2-210 (6th Cir. 2012); *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-317, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011). Contrary to employer's argument, the administrative law judge permissibly evaluated the medical opinions of record in light of the studies underlying the preamble discussion regarding the revision of the definition to legal pneumoconiosis to include obstructive respiratory impairments arising out of coal mine employment. *Adams*, 694 F.3d at 801, 25 BLR at 2-210. Therefore, the administrative law judge's references to the preamble did not, as employer maintains, convert the rebuttable presumption of Section 411(c)(4) into an irrebuttable presumption, or deny employer a fair adjudication. *See Little David Coal Co. v. Director, OWCP*, 532 F. App'x. 633, 635-36 (6th Cir. 2012). Moreover, the preamble does not constitute evidence outside the record with respect to which the administrative law judge must give notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12.

With regard to the administrative law judge's credibility findings, he observed correctly that Drs. Jarboe and Rosenberg relied on the "pattern of airflow obstruction" to exclude a diagnosis of legal pneumoconiosis. Decision and Order at 30-31. The administrative law judge noted that both physicians "opined that while the FEV_1

decreases in relationship to coal mine dust exposure, the measurement of FEV_1/FVC ratio generally is preserved. . . . with smoking-related forms of [chronic obstructive pulmonary disease (COPD)], the FEV_1/FVC ratio is generally reduced." *Id.* (internal quotations omitted); *see* Director's Exhibit 14; Employer's Exhibits 6, 7. Contrary to employer's contention, the administrative law judge permissibly rejected the opinions of Drs. Jarboe and Rosenberg as inconsistent with the preamble to the 2001 regulations. The preamble recognizes that COPD "may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC" and "[d]ecrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners."[19] *Id.*, *quoting* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Adams*, 694 F.3d at 801, 25 BLR at 2-210.

In addition, the administrative law judge accurately stated that "Dr. Jarboe opined that because the [m]iner's ventilatory impairment was reversible after bronchodilators were administered, coal dust did not cause the impairment." Decision and Order at 30, *citing* Director's Exhibit 14 at 5, *see* Employer's Exhibit 6 at 8. The administrative law judge permissibly rejected this reasoning because Dr. Jarboe failed to "address the etiology of the fixed portion of the [m]iner's impairment that does not benefit from bronchodilator treatment" and because Dr. Jarboe "failed to acknowledge that the [m]iner's two most recent [pulmonary function studies], dated February 6, 2009 and March 26, 2009, revealed total disability even after bronchodilators were administered." Decision and Order at 30; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

The administrative law judge also correctly noted that Dr. Jarboe diagnosed pulmonary emphysema and excluded coal dust exposure as a contributing factor for the disease because "the [m]iner showed 'no evidence of dust retention on his' chest x-ray." Decision and Order at 30, *quoting* Director's Exhibit 14 at 6. The administrative law judge acted within his discretion in assigning little weight to Dr. Jarboe's opinion because his reasoning conflicts with the regulatory definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2), which does not require the presence of clinical pneumoconiosis, and with 20 C.F.R. §718.202(a)(4), which provides for a diagnosis of pneumoconiosis "notwithstanding a negative x-ray." 20 C.F.R. §§718.201(b), 718.202(a)(4); *see* 65 Fed. Reg. 79,971 (Dec. 20, 2000) (recognizing that coal mine dust can cause clinically

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[19] Because the administrative law judge gave a valid reason for according Dr. Rosenberg's opinion less weight, we need not address employer's additional allegations of error with regard to the administrative law judge's treatment of his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 27.

significant obstructive lung disease, even in the absence of x-ray evidence of clinical pneumoconiosis); *Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

In addition, the administrative law judge permissibly rejected Dr. Jarboe's reasoning that because the miner "only worked as a coal miner for 12.65 years" he "would have very low probability of developing a clinically significant, much less disabling decrement in lung function," as inadequately explained and "based on generalities, rather than specifically focusing on the miner's condition." Decision and Order at 31, *quoting* Employer's Exhibit 6 at 10; *see Adams*, 694 F.3d at 802-03, 25 BLR at 2-210-12; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge rationally found that while "Dr. Jarboe determined [that] the [m]iner would have . . . only a two to three percent chance of developing obstruction from coal dust inhalation," this does not explain "why the [m]iner was not one of the two to three percent of miners to develop obstruction from coal dust inhalation." *Id*.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and to assign those opinions appropriate weight. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). Additionally, the Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Jarboe and Rosenberg, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis and thus did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[20]

With respect to the presumed fact of disability causation, the administrative law judge rationally determined that the opinions of Drs. Jarboe and Rosenberg were not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis, as neither physician diagnosed the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013);

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[20] We affirm, as unchallenged on appeal, the administrative law judge's determination that employer failed to rebut the presumed existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). *See Skrack*, 6 BLR at 1-711.

Island Creek Ky. Mining v. Ramage, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); Decision and Order at 33. We therefore affirm, as supported by substantial evidence, 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). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

In summary, we vacate the award of benefits in the miner's claim and remand the case for further consideration of whether claimant established at least fifteen years of qualifying coal mine employment for invocation of the Section 411(c) presumption. If claimant on remand establishes the requisite fifteen years of qualifying coal mine employment, she will have again invoked Section 411(c)(4) presumption and the administrative law judge may reinstate the award of benefits.

II. The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: She filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death.[21] 30 U.S.C. §932(*l*). However, because we have vacated the award of benefits in the miner's claim, we vacate the administrative law judge's determination that claimant is automatically entitled to survivor's benefits under Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). On remand, if the administrative law judge awards benefits in the miner's claim, he may reinstate the award of benefits in the survivor's claim. However, if the miner's claim is denied, claimant must establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(b) by establishing that the miner's death was due to pneumoconiosis.

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[21] Employer raises no specific argument in this appeal challenging claimant's entitlement under Section 422(*l*). *Skrack,* 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in the Miner's and Survivor's Claims is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge