

BRB No. 09-0839 BLA

THOMAS E. HEWLETT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARTIN COUNTY COAL)	DATE ISSUED: 09/30/2010
CORPORATION)	
)	
and)	
)	
A.T. MASSEY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (07-BLA-5810) of Administrative Law Judge Joseph E. Kane on a subsequent claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited the parties’ stipulation that claimant worked in qualifying coal mine employment for at least nineteen years. Next, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the merits of entitlement, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.201(a)(2), (b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge’s weighing of the evidence in finding the existence of legal pneumoconiosis established pursuant to Section 718.202(a)(4), and total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has declined to file a substantive response in this appeal.

By Order dated July 21, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148. *Hewlett v. Martin County Coal Corp.*, BRB No. 09-0839 BLA (July 21, 2010) (unpub. Order). This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and remained pending as of March 23, 2010, the effective date of the amendments. All parties have responded.

¹ Claimant, Thomas E. Hewlett, filed his initial application for benefits on October 21, 1980, which was finally denied on November 19, 1980. Director’s Exhibit 1. On February 21, 1995, claimant filed a second application, which was finally denied on July 19, 1995 based on claimant’s failure to establish any element of entitlement. Director’s Exhibit 2. Likewise, claimant’s third application, filed on June 11, 2001, was denied on May 23, 2005, for failure to establish any element of entitlement. Director’s Exhibit 3. Claimant filed the instant claim on June 30, 2006. Director’s Exhibit 5.

The Director states, and claimant agrees, that if the Board affirms the administrative law judge's factual findings and the award of benefits, the Board need not address the impact of the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² However, the Director and claimant maintain that, if the Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and, if so, to allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause. Employer has filed a supplemental letter brief, averring that the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), may apply to the instant case, as claimant filed his application for benefits on June 30, 2006 and the administrative law judge credited claimant with at least fifteen years of coal mine employment. In addition, employer agrees that the parties should be afforded an opportunity to develop evidence in the event of a remand, but employer objects to any limitations on the type of evidence it may proffer, on the basis that due process mandates that it be permitted to develop whatever new medical evidence it deems necessary to respond to the changes in the law. Lastly, employer challenges the retroactive application of the amended provisions of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), on the grounds that it is unconstitutional as it denies employer the right to due process.

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).

Employer argues initially that the administrative law judge erred in failing to resolve the various discrepancies in claimant's cigarette smoking history that were reported by Drs. Rasmussen, Jarboe, and Dahhan, all of whom opined that claimant's extensive smoking history was a cause of his pulmonary impairment. Specifically, employer contends that because Dr. Rasmussen relied on a smoking history significantly less than those relied upon by Drs. Jarboe and Dahhan, it was incumbent upon the

² Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

administrative law judge to provide more than a mere summary of the different histories and more than a conclusory statement that claimant smoked between twenty and forty pack-years.

A review of the record belies employer's argument. During his pulmonary evaluation of claimant, Dr. Rasmussen noted that claimant smoked six to seven cigarettes per day, starting in 1965 at age sixteen and, at the time of the examination on November 7, 2006, claimant smoked "only an occasional cigarette every 1-2 weeks." Director's Exhibit 15. In a report dated September 16, 2007, Dr. Jarboe reported that claimant started smoking at age fifteen or sixteen, "never consumed over a half-pack a day," and stopped smoking in December 2006. Employer's Exhibit 8. Dr. Dahhan reported a cigarette smoking history of a pack per day, starting at age sixteen and ceasing in December 2006, for a total of forty pack-years. Employer's Exhibit 3. Hence, both Drs. Rasmussen and Jarboe relied on similar smoking histories that would equate to a twenty-pack year history, whereas Dr. Dahhan relied on a forty-pack year history. Further, Dr. Rasmussen testified, "there are other smoking histories that would indicate more smoking [than twenty-pack years] and would amount to a significant history of cigarette smoking." Claimant's Exhibit 1 at 27-28.

Utilizing a chart to summarize "the contradictory and inconsistent" evidence concerning claimant's smoking history, the administrative law judge properly analyzed the divergent histories and stated, "[b]ased on this conflicting evidence, I find that Claimant began smoking in the late 1960s and smoked at a rate of one-half to one pack of cigarettes per day until 2006 or 2007, for a smoking history of 20 to 40 pack-years." Decision and Order at 3, 4. Therefore, contrary to employer's argument, the administrative law judge rendered as specific a determination on the issue of claimant's smoking history as the evidence permitted. Employer has not argued that the record demonstrates that Dr. Dahhan's smoking history was correct, and those of Drs. Jarboe and Rasmussen were incorrect, or that Dr. Rasmussen failed to explain the impact of claimant's smoking on his respiratory condition when assessing the etiology of claimant's pulmonary disease. We, therefore, reject employer's argument. *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-308 (1985); Decision and Order at 4.

Next, employer contends that the administrative law judge erred in finding that Dr. Rasmussen's opinion was better reasoned than the opinions of Drs. Dahhan and Jarboe, and was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that, even though the administrative law judge correctly cited claimant's burden of proof, he improperly applied a presumption that "any lung disease in a retired coal miner arose from his occupation[al] exposure to coal mine dust" when evaluating the medical opinions. Employer's Petition for Review and Brief (Employer's Brief) at 14. Specifically, employer argues that the administrative law

judge, in effect, shifted claimant's burden to prove the cause of his pulmonary disease to employer, by requiring employer to disprove that claimant's lung disease arose out of coal mine employment, which, employer argues, is antithetical to the regulations. Employer avers that the administrative law judge's reliance on Dr. Rasmussen's opinion was flawed because Dr. Rasmussen failed to explain how claimant's coal mine employment, which had ceased in 1990, was a contributing factor to his pulmonary impairment, notwithstanding his continuous cigarette smoking exposure that lasted an additional twenty years. Lastly, employer contends that Dr. Rasmussen's opinion was too equivocal to affirmatively establish the presence of pneumoconiosis, based on his failure to definitively identify the cause of claimant's pulmonary impairment, rather than merely attributing it to both cigarette smoking and coal dust exposure.

Employer's arguments are premised upon the erroneous assumption that a physician's opinion must specify the relative contributions of coal dust exposure and cigarette smoking, in order to establish that claimant's respiratory impairment constitutes legal pneumoconiosis. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,³ has held that a physician's opinion attributing a miner's lung disease to both cigarette smoke and coal dust exposure is sufficient to support a finding of legal pneumoconiosis, as a miner is "not required to demonstrate that coal dust was the *only* cause of his current respiratory problems," but need show only that his lung disease was "significantly related to, or substantially aggravated by, coal mine dust exposure." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000) (emphasis added); accord *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); see also *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). In assessing the probative value of the medical opinions, the administrative law judge determined that Dr. Rasmussen definitively linked claimant's lung disease to both cigarette smoking and coal mine dust exposure, and the administrative law judge, within a proper exercise of his discretion, found that Dr. Rasmussen's opinion was sufficient to affirmatively establish the existence of legal pneumoconiosis. 20 C.F.R. §718.201(b); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Decision and Order at 14-16, 18. The administrative law judge was particularly persuaded by Dr. Rasmussen's explanation that, since claimant's gas exchange impairment was greater than his ventilatory impairment, claimant's respiratory condition was not due entirely to cigarette smoking, and that coal dust exposure was a significant cause of claimant's respiratory impairment. Similarly, the administrative law judge credited Dr. Rasmussen's opinion that claimant's obesity had "no effect" on his

³ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

respiratory condition, based on Dr. Rasmussen's observations that severe obesity typically results in hypoxia during the resting portion of an arterial blood gas study, rather than the exercise portion of the study, and in this case, claimant's resting values were "quite normal," while his exercise values demonstrated hypoxia. Claimant's Exhibit 1 at 29. In addition, the administrative law judge properly determined that Dr. Rasmussen's diagnoses of clinical pneumoconiosis and legal pneumoconiosis were based on a plethora of factors: claimant's twenty to twenty-two years of coal mine employment; a history of smoking six to seven cigarettes per day since 1965; a physical examination; a positive chest x-ray interpretation; pulmonary function studies; a single breath carbon monoxide diffusing capacity test that was minimally reduced; and arterial blood gas studies indicating minimal impairment in oxygen transfer during exercise. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 7. Because the administrative law judge's determination, that Dr. Rasmussen's opinion was sufficient to establish the existence of legal pneumoconiosis, was rational, we reject employer's arguments. *See* 20 C.F.R. §718.201; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003); Decision and Order at 14-16, 18.

Employer next contends that the administrative law judge "blindly attributed significant weight to the opinion of Dr. Rasmussen without considering the entire record and the conflicting medical opinions" to support his finding of legal pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis at Section 718.204(b)(2)(iv), (c). In so doing, employer asserts that the administrative law judge engaged in a selective analysis of the evidence. Employer's Brief at 18. Employer argues that Dr. Rasmussen's failure to diagnose legal pneumoconiosis when he had diagnosed clinical pneumoconiosis, and his failure to explain his disability opinion in light of the non-qualifying pulmonary function studies and arterial blood gas studies, rendered his opinion poorly reasoned, poorly documented, and internally inconsistent. Employer avers further that even though Dr. Rasmussen rendered a subsequent report on January 31, 2007 at the behest of claimant's counsel, his reiteration of his original opinion, that claimant did not retain the pulmonary capacity to perform his usual coal mine work, remained unexplained and unsupported. Employer's arguments lack merit.

Regarding the issue of the existence of pneumoconiosis, a review of the record reveals that Dr. Rasmussen diagnosed clinical pneumoconiosis based on abnormal radiographic changes, and legal pneumoconiosis based on his conclusion that claimant's disabling pulmonary impairment, as evidenced by his abnormal blood gas study results on exercise, was due to a combination of coal dust exposure and cigarette smoking. 20 C.F.R. §718.201; Director's Exhibit 15. In addition, Dr. Rasmussen's deposition testimony contains an affirmative diagnosis of legal pneumoconiosis, as he stated: "Were that radiograph, in fact, negative, I would still believe that [claimant's] impairment was

caused in significant part by his coal mine dust exposure.” Claimant’s Exhibit 1 at 24-25. Consequently, the administrative law judge could properly rely on Dr. Rasmussen’s opinion to support a finding of legal pneumoconiosis, as well as a finding of disability causation. 20 C.F.R. §§718.201(a)(2), 718.204(c).

With regard to the issue of total disability at Section 718.204(b)(2)(iv), we reject employer’s argument that, in light of the non-qualifying pulmonary function studies and arterial blood gas studies, the administrative law judge should have found Dr. Rasmussen’s opinion, that claimant does not retain the respiratory capacity to perform his usual coal mine employment, to be unreasoned, unsupported, and internally inconsistent in that the physician characterized claimant’s loss of lung function as “minimal.” The Sixth Circuit court has held that, under the regulations, a physician can base a reasoned medical judgment that a miner is totally disabled on non-qualifying test results, *see Cornett*, 227 F.3d at 577, 22 BLR at 2-123, and that even a “mild” respiratory impairment may preclude the performance of a miner’s usual duties, depending on the exertional requirements of the miner’s usual coal mine employment. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996). In the present case, Dr. Rasmussen concluded that, while the pulmonary function and arterial blood gas tests he administered were non-qualifying, the test results demonstrated that claimant’s respiratory impairment, albeit mild, rendered claimant totally disabled due to the arduous and “very heavy manual labor” involved in his usual coal mine work. Director’s Exhibit 15. Contrary to employer’s argument, in a supplemental report dated January 31, 2007, Dr. Rasmussen clearly explained that, while claimant’s arterial blood gas studies did not yield qualifying values, the exercise portion of the study demonstrated a minimal impairment in oxygen transfer because claimant “achieved an oxygen consumption ...of only 15.5 [milliliters per kilogram per minute], which was 63% of his predicted maximum oxygen consumption and excessive for this light exercise level.” Director’s Exhibit 17. Dr. Rasmussen observed further that claimant “would not be capable of performing heavy manual labor requiring an oxygen consumption of 25-30 [milliliters per kilogram per minute] doing such work as pulling and hanging heavy electrical cable and water lines, setting timbers, helping to move and clean along the belt and building stoppings.” *Id.* Within a permissible exercise of his discretion, the administrative law judge found that Dr. Rasmussen based his disability assessment “on the arterial blood gas test, noting that the Claimant’s oxygen tension fell with each of the two samples” and “that Claimant’s oxygen tension likely would have continued to fall to qualifying levels had he been able to keep exercising.” Decision and Order at 20; *see* Claimant’s Exhibit 1 at 18-20, 37. While the administrative law judge found that “Dr. Rasmussen’s arterial blood gas test best represent[ed] Claimant’s pulmonary capacity,” he noted that “all three physicians reviewed all three arterial blood gas tests in assessing total disability,” and that, therefore, it was incumbent upon him to determine the most probative opinion. Decision and Order at 21. Ultimately, the administrative law judge accorded “significant weight” to the opinion of Dr. Rasmussen, who conducted a comparative assessment of

the exertional requirements of claimant's last coal mine job as a continuous miner with the abnormalities demonstrated on the blood gas study, in concluding that claimant was totally disabled, and less weight to the contrary opinions of Drs. Jarboe and Dahhan, who offered no rationale for finding that claimant was not disabled, other than non-qualifying test values. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-123-124; *Ward*, 93 F.3d. 211, 20 BLR 2-360; Decision and Order at 21.

Most of employer's arguments with respect to the administrative law judge's weighing of Dr. Rasmussen's opinion on the issues of legal pneumoconiosis and total disability due to pneumoconiosis are tantamount to a request for the Board to reweigh the evidence, which exceeds the scope of our review. It is well established that: "We do not place evidence back on the scale after the [administrative law judge] has already done so. We simply examine whether the scale was correctly calibrated," and in this case, it was. *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 727, 24 BLR 2-97, 2-105 (7th Cir. 2008); *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). As the administrative law judge critically examined the various bases supporting Dr. Rasmussen's opinion, that claimant was totally disabled by pneumoconiosis, Director's Exhibit 15, and acted within his discretion in finding that Dr. Rasmussen's opinion was well-reasoned and adequately explained, we reject employer's contention that the administrative law judge erred in crediting the opinion. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-123-124; Decision and Order at 20-21.

Employer next argues that the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Jarboe and Dahhan, which employer asserts were better reasoned and documented than that of Dr. Rasmussen. Specifically, employer contends that the administrative law judge improperly discredited Dr. Jarboe's opinion on the basis that he failed to discuss the effect of coal dust exposure on claimant's condition or to fully explain why he ruled out coal dust exposure as a contributing or aggravating cause of claimant's disability. Employer asserts that, because Dr. Jarboe adequately explained his rationale for concluding that claimant's pulmonary impairment was unrelated to coal dust exposure, the administrative law judge improperly shifted the burden of proof to employer to rule out coal workers' pneumoconiosis as a contributing cause of disability. Further, employer asserts that the administrative law judge engaged in a selective analysis of Dr. Jarboe's opinion by failing to consider Dr. Jarboe's criticisms of the arterial blood gas study administered by Dr. Rasmussen, or Dr. Jarboe's explanation of how claimant's obesity contributed to his respiratory condition. Lastly, employer contends that the administrative law judge's determination to discount Dr. Dahhan's opinion, on the basis that Dr. Dahhan did not specify the etiology of claimant's resting hypoxemia, is not supported by substantial evidence. Employer asserts that, contrary to the administrative law judge's finding, Dr. Dahhan attributed claimant's hypoxemia to ventilation perfusion mismatch correctable with exercise, and provided a

detailed explanation during his deposition testimony as to how claimant's obesity affected his pulmonary condition. Employer's arguments lack merit.

A review of the Decision and Order reveals that the administrative law judge provided a comprehensive discussion of Dr. Jarboe's opinion, as contained in the physician's September 16, 2007 report and his deposition testimony taken on June 19, 2008, including, but not limited to, a detailed analysis of: his findings subsequent to his examination of claimant and administration of objective tests; his review of the narrative reports of Drs. Dahhan and Rasmussen; his reasons for concluding that smoking, obesity, and asthma caused claimant's pulmonary problems; and his criticisms of Dr. Rasmussen's arterial blood gas study.⁴ Decision and Order at 9-10; Employer's Exhibits 8, 11. Therefore, employer's contention that the administrative law judge engaged in a selective analysis of Dr. Jarboe's opinion is without merit. The administrative law judge found that the opinion of Dr. Jarboe was less persuasive on the ground that Dr. Jarboe, like Dr. Dahhan, failed to "explain why he determined that Claimant's impairment is due entirely to smoking, obesity, and asthma, with *no contribution* from coal dust exposure" while, on the contrary, Dr. Rasmussen "persuasively explained why Claimant's pulmonary impairment is not due to obesity or solely due to smoking." Decision and Order at 16 [emphasis added]. Hence, the administrative law judge acted within his discretion in finding that Dr. Jarboe's failure to consider the effect on claimant's pulmonary condition of "20+ years of coal dust exposure," as noted in his report, Employer's Exhibit 8, diminished the probative value of his opinion. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may legitimately assign less weight to medical opinion that fails to consider all potential causative factors suggested in record).

In addition, the administrative law judge found the opinions of Drs. Jarboe and Dahhan to be further undermined because they "did not adequately respond to" Dr. Rasmussen's criticism that the arterial blood gas tests they administered were "inaccurate and [did] not fairly represent Claimant's pulmonary capacity." Decision and Order at 20. Specifically, Dr. Rasmussen observed that, during Dr. Jarboe's exercise test, claimant's blood sample was not taken during exercise while the heart rate was still elevated but, instead, one minute afterward, which most likely resulted in the restoration of claimant's oxygen tension to normal levels. Thus, the administrative law judge determined that Dr. Jarboe's exercise test was inconsistent with the regulations, which provide that "blood

⁴ While Dr. Jarboe opined that claimant was not maximally exercised in Dr. Rasmussen's arterial blood gas study, the administrative law judge noted that Dr. Jarboe did not explain why this would produce an artificially *low* result, and that Dr. Rasmussen explained that, if claimant had been exercised harder, "his oxygen tension would have continued to fall, possibly to qualifying levels." Decision and Order at 21.

shall be drawn during exercise,” 20 C.F.R. §718.105(b). Decision and Order at 21, n.6. Dr. Rasmussen also questioned the accuracy of Dr. Dahhan’s exercise test results because claimant’s heart rate reached only 84 beats per minute, demonstrating that claimant did not reach peak exercise,⁵ compared to 104 beats per minute during Dr. Rasmussen’s exercise test and 146 beats per minute during Dr Jarboe’s exercise test. Claimant’s Exhibits 1, 5. While Drs. Jarboe and Dahhan each responded to Dr. Rasmussen’s criticisms of their studies, the administrative law judge permissibly found that “Dr. Rasmussen persuasively explained that Claimant’s exercise-induced hypoxemia, exhibited in his study, was masked in Dr. Jarboe’s study by the rebound effect,” and was unobtainable in Dr. Dahhan’s “insufficiently rigorous” study. Decision and Order at 20, 21. Because the administrative law judge found that Dr. Rasmussen provided a more persuasive rationale for his conclusion that claimant suffers from totally disabling pneumoconiosis, the administrative law judge permissibly accorded dispositive weight to Dr. Rasmussen’s opinion. *See generally Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 16, 18, 20-22.

The administrative law judge provided valid reasons for his credibility determinations, and employer has not otherwise challenged the administrative law judge’s weighing of the evidence. As substantial evidence supports the administrative law judge’s findings, we affirm his determination that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis and a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence of record was sufficient to establish legal pneumoconiosis under Section 718.202(a)(4) and total disability due to pneumoconiosis under Section 718.204(b), (c). Hence, the administrative law judge properly found that claimant was entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Based on our affirmance of the administrative law judge’s award of benefits, we need not address the impact of the recent amendments to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

⁵ The administrative law judge noted that Dr. Jarboe concurred, stating that Dr. Dahhan’s test represented only “light” exercise. Decision and Order at 21.

Accordingly, the Decision and Order – Award of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge