U.S. Department of Labor

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

BRB No. 16-0091 BLA

JIMMIE J. ARTHUR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY WESTERN COAL COMPANY	)	DATE ISSUED: 11/30/2016
	)	
Employer-Petitioner	)	
	)	
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 of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Jared L. Bramwell (Kelly & Bramwell, P.C.), Draper, Utah, for claimant.

Laura Metcoff Klaus (Greenburg Traurig LLP), Washington, D.C. for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-6144) of Administrative Law Judge Scott R. Morris (the administrative law judge), rendered on a claim filed on September 9, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with twenty-five years of surface coal mine employment, as stipulated by the parties, and found that at least fifteen years of claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge also found that the evidence established total respiratory disability pursuant to 20 C.F.R. §§718.204(b)(2)(ii), (iv) and 718.204(b)(2) overall. The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and a total respiratory disability at 20 C.F.R. §718.204(b)(2). Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its prior contentions. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 are established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that the arterial blood gas study evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Ninth Circuit, as claimant was last employed in the coal mine industry in Arizona. Director's Exhibits 3, 4; Hearing Tr. at 26, 56. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption
A. Qualifying Coal Mine Employment

Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment. Employer asserts that, in finding claimant's surface mine employment comparable to underground coal mine employment, the administrative law judge failed to distinguish between claimant's exposure to coal dust and his exposure to dirt. Employer's Brief at 18. Employer's contention lacks merit.

In order to invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of "employment in one or more underground coal mines," or "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4)(2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). Section 411(c)(4) does not define the term "substantially similar." However, the implementing regulation at Section 718.305(b)(2) provides that "[t]he 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."[4] 20 C.F.R. §718.305(b)(2). Moreover, exposure to any kind of coal mine dust, in sufficient quantity, may support a finding of qualifying coal mine employment, *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 665, BLR (6th Cir. 2015); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990), and the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990).

In this case, the administrative law judge considered claimant's hearing testimony regarding the dust conditions of his surface coal mine work. Claimant testified that his

[4] To the extent employer argues that the regulation at 20 C.F.R. §718.305(b)(2) is invalid, that argument is rejected. *See* 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988); Employer's Brief at 19.

work for five years in the open cab of a scraper was "really dusty."[5] Hearing Tr. at 29-30. Claimant also testified that the closed cab of a bulldozer that he worked in for three years did not stop dust from entering inside of the cab.[6] Hearing Tr. at 32. Claimant additionally testified that his work for five years as a heavy equipment operator was dusty.[7] Hearing Tr. at 34. Claimant further testified that he was exposed to dust during his five years working as a groundman for the dragline.[8] Hearing Tr. at 36. As it relates to his approximately five years as a drag line oiler, claimant specifically testified that, "[he] spent fifty-percent of his day inside the cab of the drag line and fifty-percent outside of it," and that "[t]he time he spent outside of the cab exposed him to coal mine

[5] In describing the dust conditions of his work as a scraper, claimant stated: "[W]e work uncovered, to the same – to the cove. And there's – when it gets down close to the cove, you get all of those coal dust. And it does – dusty and that coal dust will get to you, get on your clothes, get on yourself and your face." Hearing Tr. at 29. Claimant further stated, "[y]ou've got all of that coal dust on you by the time that you go home." *Id*. at 30. Claimant therefore stated, "So I would say it was really dusty and I used to work at that time." *Id*. at 31.

[6] After noting that, "[w]hen they dig for the coal," piles are made for reclamation of the land, claimant stated that in "some area[s] there was some coal that was burning." Hearing Tr. at 31-32. Claimant further stated, "[a]nd then when you're going, pushing that level, there was a time where there would be ash in there and there would be a time that there's still some hard charcoal in there that when you push it – you put the dozer in there, you push it out, you get all of this smoke all over you and by the time – when [it's] quitting time, it seems that all of these ashes would – and we even told them that the dozer had a cabin there, but there was air coming in here and you see all of this black dust inside the dozer and then on you, too, on yourself." *Id*. at 32.

[7] In describing his exposure to dust as a grader, claimant stated that he was exposed to "more dust [in the grader] than the scraper, because the scraper [had] the closed cab." Hearing Tr. at 34. Claimant additionally stated, "You come to a certain area, there was some fine dust, and then there would be some coal – some in that area that it seems you just still have contact with dust. But it's not as dusty, but it does – but it was." *Id*. at 34-35.

[8] As a groundman, claimant stated that at times he was required to "go down [into the pit] and force the coal seam out to the drag line where it could reach it and pick it up." Hearing Tr. at 36. Claimant further stated: "some places, like those seams, sometimes there's really fine dust in there. Some are just – it's not like that. If it's really fine, then you come to where you'll be exposed to the dust." *Id*. at 36-37.

dust." Hearing Tr. at 39-40; Director's Exhibit 3. The administrative law judge rationally relied on claimant's uncontradicted testimony to find that claimant was "consistently exposed to both dirt and coal dust" throughout his surface coal mine employment and, therefore, established that he worked in conditions substantially similar to those in an underground coal mine for at least fifteen years. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-140 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); Decision and Order at 7; Hearing Tr. at 57-60. Consequently, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See* 30 U.S.C. §921(c)(4)(2012); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

B. Total Respiratory Disability

Employer next argues that the administrative law judge erred in finding that the medical opinions establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Having found that the blood gas studies of record support a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge next considered the medical opinions of Drs. Klepper, Sood, Houser, Repsher and Farney. Based on the blood gas study results, Dr. Klepper opined that claimant has a severe respiratory impairment, and Drs. Sood and Houser both opined that claimant suffers from a totally disabling respiratory impairment. The administrative law judge noted that Drs. Repsher[9] and Farney opined that any disability claimant has is "due to a non-pulmonary issue; specifically, alveolar hypoventilation syndrome." Decision and Order at 24.

The administrative law judge found that the opinions of Drs. Klepper and Sood were entitled to less weight, because neither physician definitively addressed whether claimant is unable to perform his usual coal mine work. However, the administrative law judge found that Dr. Houser's opinion, that claimant's respiratory impairment precluded him from performing his usual coal mine work, was well-documented and well-reasoned, and entitled to probative weight. In contrast, the administrative law judge found that the opinions of Drs. Repsher and Farney were not well-reasoned, and were entitled to less weight, in part, because they were equivocal. Finding that the well-reasoned and well-documented opinion of Dr. Houser outweighed the opinions of Drs. Repsher and Farney,

[9] Dr. Repsher theorized that claimant suffers from a neurological condition that prevented his chest from expanding, and, thus, claimant's "apparent pulmonary impairment" is "not a pulmonary illness, but rather [a] neurologic problem in which the respiratory center in the medulla of the brain fails to maintain normal alveolar ventilation." Director's Exhibits 24, 30.

the administrative law judge concluded that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Kowalchick v. Director, OWCP*, 893 F.2d 615, 13 BLR 2-226 (3d Cir. 1990); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc). Alternatively, the administrative law judge found that, even if the medical opinions did not establish total disability, they did not constitute contrary probative evidence sufficient to rebut the presumption of total disability established by the blood gas study evidence. Decision and Order at 27, *referencing* 20 C.F.R. §718.204(b)(2) and 20 C.F.R. Part 718, Appendix C.

Employer argues that the administrative law judge erred in discrediting the opinion of Dr. Repsher as equivocal and inconsistent on the issue of whether claimant suffers from a disabling respiratory impairment. We disagree. The administrative law judge correctly noted that, in his initial report, Dr. Repsher opined that, based on the pulmonary function test results, claimant should be able to perform his usual coal mine work as a dragline oiler. Decision and Order at 25; Director's Exhibit 27. The administrative law judge noted that while Dr. Repsher also stated that claimant had abnormal blood gas studies, probably due to primary alveolar hypoventilation, he did not indicate whether claimant was totally disabled due to such values. *Id.* Further, Dr. Repsher emphasized that "primary alveolar hypoventilation is not a pulmonary illness, but rather is a neurologic problem." Decision and Order at 25; Director's Exhibit 27. The administrative law judge noted that, in his supplemental opinion, Dr. Repsher stated that claimant has a non-disabling impairment due to very mild airways obstruction, and a disabling impairment due to "classic primary alveolar hypoventilation syndrome," as demonstrated by his blood gas studies. Decision and Order at 25; Director's Exhibit 30. Lastly, in considering Dr. Repsher's deposition, the administrative law judge noted that Dr. Repsher testified that claimant's arterial blood gas test results displayed severe hypoxemia, and acknowledged that claimant has "a significant respiratory impairment." Decision and Order at 25, *quoting* Employer's Exhibit 5 at 23. Thus, contrary to employer's contention, the administrative law judge permissibly found Dr. Repsher's opinion to be inconsistent and equivocal on the issue of whether the arterial blood gas tests indicated total respiratory disability.[10] *See Underwood v. Elkay Mining, Inc.*, 105

[10] Further, as the administrative law judge noted, because the regulations provide that qualifying blood gas study values can establish the existence of a totally disabling respiratory impairment, Dr. Repsher's opinion tends to support, rather than refute, a finding of total respiratory disability. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 25. Specifically, Dr. Repsher's attribution of claimant's disabling blood gas abnormalities to primary alveolar hypoventilation, which he characterized as a non-pulmonary illness, speaks to the cause of claimant's respiratory or pulmonary impairment, not to whether a respiratory or pulmonary impairment exists that prevents claimant from performing the strenuous tasks required by his last coal mine job. The

F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Consequently, we reject employer's assertion that the administrative law judge erred in according Dr. Repsher's opinion less weight.[11]

We further reject employer's contention that the administrative law judge erred in discounting Dr. Farney's opinion. As summarized by the administrative law judge, in concluding that claimant is not disabled from a respiratory standpoint, Dr. Farney stated that, although claimant's blood gas studies were qualifying under the Department of Labor (DOL) tables, they were within normal limits if adjusted for age and elevation and if an "A-a gradient" value were used to assess the studies. Employer's Exhibits 6A at 15, 28; 6B at 15-19, 22, 55. Because the administrative law judge found that the Appendix C tables already account for changes in barometric pressure at higher altitudes, he permissibly accorded little weight to Dr. Farney's opinion.[12] *See Peabody Coal Co. v.*

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relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is present; the cause of the totally disabling impairment is a distinct issue. *See* 20 C.F.R. §§718.204(a),(c); 718.305(d); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989). Moreover, a review of Dr. Repsher's opinion further supports the conclusion that Dr. Repsher disputed the cause of claimant's disabling blood gas impairment, not its existence. Specifically, when asked during his deposition whether claimant "has a totally disabling pulmonary [or] respiratory impairment," Dr. Repsher responded "He does have a significant respiratory impairment." Employer's Exhibit 5 at 22. Additionally, when Dr. Repsher was asked whether there was "any connection between [claimant's] totally disabling respiratory impairment and the fact that he worked in the coal mine," Dr. Repsher responded, "Not that I am aware of, no," but did not object to the characterization of claimant's respiratory impairment as totally disabling. *Id.* at 23.

[11] Because the administrative law judge permissibly discounted Dr. Repsher's opinion because it is equivocal, *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), we need not address employer's contentions that the administrative law judge selectively evaluated the evidence and substituted his opinion for that of Dr. Repsher. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[12] Because the administrative law judge provided a valid basis for discounting Dr. Farney's opinion, *see Kozele*, 6 BLR at 1-382 n.4, any error by the administrative law judge in also discounting Dr. Farney's opinion because he did not have a complete

Director, OWCP [*Opp*], 746 F.3d 1119, 1127, 25 BLR 2-581, 2-598 (9th Cir. 2014); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

Employer further argues that the administrative law judge violated the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by failing to explain why he credited Dr. Houser's opinion. Employer specifically asserts that the administrative law judge failed to provide the same level of scrutiny to Dr. Houser's opinion that he applied to the opinions of Drs. Repsher and Farney, regarding inconsistencies or missing information. We disagree. A review of the administrative law judge's decision reflects that he properly considered each physician's qualifications and assessed the documentation and reasoning of each medical opinion. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002**)**; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 13-27. In considering Dr. Houser's opinion, the administrative law judge noted that Dr. Houser discussed the relationship between claimant's total disability and the exertional requirements of his usual coal mine job. Specifically, the administrative law judge found that Dr. Houser explained that because claimant's airways obstruction and air trapping would necessitate supplemental oxygen for any exertion beyond a sedentary level, this would "clearly preclude" claimant from performing his usual coal mine work. Decision and Order at 24-25. In addition, the administrative law judge found that, in concluding that claimant also suffers from disabling hypoxemia, Dr. Houser relied on the qualifying blood gas study results. Decision and Order at 25. Because he found that Dr. Houser's opinion is supported by the objective evidence of record, the administrative law judge permissibly found that Dr. Houser's opinion is well-documented and well-reasoned, and sufficient to establish the existence of a totally disabling respiratory impairment. *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we reject employer's assertion that the administrative law judge erred in failing to explain why he credited Dr. Houser's opinion.

Additionally, there is no merit to employer's contention that the administrative law judge erroneously relied on the numerical superiority of the opinions of physicians who opined that claimant has a disabling respiratory impairment. Employer's Brief at 22. Rather, as set forth above, the administrative law judge discussed the opinions of Drs. Repsher, Farney, and Houser, analyzed the quality of the physicians' reasoning and the

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understanding of the exertional claimant's usual coal mine work, is harmless. *See Larioni*, 6 BLR at 1-1278.

objective evidence upon which the opinions were based, and explained his credibility determinations.[13] Decision and Order at 24-28.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). *See Opp*, 746 F.3d at 1127, 25 BLR at 2-598-99. We also affirm the administrative law judge's finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall.[14] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Decision and Order at 27. Furthermore, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

[13] The administrative law judge also explained that he gave less weight to Dr. Klepper's opinion because "[Dr. Klepper] never opined on how [c]laimant's 'severe impairment' would impinge on his ability to return to work as a dragline operator." Decision and Order at 24. Similarly, the administrative law judge explained that he gave less weight to Dr. Sood's opinion because "[it] does not provide the required nexus between [c]laimant's total disability and the exertional requirements of his last coal mine employment." *Id.*

[14] We reject employer's argument that, in finding total disability established based on the evidence overall, the administrative law judge improperly shifted the burden to employer when he concluded that, "employer ha[d] not succeeded in rebutting the presumption of total disability, per Appendix C to Part 718." Decision and Order at 28; Employer's Brief at 21-22. As referenced by the administrative law judge, the regulation at 20 C.F.R. §718.204(b)(2)(ii) provides that a blood gas study that meets the PO2 and PCO2 values specified in Appendix C to 20 C.F.R. Part 718 is sufficient to establish the existence of a totally disabling impairment "[i]n the absence of contrary probative evidence" or "rebutting evidence." 20 C.F.R. §718.204(b)(2); 20 C.F.R. Part 718, Appendix C. As employer concedes, this was an alternative finding by the administrative law judge. Employer's Brief at 22. Because we have found that the administrative law judge properly weighed the medical opinion evidence, with the burden of proof on claimant, and permissibly concluded that it supported, rather than rebutted, the qualifying blood gas study evidence, the administrative law judge's error in stating that employer did not meet its burden to rebut the presumption of total disability established by the qualifying blood gas study evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 27.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[15] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. The administrative law judge considered the opinions of Drs. Repsher, Farney, and Renn,[16] together with the computed tomography (CT) scan and claimant's treatment records. Dr. Repsher opined that claimant does not have legal pneumoconiosis, but suffers from a gas exchange impairment due to primary aveolar hypoventilation, attributable to a neurologic condition, bronchiectasis, and childhood tuberculosis. Director's Exhibits 24, 30; Employer's Exhibit 5. Dr. Farney similarly opined that claimant's impairment is due to the residual effects of tuberculosis and bronchiolar disease, and possibly to primary

[15] "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). "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).

[16] The administrative law judge also considered the opinions of Drs. Klepper, Sood, and Houser, that claimant suffers from legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and hypoxemia due to coal mine dust exposure. Specifically, Dr. Klepper diagnosed COPD and a gas exchange impairment, due to claimant's "extensive mining exposure." Director's Exhibit 9. Dr. Sood also diagnosed COPD and hypoxemic respiratory failure, due to coal mine dust exposure. Director's Exhibit 9. Dr. Houser similarly opined that claimant suffers from hypoxemia due to coal mine dust-induced COPD/emphysema and chronic bronchitis. Claimant's Exhibit 6. The administrative law judge discounted the opinion of Dr. Klepper, as not well-documented, but found the opinions of Drs. Sood and Houser entitled to probative weight. The administrative law judge properly noted, however, that their opinions do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. Decision and Order at 37.

aveolar hypoventilation, unrelated to coal mine dust exposure. Employer's Exhibits 1, 6. Dr. Renn opined that the objective test results he reviewed supported the diagnoses of bronchiectasis and past tuberculosis, and did not support the existence of emphysema. Employer's Exhibit 7. However, Dr. Renn did not comment on the possible role of coal mine dust exposure in any of the conditions he observed. *Id.*

The administrative law judge found that the opinions of Drs. Repsher and Farney are not well-reasoned and "did not rebut the presumption" that claimant has legal pneumoconiosis. Decision and Order at 37, 43. The administrative law judge also discredited the opinion of Dr. Renn, as undocumented. Decision and Order at 36. Finally, the administrative law judge found that the CT scan and medical treatment records did not assist employer in disproving the existence of legal pneumoconiosis. Decision and Order at 43.

Employer argues that the administrative law judge erred in discrediting Dr. Repsher's opinion. We disagree. The administrative law judge correctly noted that, in support of his conclusion that claimant's impairment is not due to coal mine dust exposure, Dr. Repsher stated that "generally speaking," surface miners are less likely to develop pneumoconiosis than underground miners, as are miners, such as claimant, who worked entirely or mostly after 1970, due to dust control regulations. Decision and Order at 33; Director's Exhibit 24 at 4. The administrative law judge permissibly discredited Dr. Repsher's opinion, in part, because he found it to be based on generalities[17] and contrary to the evidence of record regarding claimant's coal mine dust exposure history.[18] *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *see also Hicks*, 138 F.3d

[17] The administrative law judge further found that "Dr. Repsher's initial claim [that surface miners are less likely to develop pneumoconiosis than underground miners] is not only generalized, but it is in opposition to the governing regulations, which do not make a distinction between surface mining and underground mining." Decision and Order at 33-34.

[18] The administrative law judge noted that, in addition to claimant's extensive testimony regarding his dust exposure, Dr. Sood recorded that claimant's work was "very dusty," that for the first twenty years of his career, claimant did not have access to much respiratory protection, and that even during his last ten years he was provided only with paper masks. Decision and Order at 34; Director's Exhibit 27.

at 522, 21 BLR at 2-325; Decision and Order at 34. Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Repsher's opinion.[19]

Employer also argues that the administrative law judge erred in discrediting Dr. Farney's opinion that claimant's gas exchange impairment is not due to coal mine dust exposure, but is due to bronchiolar disease and bronchiectasis, attributable to airway remodeling as a result of claimant's childhood tuberculosis. Employer's Exhibit 1 at 20; 6B at 32-33. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Farney's opinion, in part, because he did not adequately explain why coal mine dust did not contribute, along with claimant's other conditions, to his disabling gas exchange impairment. *See Opp*, 746 F.3d at 1127, 25 BLR at 2-598; *see also Kennard*, 790 F.3d at 668; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); Decision and Order at 35. Specifically, the administrative law judge noted that, in support of his opinion, Dr. Farney stated that coal dust from mines situated in the western United States, where claimant worked, is "less toxic" than dust from mines in the east. The administrative law judge permissibly discounted Dr. Farney's opinion, as not well-reasoned, because he provided no authority for this premise.[20] *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Hicks*, 138 F.3d at

[19] Employer challenges the administrative law judge's additional finding that Dr. Repsher's acknowledgement that claimant suffers from COPD undermined his opinion that claimant does not have legal pneumoconiosis, because the definition of legal pneumoconiosis includes COPD due to coal mine dust exposure. Decision and Order at 33; Employer's Brief at 28. Employer asserts that, in so finding, the administrative law judge erroneously treated the preamble as a presumption that all COPD constitutes legal pneumoconiosis. Employer's Brief at 28. Because the administrative law judge permissibly discounted Dr. Repsher's opinion as not well-reasoned, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc), the administrative law judge's error in additionally discrediting Dr. Repsher's opinion because the doctor acknowledged the existence of COPD, is harmless. *See Larioni*, 6 BLR 1-1278; *Kozele*, 6 BLR at 1-382 n.4.

[20] The administrative law judge noted that the study cited by Dr. Farney, involving miners who worked in Pennsylvania, Ohio, Indiana, Illinois, Kentucky, and Alabama, addressed the prevalence of coal mine dust-induced disease in surface miners, as compared to underground miners, not the toxicity of coal dust in various locations. Decision and Order at 36; Exhibit 5 to Employer's Exhibit 6.

533, 21 BLR at 2-335; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-155; Decision and Order at 36.

Employer additionally argues that the administrative law judge erred in discrediting Dr. Renn's opinion. The administrative law judge noted that Dr. Renn had reviewed the CT scan reading and pulmonary function study results relied upon by Dr. Sood in support of Dr. Sood's diagnosis of legal pneumoconiosis, and expressed disagreement with Dr. Sood's conclusions as to what the objective tests demonstrated. Decision and Order at 36. Contrary to employer's assertion, the administrative law judge permissibly discredited Dr. Renn's opinion, in part, because Dr. Renn did not have the opportunity to review the actual CT scan that Dr. Sood relied upon to diagnose legal pneumoconiosis. Decision and Order at 36; *see Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294; Employer's Brief at 33-34. Moreover, as Dr. Renn did not address the possible role of coal mine dust in any of the conditions he observed, the administrative law judge properly found that his opinion does not assist employer in establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(b); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 36. Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Renn's opinion.

Finally, the administrative law judge considered the "other medical evidence" of record, consisting of one CT scan interpretation and numerous hospitalization and medical treatment records. Decision and Order at 36-43. The administrative law judge noted that Dr. Meyer interpreted the sole CT scan of record as reflecting tree-in-bud opacities, bronchiectasis with a basilar prominence, a calcified granuloma, and focal emphysema. Decision and Order at 38-39; Employer's Exhibit 2. The administrative law judge further noted that Dr. Meyer explained that the presence of tree-in-bud opacities, in association with bronchiectasis with a basilar prominence, is consistent with bacteria-induced bronchiolitis, and is not a manifestation of coal mine dust exposure. *Id.* The administrative law judge permissibly found, however, that because Dr. Meyer did not clearly address the etiology of the emphysema he observed, his opinion does not assist employer in rebutting the presumption of legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(b); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 39, 43. Turning to the hospitalization and medical treatment records, the administrative law judge rationally found that, because claimant's physicians documented treatment for pneumoconiosis, as well as numerous other respiratory diseases,[21] the

[21] The administrative law judge noted that, in addition to pneumoconiosis, claimant's records documented treatment for bronchiectasis, chronic bronchitis, asthma, tuberculosis, allergic rhinitis, COPD, sleep apnea, hypoxia, and emphysema. Decision and Order at 43.

treatment notes do not assist employer in carrying its rebuttal burden.[22] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 43.

Because the administrative law judge permissibly discredited the opinions of Drs. Repsher, Farney, [23] and Renn, and rationally concluded that the other evidence of record does not assist employer in disproving the existence of legal pneumoconiosis, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis.[24] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *Id.*

The administrative law judge next addressed whether employer established rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 44.

Contrary to employer's contention, as the administrative law judge permissibly discredited the opinion of Dr. Repsher, that claimant does not suffer from legal pneumoconiosis, he rationally rejected his opinion that claimant's disabling respiratory

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[22] In light of the administrative law judge's rational conclusion that the hospitalization and medical treatment records do not assist employer in rebutting the presumption of legal pneumoconiosis, the administrative law judge's error in characterizing the hospitalization and medical treatment evidence as "preponderat[ing] toward a finding of legal . . . pneumoconiosis," rather than as failing to affirmatively establish the absence of the disease, is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-1278; Employer's Brief at 35.

[23] Employer argues that the administrative law judge erred by requiring Drs. Repsher and Farney to "rule out" the existence of legal pneumoconiosis in order to rebut the Section 411(c)(4) presumption. Employer's Brief at 31. We disagree. The administrative law judge did not reject the opinions of Drs. Repsher and Farney as insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, he found that their opinions on the existence of legal pneumoconiosis were not credible, because they were inadequately explained. Decision and Order at 23-36.

[24] We decline to address employer's contentions of error regarding the administrative law judge's consideration of the opinion of Dr. Houser, as his opinion does not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-278.

impairment was not caused by pneumoconiosis. *See Kennard*, 790 F.3d at 668; *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 25 BLR 2-431 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 45. Further, the administrative law judge permissibly found that the opinions of Drs. Farney and Renn are not credible to establish that no part of claimant's respiratory or pulmonary total disability was caused by legal pneumoconiosis, as neither physician diagnosed the disease. *See Kennard*, 790 F.3d at 668; *Ogle*, 737 F.3d at 1074; *Toler*, 43 F.3d at 116, 19 BLR at 2-83; Decision and Order at 45. As no other evidence would support a finding to the contrary, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and we affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(2)(i), (ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge