U.S. Department of Labor

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

BRB No. 16-0371 BLA

MALCOLM MORRIS, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 05/24/2017
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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:

Claimant appeals the Decision and Order Denying Benefits (2013-BLA-05867) of Administrative Law Judge Larry A. Temin, rendered on a subsequent claim[1] filed on July 22, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 10.71 years of coal mine employment.[2] Because claimant established less than fifteen years of coal mine employment, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3]

The administrative law judge then considered whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, without the aid of the Section 411(c)(4) presumption. The administrative law judge found that the new evidence did not establish the existence of clinical pneumoconiosis[4] pursuant to 20 C.F.R. §718.202(a)(1),(4). However, the administrative law judge found that the new medical opinion evidence established the existence of legal pneumoconiosis,[5] in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure, pursuant

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[1] Claimant filed two previous claims for benefits, both of which were finally denied by the district director because claimant did not establish any element of entitlement. Director's Exhibits 1, 2.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6; Hearing Transcript at 13.

[3] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant 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.

[4] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. However, the administrative law judge found that claimant failed to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in determining the length of his coal mine employment. Claimant also argues that the administrative law judge erred in finding that the medical opinion evidence did not establish disability causation pursuant to 20 C.F.R. §718.204(c).[6] Employer responds, urging affirmance of the denial of benefits. In the alternative, employer contends that the administrative law judge erred in finding that the medical opinion evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs, has declined to file a brief in this 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. 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 living 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, that he is totally disabled, and that his total disability is caused by pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

I. LENGTH OF COAL MINE EMPLOYMENT

Claimant contends that the administrative law judge erred in crediting him with less than fifteen years of coal mine employment and, therefore, erred in determining that he could not invoke the Section 411(c)(4) presumption. Claimant's Brief at 7-10 (unpaginated). For the reasons set forth below, we disagree with claimant.

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[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence did not establish that claimant has clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant bears the burden of establishing the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). Because the Act does not provide specific guidelines for calculating the time spent in coal mine employment, the administrative law judge is granted broad authority in deciding this issue, and his or her determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge considered claimant's Social Security Administration (SSA) earnings records, hearing testimony, and work histories as reported to the Department of Labor (DOL) on Form CM-911a. Decision and Order at 5-8. The administrative law judge found that claimant's hearing testimony was vague and that his work history forms were inconsistent. *Id*. at 5. Therefore, the administrative law judge found that claimant's SSA earnings records were "the most reliable sources of information" with respect to claimant's coal mine employment. *Id*. at 5-6. However, where claimant's hearing testimony was consistent with his SSA earnings records, the administrative law judge relied on both the SSA earnings records and hearing testimony. *Id*. at 6.

The administrative law judge noted that claimant was employed from 1974 to 1977 with Newcon Coal, Inc. (Newcon). Decision and Order at 6 n.15. For pre-1978 coal mine employment, the administrative law judge credited claimant for any quarter of coal mine employment in which his SSA earnings records showed that he earned at least $50.00. *Id*. at 6. Because claimant earned at least $50.00 in nine "non-overlapping quarters" with Newcon, the administrative law judge credited claimant with 2.25 years of coal mine employment through 1977. *Id*. at 6 & n.15; Director's Exhibits 3 at 94; 8.

Addressing claimant's coal mine employment from 1978 onward, the administrative law judge noted that claimant worked for Newcon in 1978, M&W Sales, Inc. (M&W) from 1978 to 1979, Call Detroit Diesel Allison, Inc. (Diesel Allison) from 1979 to 1983, Ball Branch Mining Co., Inc. (Ball Branch) from 1983 to 1988, Big Elk Creek Coal (Big Elk Creek) from 1988 to 1990, and Flaget Fuels, Inc. (Flaget Fuels) in 1989. Decision and Order at 6.

With respect to the years 1978 to 1979, 1983, and 1988 to 1990, the administrative law judge stated that he was "unable to [determine] the beginning and ending dates of [claimant's] employment . . . ." Decision and Order at 8. Therefore, citing the formula set forth at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge assessed whether claimant's earnings as reflected in the SSA records "exceed the wage base amount for the relevant year" as reported by the DOL in the Office of Workers' Compensation Programs *Coal Mine (Black Lung Benefits Act) Procedure Manual (BLBA Procedure Manual)*. Where claimant's earnings did not exceed the wage base amount for the relevant year, the

administrative law judge "divided [claimant's] coal mine employment earnings by the wage base to credit him with a portion of a year." *Id.* Using this formula, the administrative law judge credited claimant with a total of 1.96 years of coal mine employment for 1978 to 1979, 1983, and 1988 to 1990. *Id.* at 8.

With respect to the years 1980 to 1982, with Diesel Allison, and 1984 to 1987, with Ball Branch, the administrative law judge found that claimant's SSA earnings records established that he was employed continuously. Decision and Order at 8; *see* Director's Exhibits 3 at 94, 8. The administrative law judge also found that claimant's yearly earnings for those calendar years "equaled or exceeded the industry average earnings of employees in coal mining for a 125-day period" as reported by the DOL in the *BLBA Procedure Manual*. *Id.* Therefore, the administrative law judge credited claimant with four years of coal mine employment with Ball Branch for the years 1984 to 1987. Decision and Order at 8.

However, the administrative law judge credited claimant with coal mine employment with Diesel Allison for only half of his time there, finding 1.5 years from 1980 to 1982 rather than three. Decision and Order at 7-8. The administrative law judge explained that he made this finding because claimant testified that his job with Diesel Allison "require[ed] that he spend more than half of his time physically at [the] strip mines and the other half" repairing mining equipment engines "at a facility where no mining was performed." *Id.* at 7-8. The administrative law judge found that the evidence did not establish that the repair facility was in or around a coal mine and, therefore, found that claimant's work at the repair facility did not meet the situs test.

Based on the sum of all of the years calculated, the administrative law judge found that claimant established a total of 10.71 years of coal mine employment. *Id.* at 9.

Claimant first contends that the administrative law judge erred in crediting him with only 2.25 years for pre-1978 coal mine employment. Claimant asserts that he "testified to working at Sigmond Coal Company[7] beginning in 1970 for approximately [three] years." Claimant's Brief at 7 (unpaginated); Hearing Transcript at 30-31. Claimant argues that the SSA earnings records do not reflect this employment because "it is possible that taxes were not withheld for these jobs." *Id.* Claimant's argument lacks merit.

The administrative law judge is charged with determining the reliability of witness testimony. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v.*

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[7] As summarized by the administrative law judge, claimant testified that Sigmond Coal Company was the same entity as Newcon Coal, Inc. Decision and Order at 6 n.15; Hr'g Tr. at 38.

Bishop Coal Co., 9 BLR 1-67, 1-68 (1986). The administrative law judge permissibly found that claimant's hearing testimony was "vague" and, therefore, reasonably relied on claimant's SSA earnings records for this time period. Decision and Order at 5-6; *see Lafferty,* 12 BLR at 1-192; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Mabe,* 9 BLR at 1-68. Moreover, contrary to claimant's argument, the administrative law judge correctly found that claimant "earned more than $50.00 in [nine] non-overlapping quarters" in coal mine employment between 1974 and 1977. Decision and Order at 6; Director's Exhibits 3 at 94, 8. Therefore, we affirm the administrative law judge's finding that claimant's SSA earnings records established 2.25 years of coal mine employment from 1974 through 1977. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984).

Claimant next argues that the administrative law judge erred in crediting him with coal mine employment for only half the time he worked for Diesel Allison, based on claimant's testimony regarding the time he was away from the strip mines. Claimant's Brief at 9 (unpaginated). We disagree. Claimant testified that he repaired engines for equipment that was used in strip mining with Diesel Allison. Hr'g Tr. at 46. Specifically, he testified that he would go to strip mine sites, "pull the engines out, take them to the [repair] shop and rebuild them and take them back to the mountains to the job and put them back in." *Id*. at 36. According to claimant, the company he worked for was not a coal mining company and the repair shop was not located on the mine sites. *Id*. at 36, 49-50, 52. Claimant stated that he worked for Diesel Allison full-time for fifty hours a week, and he estimated that he spent thirty hours at the strip mines with the remainder of the time at the repair shop. *Id*. at 47. He further clarified that he spent, on average, three out of five days a week at the strip mines. *Id*. at 55. He estimated that he was exposed to coal mine dust 90% of the time he was at the strip mines. *Id*. at 55.

The administrative law judge found that claimant's testimony established that he was at the site of the strip mines for only 50% of the time, when he was removing and replacing the engines and equipment parts. With respect to the time that claimant was repairing engines at the repair shop, the administrative law judge found that this work met the function test because it "is integral to the coal production process."[8] Decision

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[8] A miner is defined as any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202. Duties that meet the situs and function requirements constitute the work of a miner as defined in the Act. *Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-664 (6th Cir. 2014). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. *Director, OWCP v. Consolidation Coal Co.*, [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir.

and Order at 7. The administrative law judge found that the repair work did not meet the situs test, however, because there was insufficient evidence to establish that claimant's time working at the repair shop, away from the mine site, "took place in or around a coal mine," as there was "no testimony regarding how far the off-site repair shop was from the strip mines . . . ." Decision and Order at 7. Contrary to claimant's argument, the administrative law judge permissibly found that claimant's time working at the repair shop was not coal mine employment, because the evidence did not establish that the repair shop was in or around a mine. *See Director, OWCP v. Consolidation Coal Co.,* [*Petracca*], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989) (holding that the factual determination of what constitutes an "on-site" repair facility is left to the administrative law judge). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's determination that claimant had 1.5 years of coal mine employment with Diesel Allison from 1980 through 1982.

Claimant next asserts that his SSA earnings records establish that he worked for five years with Ball Branch from 1983 to 1988, 1.5 years with Big Elk Creek from 1988 to 1990, and one year with Flaget Fuels in 1989. Claimant's Brief at 9 (unpaginated). Claimant, however, has not alleged any specific error concerning the administrative law judge's calculation for these years of coal mine employment. These findings are therefore affirmed.[9] *See Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987); *Fish v.*

1989). The function requirement mandates that the duties performed be integral to the extraction or preparation of coal or, to the extent the individual's duties were incidental to the extraction or preparation of coal, those duties were an integral or necessary part of the coal mining process. *Id*.

[9] Subsequent to the issuance of the administrative law judge's Decision and Order, the Board held in a published decision that it is error to use Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine* (*BLBA*) *Procedure Manual* to calculate the length of a miner's coal mine employment using the income-based formula at 20 C.F.R. §725.101(a)(32)(iii). *Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016). The Board 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 Exhibit 609 contains a wage base that is not specific to the coal mine industry. *Id.* In contrast, 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 . . . ." Therefore, the administrative law judge erred in using Exhibit 609 instead of Exhibit 610 when he applied 20 C.F.R. §725.101(a)(32)(iii) to calculate the length of claimant's coal mine employment from 1978 to 1979, in 1983, and from 1988 to 1990. Even if the

Director, OWCP, 6 BLR 1-107, 1-109 (1983). Thus, we affirm the administrative law judge's finding that claimant established 10.71 years of coal mine employment.[10] *Muncy*, 25 BLR at 1-27. Therefore, we also affirm the administrative law judge's determination that claimant did not establish sufficient coal mine employment to invoke the Section 411(c)(4) presumption.

II. LEGAL PNEUMOCONIOSIS

We next address employer's argument that the administrative law judge erred in finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[11] In order to establish that he suffers from legal pneumoconiosis, claimant must prove that he suffers from a "chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation 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).

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administrative law judge had used Exhibit 610 for the years in question, however, the result would establish an additional 3.57 years of coal mine employment, bringing the total to 14.28 years of coal mine employment. Director's Exhibit 3, 8. Because that total is insufficient for invocation of the Section 411(c)(4) presumption, reconsideration of the length of claimant's coal mine employment is not required on remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

[10] Claimant argues that the administrative law judge should have considered that the district director credited him with a total 11.54 years of coal mine employment in a prior claim. This argument lacks merit. With only one exception not applicable here, the regulations bar the administrative law judge from considering the district director's findings. 20 C.F.R. §725.455(a). Moreover, claimant has not explained how considering the previous finding of 11.54 years of coal mine employment would have altered the administrative law judge's determination that claimant established less than fifteen years of coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

[11] Although not raised in a cross-appeal, employer's argument is properly before the Board, as the argument is supportive of the administrative law judge's decision denying benefits. 20 C.F.R §802.212(b); *see Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc).

The administrative law judge considered the new medical opinions of Drs. Baker and Jarboe on the issue of legal pneumoconiosis.[12] Dr. Baker diagnosed claimant with COPD and chronic bronchitis, and opined that claimant's COPD was due primarily to his cigarette smoking history, but that the COPD was "significantly contributed to[,] and substantially aggravated by, dust exposure in [claimant's] coal mine employment." Director's Exhibit 10; Claimant's Exhibit 1. Dr. Jarboe concluded that claimant does not have legal pneumoconiosis, but suffers from chronic bronchitis and pulmonary emphysema due solely to smoking, and reactive airways disease due to asthma unrelated to coal mine employment. Director's Exhibit 11.

The administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis was "supported by the objective evidence of record [and by Dr. Baker's] physical examination of [claimant]," and was based on "accurate smoking and mining histories." Decision and Order at 25-26. The administrative law judge further found that Dr. Baker's opinion that coal mine dust exposure contributed to claimant's COPD was consistent with the medical science endorsed by the DOL in the preamble to the 2001 regulatory revisions. *Id*. at 25. The administrative law judge therefore found that Dr. Baker's opinion was "well-reasoned" and merited "substantial weight." Decision and Order at 26, 29. In contrast, the administrative law judge found that Dr. Jarboe's reasoning for excluding coal mine dust exposure as a cause of claimant's COPD was not persuasive. The administrative law judge found that Dr. Jarboe's opinion was not consistent with the medical science in the preamble to the 2001 revised regulations, was based on generalities, and was not well-reasoned. *Id*. at 26-29. The administrative law judge therefore found that the weight of the medical opinion evidence established that claimant has legal pneumoconiosis.

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. Employer's Brief at 19-20, 26. This assertion lacks merit. 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 Cent. 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, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012). Therefore, contrary to employer's argument, the

[12] The administrative law judge noted that the record also contains medical opinion evidence associated with claimant's previous claims, but accorded it "little weight" in light of its age. Decision and Order at 29. This finding is affirmed as unchallenged by the parties. *See Skrack*, 6 BLR at 1-711.

administrative law judge permissibly consulted the preamble as a statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Adams*, 694 F.3d at 801, 25 BLR at 2-210.

Employer argues further that the administrative law judge erred in discounting Dr. Jarboe's opinion that claimant does not have legal pneumoconiosis. Employer's Brief at 18-24. We disagree. Dr. Jarboe relied on claimant's significantly reduced FEV1/FVC ratio as a basis for eliminating coal mine dust exposure as a causative factor in claimant's obstructive impairment. Director's Exhibit 11 at 9-10. The administrative law judge permissibly found that Dr. Jarboe's reasoning was in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Sterling*, 762 F.3d at 491, 25 BLR at 2-645; 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 26-27.

Dr. Jarboe also opined that claimant's chronic bronchitis is not legal pneumoconiosis because chronic bronchitis "will generally resolve after withdrawal from dust exposure" and claimant "has not had exposure to coal mine dust in over 20 years." Employer's Exhibit 11 at 13. The administrative law judge rationally found that aspect of Dr. Jarboe's reasoning to be inconsistent with DOL's recognition that pneumoconiosis is "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); Decision and Order at 28-29.

Further, the administrative law judge considered Dr. Jarboe's opinion that "[a]nother finding not characteristic of the impairment caused by coal [mine] dust inhalation is the presence of . . . reversible airways disease (asthmatic component)." Director's Exhibit 11 at 10. The administrative law judge found that "although [claimant's] pulmonary function study of record showed improvement after bronchodilator administration, [claimant's] lung function did not improve to . . . normal" and, therefore, found that claimant's "impairment has a fixed, non-reversible component." Decision and Order at 27. The administrative law judge permissibly found that Dr. Jarboe's reasoning was unpersuasive because "Dr. Jarboe has not adequately explained why [claimant's] responsiveness to treatment with bronchodilators necessarily eliminated a finding of legal pneumoconiosis." *Id.*; *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 found that Dr. Jarboe's opinion was based on generalities regarding the effects of smoking as opposed to those of coal mine dust

exposure.[13] The administrative law judge therefore permissibly discounted the doctor's opinion, because Dr. Jarboe "gave no persuasive reason why [claimant] could not have [been] among the minority of miners who have significant decrements in pulmonary function due to coal [mine] dust in contrast to the majority who do not." Decision and Order at 27-28; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-104 (7th Cir. 2008); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). We therefore reject employer's allegations of error in the administrative law judge's decision to accord less weight to Dr. Jarboe's opinion.[14]

There is merit, however, in employer's contention that the administrative law judge did not apply the same level of scrutiny in analyzing whether Dr. Baker provided a reasoned medical opinion that claimant's COPD arose out of coal mine employment. Employer's Brief at 18, 22-23. Specifically, employer contends that, although the administrative law judge discredited Dr. Jarboe's opinion as inadequately explained and based on generalities, he did not address what employer argues are similar deficiencies in Dr. Baker's opinion. We agree.

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[13] The administrative law judge noted that Dr. Jarboe opined that it "was 'highly [improbable]' from a medical standpoint that [claimant's] airflow obstruction has developed from his occupation as a coal miner." Decision and Order at 27, *quoting* Employer's Exhibit 9. The administrative law judge also noted that this conclusion was based on Dr. Jarboe's reasoning with respect to the "likely intensity and duration of [claimant's] coal [mine] dust exposure" and the "effects of cigarette smoking [being] more damaging to the lungs . . . ." *Id.* The administrative law judge determined that Dr. Jarboe "point[ed] to no objective evidence to support his assertion that [claimant] was only exposed to 0.4-0.7 mg/m3 of dust during his coal mine employment . . . ." *Id.* at 28.

[14] Employer also argues that the administrative law judge erred in failing to "explain why the miner's treatment records were not substantial evidence of the absence of legal pneumoconiosis." Employer's Brief at 24. We disagree. While an administrative law judge may conclude that treatment records not diagnosing pneumoconiosis are probative of its absence, the administrative law judge is not required to do so. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Whether such evidence establishes the absence of pneumoconiosis is a question of fact committed to the administrative law judge. *Id.* at 1-219. Here, the administrative law judge considered the miner's treatment records and noted that although they listed diagnoses of chronic obstructive pulmonary disease (COPD), no treatment record indicated what objective testing, if any, the diagnosis was based upon, or addressed the etiology of the COPD. Decision and Order at 26. He therefore found that the treatment records could not establish legal pneumoconiosis. On the facts as found by the administrative law judge, no further explanation was required. *See Marra,* 7 BLR at 1-218-19.

The administrative law judge found that Dr. Baker's opinion attributing claimant's COPD to both smoking and coal mine dust exposure was documented, because it was based on accurate smoking[15] and coal mine employment histories and on objective tests indicating the presence of COPD. After summarizing Dr. Baker's opinion that claimant's COPD is due to both his smoking history and ten years of coal mine employment, the administrative law judge summarized two of DOL's findings in the preamble regarding the effects of smoking and coal mine dust.[16] The administrative law judge then found that Dr. Baker's opinion that coal mine dust exposure contributed to claimant's COPD was well-reasoned and met the standard to establish legal pneumoconiosis at 20 C.F.R. §718.201. Decision and Order at 26.

Employer argues that the administrative law judge did not consider whether Dr. Baker adequately explained his reasons for concluding that in this specific case, ten years of coal mine dust exposure contributed to claimant's COPD. Employer notes that Dr. Baker cited medical literature in support of the propositions that coal mine dust exposure can cause obstruction, and that smoking and coal dust "may be either synergistic or additive," Director's Exhibit 10 at 26, but argues that Dr. Baker did not explain why that occurred in this particular case. Employer's Brief at 13. Further, employer points to testimony that was not weighed by the administrative law judge when determining the credibility of Dr. Baker's opinion that claimant's COPD was related to coal mine dust.[17] Employer's Brief at 8, 14.

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[15] The administrative law judge found that claimant "has between a 50 and 55 pack-year smoking history, which is substantial." Decision and Order at 24.

[16] The administrative law judge stated that "[i]n the [p]reamble . . . [DOL] has taken the position that both coal dust and cigarette smoking are equally harmful to the lungs and produce clinically significant obstructive lung disease . . . at roughly the same incidence. [DOL] has also concluded that the two exposures have an additive effect . . . ." Decision and Order at 25, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

[17] During his November 2, 2015 deposition, Dr. Baker was asked on cross-examination, "Do you believe that every individual who has an exposure to coal mine dust and has a chronic or obstructive pulmonary disease, that that is due at least in part [to] his exposure to coal dust?" Claimant's Exhibit 1 at 9. Dr. Baker responded, "That's my opinion, yes, ma'am." *Id.* When asked "So you believe in every individual?" he responded, "With all my heart." *Id.* In its brief filed with the administrative law judge, employer noted this aspect of Dr. Baker's opinion when it argued that Dr. Baker's opinion should not be found reasoned. Employer's Brief, Mar. 9, 2016, at 33.

Whether a physician's opinion is adequately reasoned is for the administrative law judge to determine. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny to determining the credibility of the medical opinion evidence under 20 C.F.R. §718.202(a)(4). 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(en banc). Because the administrative law judge did not consider all the relevant evidence and render the necessary factual findings as to the credibility of Dr. Baker's opinion, we must vacate the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand this case for further consideration.

Therefore, on remand, the administrative law judge should reconsider Dr. Baker's medical opinion on the issue of legal pneumoconiosis and address employer's argument that it is based on generalities, rather than claimant's specific condition. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Knizner,* 8 BLR at 1-7; Employer's Brief at 13-14, 17-18. In weighing Dr. Baker's medical opinion, the administrative law judge should address Dr. Baker's credentials, the explanations for his conclusions, the documentation underlying his medical judgment, and the sophistication of, and bases for, his opinion.[18] *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

III. TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Because we have vacated the administrative law judge's finding of legal pneumoconiosis and are remanding this case for the administrative law judge to reconsider that issue, the administrative law judge must also reconsider whether claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c) if that issue is reached on remand. In the interest of judicial economy, and to avoid any repetition of error if legal pneumoconiosis is established, we will address claimant's argument that the administrative law judge failed to apply the proper standard for disability causation at 20 C.F.R. §718.204(c). Claimant's argument has merit.

Prior to evaluating the medical opinions at 20 C.F.R §718.204(c), the administrative law judge, citing *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014), articulated the proper standard under the regulations for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a

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[18] We reject employer's argument that Dr. Baker's opinion is legally insufficient to establish legal pneumoconiosis. Employer's Brief at 13. Dr. Baker concluded that claimant's COPD "has been significantly contributed to[,] and substantially aggravated[,] by dust exposure in his coal mine employment." Director's Exhibit 10 at 26; *see* 20 C.F.R. §718.201(b).

"substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 17-19. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-228, 2-303 (6th Cir. 2001); Decision and Order at 33.

The administrative law judge, however, applied an erroneous standard in his analysis of whether Dr. Baker's opinion met claimant's burden on this issue. Instead of focusing on the contribution that legal pneumoconiosis makes to claimant's total respiratory disability at 20 C.F.R. §718.204(c)(1), the administrative law judge revisited the question of the extent to which claimant's respiratory impairment is attributable to coal mine dust exposure, which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4). Decision and Order at 33-34. Specifically, the administrative law judge found Dr. Baker's opinion insufficient to establish disability causation because Dr. Baker did not opine that coal dust exposure was a substantially contributing cause of claimant's total disability:

> [W]hile Dr. Baker asserted that [claimant's] coal dust exposure contributed "in part" to his impairment, there is nothing in his opinion to support a finding that coal dust exposure and thus legal pneumoconiosis constituted a significant or substantially contributing cause of [c]laimant's overall disability. In fact, Dr. Baker concluded that cigarette smoking was the main contributory factor in [claimant's] "overall picture" and that smoking was a "significant portion" of [claimant's] obstructive impairment and his overall disability.

Id. at 34.

The administrative law judge's analysis of Dr. Baker's opinion was error. Where an administrative law judge finds that legal pneumoconiosis is established, in the form of COPD, the administrative law judge must consider whether that condition is a "substantially contributing cause" of a claimant's disabling respiratory or pulmonary

impairment.[19] *See Groves,* 761 F.3d at 599, 25 BLR at 2-624; *Banks*, 690 F.3d at 490, 25 BLR at 2-154-55; *Kirk*, 264 F.3d at 611, 22 BLR at 2-303; 20 C.F.R. §718.204(c)(1). Therefore, we vacate the administrative law judge findings regarding Dr. Baker's opinion at 20 C.F.R. §718.204(c). If the administrative law judge again finds that claimant's COPD is legal pneumoconiosis, the administrative law judge must then determine whether legal pneumoconiosis—the COPD—is a substantially contributing cause of claimant's total disability.

IV. CONCLUSION

On remand, the administrative law judge must first reweigh Dr. Baker's medical opinion on the issue of legal pneumoconiosis to determine whether it is adequately reasoned and meets claimant's burden to establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Groves,* 761 F.3d at 598-99, 25 BLR at 2-624; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If the administrative law judge finds that Dr. Baker's opinion is not adequately reasoned on the issue of legal pneumoconiosis, he may reinstate his denial of benefits, based on claimant's failure to establish an essential element of entitlement. *Anderson*, 12 BLR at 1-112.

If the administrative law judge finds that Dr. Baker's opinion that claimant's COPD arose out of coal mine employment establishes legal pneumoconiosis, he must then address whether Dr. Baker's opinion establishes that claimant's legal pneumoconiosis, in the form of COPD, is a substantially contributing cause of claimant's disabling respiratory impairment at 20 C.F.R. §718.204(c).[20] *See Groves,* 761 F.3d at 599, 25 BLR at 2-624; *Banks*, 690 F.3d at 490, 25 BLR at 2-154-55; *Kirk*, 264 F.3d at 611, 22 BLR at 2-303; 20 C.F.R. §718.204(c)(1).

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[19] In *Groves*, the Sixth Circuit held that the administrative law judge erred in stating that the miner need only establish that legal pneumoconiosis was a contributing cause of the miner's totally disabling respiratory or pulmonary impairment, when the regulatory standard requires that pneumoconiosis be a substantially contributing cause. *See Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 599, 25 BLR 2-615, 2-624 (6th Cir. 2014).

[20] If the administrative law judge finds that legal pneumoconiosis is established, he may reinstate his decision to discount Dr. Jarboe's disability causation opinion because Dr. Jarboe failed to diagnose legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 34.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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