BRB No. 13-0142 BLA

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| ROGER L. WAUGH | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| CLINCHFIELD COAL COMPANY | ) | DATE ISSUED: 11/25/2013 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Subsequent Claim (2011-BLA-05180) of Administrative Law Judge Christine L. Kirby, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Based on the filing date of the subsequent claim,[1] the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30

[1] Claimant filed an initial claim for benefits on September 5, 1989, which was finally denied for failure to establish total disability. *See Waugh v. Clinchfield Coal Co.*, No. 97-2351 (4th Cir. Dec. 23, 1997) (unpub.). Director's Exhibit 1. Claimant filed the current subsequent claim on December 1, 2009. Director's Exhibit 3.

U.S.C. §921(c)(4).[2] The administrative law judge accepted the parties' stipulation of at least fifteen years of qualifying coal mine employment and also determined that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Additionally, the administrative law judge determined that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled and erred in weighing the evidence relevant to rebuttal. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[3]

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.[4] 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 this subsequent claim, claimant must establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant "has [fifteen] years or more of qualifying coal mine employment" for invocation of the amended Section 411(c)(4) presumption. Decision and Order at 4; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's most recent coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

the prior claim became final." 20 C.F.R. §725.309(c);[5] *see 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)(4). Because claimant's prior claim was denied for failure to establish total disability, claimant must prove, based on the newly submitted evidence, that he is totally disabled in order to obtain a review of the merits of his claim.

## I. INVOCATION OF THE PRESUMPTION - TOTAL DISABILITY

The administrative law judge concluded that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 5-6. Relevant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially found that claimant's last coal mine job required the performance of heavy manual labor. *Id*. at 8. The administrative law judge also considered the medical opinions of Drs. Forehand, Fino, and Hippensteel.[6] Dr. Forehand performed the Department of Labor evaluation on January 12, 2010, and noted that claimant's last job in the mines involved work as a section foreman, mine foreman, and superintendent. Director's Exhibit 15. Dr. Forehand obtained qualifying pulmonary function and arterial blood gas studies, and diagnosed an obstructive ventilatory pattern and arterial hypoxemia. *Id*. Dr. Forehand stated, "claimant's cigarette smoking has resulted in a non-disabling respiratory impairment (FVC = 83 [percent] FEV1 = 66 [percent]). On the other hand, [c]laimant's coal workers' pneumoconiosis has caused a totally and permanently disabling respiratory impairment of a gas exchange nature that leaves him without the capacity to return to his coal mining job." *Id*.

Dr. Fino examined claimant on June 23, 2010, and noted in his report that claimant worked as a mine foreman and supervisor. Director's Exhibit 16. Dr. Fino indicated that claimant's pulmonary function study was invalid but opined that claimant has "a severe lung problem as evidenced by the low pO2," obtained during a resting

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language set forth in 20 C.F.R. §725.309(d), is now set forth in 20 C.F.R. §725.309(c). *See* 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

[6] The administrative law judge noted that the record contains treatment records from Dr. Robinette, but that they do not address whether claimant has a totally disabling respiratory or pulmonary impairment. *See* Decision and Order at 8; Claimant's Exhibit 2.

arterial blood gas study.[7] *Id*. Dr. Fino concluded that claimant was totally disabled from performing his usual coal mine work by a respiratory impairment secondary to asthma. *Id*.

Dr. Hippensteel examined claimant on October 12, 2011, and also reviewed medical records. He obtained a pulmonary function test but stated that claimant was unable to produce consistent effort due to an irritant cough. Employer's Exhibit 2. Based on the arterial blood gas study he obtained and a review of the arterial blood gas studies by Drs. Forehand and Fino, Dr. Hippensteel opined that claimant "does not have findings of permanent gas exchange impairment related to diffusion or any permanent cause. His variable gas exchange appears to be related to variability in his asthma and bronchospasm and unrelated to his prior coal mine dust exposure." *Id*. Dr. Hippensteel further opined, however, that claimant's age, coronary disease, and asthma "are sufficient in combination to keep him from going back to his work as a whole man, but these problems are unrelated to his prior coal mine dust exposure." *Id*. During a deposition conducted on November 4, 2011, Dr. Hippensteel testified that claimant has a variable respiratory impairment that can return to normal on occasion, but would also affect him periodically. Employer's Exhibit 3. Dr. Hippensteel indicated that on a spectrum of people who have asthma, claimant's condition is worse than usual. *Id*.

In weighing the medical opinion evidence, the administrative law judge observed that all of the physicians were "familiar with the nature of [c]laimant's coal mine employment." Decision and Order at 8-9. She found that "the reports of Drs. Forehand and Fino finding that [c]laimant does have a totally disabling respiratory impairment are well-reasoned and documented." *Id*. at 9. Conversely, she found the opinion of Dr. Hippensteel to be "vague" as to whether claimant's respiratory impairment would render him totally disabled. *Id*. The administrative law judge concluded that claimant established total disability by "a preponderance of the well-reasoned medical reports" at 20 C.F.R. §718.204(2)(iv). *Id*.

Upon examination of the newly submitted evidence as a whole, the administrative law judge found that claimant established total disability and, therefore, demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Decision and Order at 3. Based on her finding that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge determined that claimant was entitled to the

[7] Dr. Fino noted that an exercise arterial blood gas study was not obtained because claimant "looked very ill," his pO2 level was in the 50s, and he was on supplemental oxygen. Director's Exhibit 16.

rebuttable presumption of total disability due pneumoconiosis at amended Section 411(c)(4). *Id*. at 9.

In challenging the administrative law judge's finding of invocation of the amended Section 411(c)(4) presumption, employer argues that there is "inadequate evidence" to support the administrative law judge's determination that claimant's usual coal mine work involved heavy manual labor. Employer's Brief at 6. Employer alleges that employment records and claimant's hearing testimony establish that claimant worked in a supervisory capacity throughout most of his coal mining career, as either a superintendent or foreman, and that his primary physical exertion was walking. *Id*. Employer maintains that while claimant may have performed *occasional* heavy manual labor, it was not part of his usual coal mine work. *Id*.

Contrary to employer's argument, we see no error in the administrative law judge's rational interpretation of claimant's hearing testimony and her finding that, while claimant "last worked as a superintendent and foreman[,] . . . he was still required to perform heavy manual labor as a part of his job, and would help to perform jobs as necessary such as shoveling the belt in the mine or a belt drive." Decision and Order at 7; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Hearing Transcript at 11, 13-14, 30-31. The weight to be assigned to the evidence and determinations concerning the credibility of the hearing witnesses are within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Employer also contends that the administrative law judge erred in relying on the opinions of Drs. Forehand and Fino to find that claimant is totally disabled, since they based their disability findings on arterial blood gas studies that were "discredited" by the administrative law judge at 20 C.F.R. §718.204(b)(2)(ii). Employer's Brief at 7. Contrary to employer's contention, however, the administrative law judge did not "discredit" the testing obtained by either physician.[8] Although the administrative law

[8] The administrative law judge considered three arterial blood gas studies. She found that the studies dated January 12, 2010 by Dr. Forehand and June 23, 2010 by Dr. Fino yielded qualifying values for total disability, but gave greater weight to the more recent, non-qualifying study obtained by Dr. Hippensteel on October 12, 2011, because the administrative law judge considered it to be more indicative of claimant's current condition. Decision and Order at 6.

judge concluded that claimant did not establish total disability, based solely on his consideration of the arterial blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii), the regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

In this case, the administrative law judge permissibly determined that Drs. Forehand and Fino each provided a reasoned and documented opinion, that claimant is totally disabled by a severe respiratory impairment, based on the totality of their examinations, including their assessment of the qualifying arterial blood gas studies they obtained, claimant's work history and their findings on physical examination. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); Decision and Order at 8-9. Furthermore, the administrative law judge rationally concluded that Dr. Hippensteel's opinion was not sufficiently reasoned on the issue of total disability:

> Although [Dr. Hippensteel] states that the respiratory impairment is "variable" and "normal on occasion," he is vague as to whether [c]laimant could return to his former coal mine work full-time. Certainly, the implication of his opinion is that [c]laimant does not have the respiratory capacity to do so on a consistent basis.

Decision and Order at 8; *see Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, because the administrative law judge acted within her discretion in assessing claimant's hearing testimony and the medical evidence, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), and also based on her consideration of the evidence as a whole. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath*, 12 BLR at 1-9. We therefore affirm the administrative law judge's findings that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and that he invoked the amended Section 411(c)(4) presumption.

## II. REBUTTAL OF THE PRESUMPTION

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical or legal pneumoconiosis,[9] or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

### A. Existence of Pneumoconiosis

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge noted that the parties submitted seven interpretations of two analog x-rays and four interpretations of two digital x-rays. Decision and Order at 11-12. The November 18, 2009 analog x-ray was read by Dr. Miller as positive for pneumoconiosis and by Dr. Wiot as negative. Director's Exhibits 16, 23. Because Drs. Miller and Wiot are both dually qualified as Board-certified radiologists and B readers, the administrative law judge found that the November 18, 2009 x-ray was in equipoise. Decision and Order at 11.

The administrative law judge noted that the January 12, 2010 analog x-ray was read as positive for pneumoconiosis by Drs. Miller and Alexander, also dually qualified radiologists, and by Dr. Forehand, a B reader, but as negative for pneumoconiosis by Drs.

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[9] The regulations provide:

> "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. 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). "'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).

Wiot and Meyer, also dually qualified radiologists. *See* Director's Exhibits 15, 22, 24; Claimant's Exhibit 6; Employer's Exhibit 1. The administrative law judge found the January 12, 2010 x-ray was positive for pneumoconiosis, based on the preponderance of the positive readings. Decision and Order at 11.

The administrative law judge noted that, while the weight of the x-ray evidence submitted in claimant's prior claim was negative for pneumoconiosis, "the prior claim evidence predates the x-ray evidence submitted in the current claim by approximately 19 years." Decision and Order at 11. Based on the "progressive nature" of pneumoconiosis, and the administrative law judge's determination that "the more recent evidence is also likely to contain a more accurate evaluation of [c]laimant's current condition," the administrative law judge concluded that employer was unable to establish that claimant does not have clinical pneumoconiosis, as a preponderance of the "more recent" analog x-ray evidence was positive for the disease. *Id*. at 12.

The administrative law judge next considered the digital x-ray evidence. Decision and Order at 12. A June 23, 2010 digital x-ray was read as positive by Dr. Alexander and as negative by Dr. Wiot. Director's Exhibits 23, 16. Because Drs. Alexander and Wiot are both dually qualified, the administrative law judge considered the June 23, 2010 to be in equipoise. Decision and Order at 12.

An October 12, 2011 digital x-ray was interpreted as positive by Dr. Alexander, and as negative by Dr. Hippensteel, a B-reader. Claimant's Exhibit 5; Employer's Exhibit 2. Relying on Dr. Alexander's superior radiological qualifications, the administrative law judge found that the October 12, 2011 digital x-ray was positive for pneumoconiosis. Decision and Order at 12. Thus, because the weight of the evidence regarding one of the digital x-rays was in equipoise and the weight of the evidence regarding the other x-ray was positive, the administrative law judge found that employer was unable to disprove the existence of clinical pneumoconiosis, based on the digital x-ray evidence. *Id*.

In evaluating the medical opinion evidence, the administrative law judge found that the opinions of Drs. Forehand and Robinette do not assist employer in establishing rebuttal, as Dr. Forehand diagnosed both clinical and legal pneumoconiosis and Dr. Robinette diagnosed legal pneumoconiosis. Decision and Order at 17-18. The administrative law judge further determined that the opinions of Drs. Fino and Hippensteel, that claimant does not have clinical pneumoconiosis, were "compromised," in part, by their "premise that the x-ray evidence is negative" for clinical pneumoconiosis, contrary to the administrative law judge's finding that the x-ray evidence was insufficient to rebut the presumed existence of clinical pneumoconiosis. Decision and Order at 18-19. The administrative law judge also found that the opinions of Drs. Fino and Hippensteel, that claimant does not have legal pneumoconiosis, were not

well-reasoned. Accordingly, the administrative law judge concluded that employer failed to establish that claimant does not have either clinical or legal pneumoconiosis.

Employer maintains that the administrative law judge erred in failing to find the presumption rebutted and notes that, after consideration of all the evidence, she did not make a specific finding that claimant has pneumoconiosis. Claimant, however, is presumed to suffer from pneumoconiosis, based on invocation of the amended Section 411(c) presumption. The administrative law judge engaged in the proper analysis on rebuttal in considering whether employer affirmatively established that claimant does not have pneumoconiosis. *See* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Employer also argues that Dr. Wiot's qualifications exceed those of the other radiologists of record and, therefore, his negative readings of the analog and digital x-ray evidence are entitled to controlling weight. Employer specifically notes that Dr. Wiot "was involved in the actual development of the [International Labour Organization (ILO)] Classification System." Employer's Brief at 25-26. Employer also asserts that Dr. Hippensteel's negative readings of the October 12, 2011 digital x-ray should be credited over the positive reading by Dr. Alexander of that film, as Dr. Hippensteel physically examined claimant and "testified [the] his experience and training as a pulmonologist is equal to that of any radiologist." *Id*. Employer also "submits that because of his additional knowledge concerning the claimant which comes from his additional testing and actual examination of the claimant, his interpretation of the [October 12, 2011 digital] x-ray should be favored over that of Dr. Alexander." *Id*.

Contrary to employer's arguments, although the administrative law judge could have given greater weight to Dr. Wiot's negative x-ray readings, based on his involvement in the development of the ILO classification system, she was not required to do so. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). Further, despite Dr. Hippensteel's experience as a pulmonologist, and knowledge obtained by examining claimant, the administrative law judge permissibly exercised her discretion in according greatest weight to the x-ray readings by the dually qualified *radiologists*, Drs. Wiot and Alexander. *See* 20 C.F.R. §§718.102, 718.202(a)(1); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). Because Dr. Hippensteel is not a Board-certified radiologist, we affirm the administrative law judge's determination to give less weight to his negative x-ray readings.

We also reject employer's assertion that the administrative law judge ignored relevant "negative" x-ray evidence contained in claimant's treatment records. The administrative law judge properly discussed all of the x-ray evidence of record and permissibly found that the earlier treatment record x-rays lacked "probative value" as they did not specifically address the presence or absence of pneumoconiosis and because they "predate the most recent chest x-rays [sic] evidence by approximately 3-5 years." Decision and Order at 14; *see Church v. E. Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (the significance of narrative x-ray readings that make no mention of pneumoconiosis is an issue to be resolved by the administrative law judge, in the exercise of his or her discretion as fact-finder); Decision and Order at 14. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove that claimant has clinical pneumoconiosis, based on her consideration of the analog and digital x-ray evidence.[10] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003).

With regard to the weight accorded the medical opinion evidence, we reject employer's assertion that the administrative law judge did not give proper consideration to the diagnoses of asthma by Drs. Hippensteel and Fino. The administrative law judge permissibly found that Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, was not persuasive, as Dr. Fino failed to explain why twenty years of coal dust exposure had "absolutely no effect" on claimant's respiratory condition, even assuming the presence of asthma. *Id*. at 19.; *see Hicks*, 138 F.3d at 533 n.9, 21 BLR at 2-335 n.9 (4th Cir. 1998); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997). The administrative law judge also rationally explained why Dr. Hippensteel's opinion was not credible:

[10] We reject employer's contention that the administrative law judge ignored the CT scan evidence. The administrative law judge specifically noted that the record contains five computerized tomography (CT) scans, dated November 19, 2007, March 12, 2008, November 13, 2009, May 13, 2010, and March 2, 2011. Decision and Order at 12-13. She further found that each scan was interpreted as negative. *Id*. Although the administrative law judge acknowledged that the CT scan evidence supported employer's position, she concluded, based on her weighing of all the relevant evidence together, that employer did not rebut the presumed fact that claimant has pneumoconiosis. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

> Dr. Hippensteel did not adequately explain why, assuming arguendo that claimant has asthma, his condition would not be aggravated by coal dust exposure. Instead, he was insistent that coal mine work is not listed as an occupational hazard for the development of asthma, but then conced[ed] that miners with asthma can suffer acute irritation from coal dust exposure, although he would expect it to dissipate in time. His opinion however speaks of miner[s] in general and does not specifically address why claimant would fall into the general category of miners with asthma. He does not specifically address whether this [c]laimant's asthmatic condition was exacerbated by coal dust exposure and the extent thereof. This lack of specific explanation relating to this particular miner is especially problematic since he proceeded to testify that [c]laimant's asthma condition is on the "worse side" of the spectrum of people who have asthma, thus indicating that [c]laimant is not like the general person who has an asthmatic condition.

Decision and Order at 20; s*ee Lane*, 105 F.3d at 172, 21 BLR at 2-44; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988). Because the administrative law judge has explained the basis for her credibility determinations in accordance with the Administrative Procedure Act (APA),[11] her findings are supported by substantial evidence. We affirm her conclusion that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have either clinical or legal pneumoconiosis.

**B. Disability Causation**

The administrative law judge also found that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's disability did not arise out of, or in connection with, coal mine employment. The administrative law judge explained that the opinion of Dr. Hippensteel was compromised on the issue of disability causation because he did not diagnose a totally disabling respiratory impairment, contrary to the administrative law judge's finding. Decision and Order at 21. Similarly, the administrative law judge found the opinions of Drs. Hippensteel and Fino were "compromised" because they did not diagnose pneumoconiosis. *Id*.

[11] The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, 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. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer states on appeal that the administrative law judge erred in rejecting Dr. Hippensteel's disability causation opinion, to the extent that she "actually found . . . that Dr. Hippensteel's opinion supports a finding of total respiratory disability." Employer's Brief at 11. Employer also contends that the administrative law judge's analysis is flawed since Dr. Fino and Dr. Hippensteel each "stated in their respective reports and depositions that,] even if it were stipulated that [claimant] had developed coal worker[s'] pneumoconiosis from his prior coal mine dust exposure, their opinions would be the same" that claimant's disabling respiratory impairment was due to asthma. Employer's Brief at 11. Additionally, employer contends that the administrative law judge's findings do not satisfy the APA and that the administrative law judge erred in failing to consider the medical opinion evidence from the prior claim.

Contrary to employer's characterization, to the extent that Dr. Hippensteel stated that claimant does not have permanent respiratory disability, his opinion is contrary to the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2). *See* Decision and Order at 9; Employer's Exhibits 2, 3. Moreover, we conclude that the administrative law judge properly rejected the disability causation opinions of Drs. Fino and Hippensteel, as neither physician diagnosed legal pneumoconiosis. *Id.*; *see Scott*, 289 F.3d at 269, 22 BLR at 2-383-84; *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

We also reject employer's contention that the administrative law judge did not explain her disability causation findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge rationally explained, in her consideration of the issue of the existence of legal pneumoconiosis, which subsumes an analysis of disability causation, that neither Dr. Fino nor Dr. Hippensteel credibly explained why claimant's disabling respiratory condition, which they attributed to asthma, was not caused or aggravated by coal dust exposure. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 18-20.

Thus, we affirm the administrative law judge's finding that employer failed to rebut the presumed fact of disability causation.[12] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Lane*, 105 F.3d at 172, 21 BLR at 2-44; *Wojtowicz v. Duquesne Light Co.*, 12

[12] The administrative law judge also properly explained the weight accorded the prior claim evidence. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge specifically noted that she had "examined all of the evidence of record" and permissibly placed greater weight on the newly submitted evidence, as she considered it to be more probative of claimant's current condition. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 20.

BLR 1-162 (1989). Consequently, we affirm the administrative law judge's findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption and that claimant is entitled to benefits.[13] *See* 30 U.S.C. §921(c)(4); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J., concurring); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Rose*, 614 F.2d at 939, 2 BLR at 2-43.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[13] Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility findings with respect to employer's experts, it is not necessary that we address employer's arguments regarding the weight accorded claimant's experts. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).