U.S. Department of Labor

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

BRB No. 16-0692 BLA

HERSHEL SPARKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILGAR LAND COMPANY	)	
	)	DATE ISSUED: 09/28/2017
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

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

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

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

Rita A. Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05674) of Administrative Law Judge Larry A. Temin, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge accepted the parties' stipulation of twenty-three years of underground coal mine employment,[2] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[3] Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] The administrative law judge further

[1] Claimant filed three previous claims for benefits, all of which were finally denied. Director's Exhibit 1. His most recent prior claim, filed on July 11, 2006, was denied by Administrative Law Judge Thomas F. Phalen, Jr. on March 28, 2009, because the evidence did not establish the existence of pneumoconiosis. Director's Exhibit 1 at 105. Claimant timely requested modification, which the district director denied on December 7, 2010, based on a finding that the evidence did not establish total disability. *Id*. at 10, 100. Claimant took no further action until filing his current claim on July 13, 2012. Director's Exhibit 3.

[2] Claimant was last employed in the coal mining industry in Kentucky. Decision and Order at 3; Hearing Transcript at 13-14; Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 14.

[4] Under 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 surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory

found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding total disability established and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that it failed to rebut the presumption.[5] Additionally, employer contends that the administrative law judge erred in his determination of the commencement date for benefits. Both claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance. Employer has filed a consolidated reply brief, reiterating its position.

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).

I. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

Employer argues that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment. Specifically, employer contends that the administrative law judge erred in weighing the conflicting pulmonary function study and medical opinion evidence under 20 C.F.R. §718.204(b)(2)(i), (iv). We disagree.[6]

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or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-three years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

[6] The administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 14-15. He did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). On appeal, no party alleges that the record contains any evidence of cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii).

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four new pulmonary function studies, dated September 8, 2012, December 12, 2012, March 20, 2013, and January 19, 2016. Decision and Order at 6-7; Director's Exhibits 12, 14; Claimant's Exhibit 4; Employer's Exhibit 5. Before determining whether the studies were qualifying[7] for total disability, the administrative law judge noted a discrepancy in the measurements of claimant's height, which ranged from sixty-nine to seventy inches.[8] Decision and Order at 16. The administrative law judge resolved the evidentiary conflict by averaging the various heights, finding that claimant's correct height was 69.5 inches.[9] *Id*.

The administrative law judge next considered claimant's age at the time that the pulmonary function studies were conducted. Claimant was eighty-one years old at the time of the September 8, 2012, December 12, 2012, and March 20, 2013 studies, and eighty-four years old at the time of the January 19, 2016 study. Director's Exhibits 12, 14; Claimant's Exhibit 4; Employer's Exhibit 5. The administrative law judge noted the Board's holding that pulmonary function studies performed on a miner who is over the age of seventy-one must be treated as qualifying if the values produced by the miner would be qualifying for a seventy-one year old. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008).

The administrative law judge further noted, however, that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for a miner who is seventy-one years old are actually normal or otherwise do not represent a totally disabling pulmonary impairment for a miner who is over the age of seventy-one. *Meade*, 24 BLR at 1-47. The administrative law judge therefore considered Dr. Rosenberg's opinion that, using the "Knudson predictive equations," qualifying values could be extrapolated for claimant's January 19, 2016

[7] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[8] Claimant's height was measured as sixty-nine inches for the December 12, 2012, and January 19, 2016 pulmonary function studies, and as seventy inches for the September 8, 2012 and March 20, 2013 studies.

[9] The administrative law judge applied the next greater height listed in the table at 20 C.F.R. Part 718, Appendix B, which he noted was 69.7 inches. Decision and Order at 16.

pulmonary function study, and that doing so revealed that the study does not reflect total disability. Employer's Exhibit 8. The administrative law judge also considered Dr. Baker's attempt, using a somewhat different equation, to extrapolate qualifying values for an eighty-four year old man using the January 19, 2016 pulmonary function study. Claimant's Exhibit 6. Dr. Baker obtained results similar to those of Dr. Rosenberg, but opined that he was unsure whether the calculation would accurately reflect what normal pulmonary function study values would be for an eighty-four year old man. *Id*.

The administrative law judge was not persuaded by either physician's opinion, and therefore resolved to use the values for a seventy-one year old man as set forth in the tables at Appendix B. Specifically, the administrative law judge noted that the physicians used different extrapolation methods, and neither physician adequately "illustrated how the equation [he] proposed resulted in the predicted values [he] calculated." Decision and Order at 15-16. The administrative law judge further found that neither doctor used the height that the administrative law judge found to be claimant's actual height, and neither doctor used his extrapolation method to address whether claimant's other three pulmonary function studies were qualifying. *Id*. at 16.

Therefore, using the Appendix B tables for a seventy-one year old man of 69.7 inches in height, the administrative law judge found that the pre-bronchodilator results for the September 8, 2012, December 12, 2012, and March 20, 2013 pulmonary function studies were qualifying, but the pre-bronchodilator results for the January 19, 2016 pulmonary function study were non-qualifying. Decision and Order at 6-7, 17. The administrative law judge found that none of the studies produced qualifying post-bronchodilator results. *Id*. Weighing both the pre-bronchodilator and post-bronchodilator results, the administrative law judge accorded greater weight to the pre-bronchodilator results. *Id*. at 17. Furthermore, the administrative law judge rejected employer's argument that the September 8, 2012 pulmonary function study was invalid. *Id*. at 17 n. 32. Based on the "preponderance of qualifying pre-bronchodilator tests," the administrative law judge concluded that the pulmonary function study evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*. at 17.

Employer argues that the administrative law judge erred in determining claimant's correct height. Employer's Brief at 16, 19. If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height. *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Contrary to employer's argument, the administrative law judge permissibly found that claimant's actual height was 69.5 inches, because it represented the average height among the conflicting heights in the record.[10]

[10] Specifically, employer argues that the administrative law judge erred in averaging the conflicting heights because this methodology "factor[ed] in" a recorded

See Meade, 24 BLR at 1-44; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 16.

Employer further contends that the administrative law judge erred in finding that the September 8, 2012 pulmonary function study was valid because Dr. Vuskovich credibly invalidated this study based on claimant's lack of effort. Employer's Brief at 21 n.1. Employer argues that the administrative law judge impermissibly assigned more weight to the observations of the administering technician than to those of Dr. Vuskovich, who reviewed the study tracings. *Id.*, *citing Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885, 16 BLR 2-129, 2-135 (7th Cir. 1992).[11]

Contrary to employer's argument, the administrative law judge did not rely solely on the notations of the technician who administered the September 8, 2012 pulmonary function study. Rather, in finding that the study was valid, the administrative law judge permissibly found that Dr. Vuskovich's opinion was "unsupported" and was outweighed by the medical opinion of Dr. Gaziano, "who found that the vents were acceptable," and by that of Dr. Baker, who "testified that the test was valid." Decision and Order at 17 n. 32; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Director's Exhibits 12-13; Employer's Exhibit 4. Therefore, we reject employer's allegation of error, and affirm the administrative law judge's finding that the September 8, 2012 pulmonary function study is valid.

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height of seventy inches from claimant's earlier pulmonary function studies. Employer's Brief at 16, 19. Employer contends that "with age, height diminishes." *Id.* at 16. Therefore, employer asserts, the administrative law judge should have relied on a height of sixty-nine inches from claimant's most recent pulmonary function study. The record does not support employer's argument that claimant's height diminished with time. Claimant's recorded heights from 2012 to 2016, in chronological order, were seventy inches, sixty-nine inches, seventy inches, and sixty-nine inches. Director's Exhibits 12, 14; Claimant's Exhibit 4; Employer's Exhibit 5.

[11] In *Brinkley*, the United States Court of Appeals for the Seventh Circuit held that an administrative law judge erred in crediting technicians' notations of good cooperation on pulmonary function studies over the opinions of reviewing physicians indicating that the study tracings did not meet "recognized medical standards for reproducibility." *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885, 16 BLR 2-129, 2-135 (7th Cir. 1992).

Employer asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion that the January 19, 2016 pulmonary function study is not indicative of total disability based on an application of the Knudson equations. Employer's Brief at 17-19. Employer's argument lacks merit.[12]

Contrary to employer's contention, in finding Dr. Rosenberg's opinion to be inadequately explained, the administrative law judge accurately noted that the doctor did not fully explain the source of the values in the formula he used. Specifically, the administrative law judge noted that Dr. Rosenberg included "Knudson predictive equations" above the formula, but at another point in his report referenced "ATS 1991," leaving unclear for the administrative law judge whether Dr. Rosenberg "obtained his constant values from another source." Decision and Order at 15. Thus, the administrative law judge permissibly concluded that Dr. Rosenberg's failure to persuasively explain how the values obtained by the extrapolation formula supported his opinion that the miner was not disabled undermined the credibility of his opinion. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 15-16. The administrative law judge further permissibly questioned Dr. Rosenberg's conclusions, noting correctly that Dr. Rosenberg did not use the height that was found by the administrative law judge, but instead used a height of sixty-nine inches in applying his formula. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F. 2d at 255, 5 BLR at 2-103; Decision and Order at 22. We, therefore, affirm the administrative law judge's discrediting of Dr. Rosenberg's assessment of claimant's January 19, 2016 pulmonary function study.[13]

[12] Employer also appears to be raising a harmless error, given that the administrative law judge found that the January 16, 2016 pulmonary function study was non-qualifying, and Dr. Rosenberg did not apply his extrapolation method to claimant's other three pulmonary function studies. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We address the argument above, however, because of employer's arguments that claimant's January 16, 2016 pulmonary function study values merely reflect the effects of aging, and should be credited over the other objective evidence. Employer's Brief at 19, 22; Reply at 3-4.

[13] Because the administrative law judge provided valid reasons for according less weight to the opinion of Dr. Rosenberg, the administrative law judge's error, if any, in according less weight to his opinion for other reasons is harmless. *See Larioni*, 6 BLR at 1-1278; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n. 4 (1983). Therefore, we need not address employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because he did not actually insert the values into his formula or show his work.

Employer further argues that the administrative law judge erred in assigning greater weight to the qualifying pre-bronchodilator pulmonary function study results than to the post-bronchodilator results. Employer's Brief at 19-21. We disagree. Based on the recognition by the Department of Labor (DOL) that post-bronchodilator results do not provide an adequate assessment of a miner's disability, the administrative law judge rationally gave greater weight to the pre-bronchodilator results. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980); Decision and Order at 17. Moreover, because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established total disability based on the preponderance of the pre-bronchodilator pulmonary function studies under 20 C.F.R. §718.204(b)(2)(i).[14]

B. Medical Opinion Evidence

Employer next argues that the administrative law judge erred in his consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Baker, Castle, and Rosenberg.

The administrative law judge credited Dr. Baker's opinion that claimant is totally disabled from a respiratory impairment, finding that his opinion is well-reasoned and documented. Decision and Order at 18; Director's Exhibit 12; Employer's Exhibit 5; Claimant's Exhibits 4, 6. The administrative law judge noted that Dr. Castle opined that claimant is totally disabled by a "tobacco smoke-induced airway obstruction, advanced age and other medical problems, such as obesity and cardiac disease." Decision and Order at 18-19; Claimant's Exhibit 5. The administrative law judge found that Dr. Castle's opinion was insufficient to establish total disability because "there is nothing in the opinion to suggest that [c]laimant ha[s] a respiratory or pulmonary impairment that by itself would prevent him from performing his usual coal mine employment or similar work . . . ." Decision and Order at 18-19. Finally, the administrative law judge assigned "little weight" to Dr. Rosenberg's opinion that claimant is not totally disabled by a

[14] We reject employer's argument that the administrative law judge was required to assign the most weight to the January 19, 2016, non-qualifying, pulmonary function study, because it is the most recent study. Employer's Brief at 21. While an administrative law judge may accord greater weight to more recent medical evidence, the administrative law judge need not mechanically credit more recent, non-qualifying test results over earlier qualifying results merely because they are more recent. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740, 25 BLR 2-675, 2-687-88 (6th Cir. 2014); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-85 (6th Cir. 1993).

respiratory or pulmonary impairment, because he found that the opinion was "poorly reasoned and not well[-]documented." Decision and Order at 18; Director's Exhibit 14; Employer's Exhibit 8. The administrative law judge therefore found that the medical opinion evidence established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18-19.

Employer asserts that the administrative law judge erred in his consideration of Dr. Castle's opinion, which he should have treated as an opinion that claimant is *not* totally disabled from a pulmonary standpoint. Employer's Brief at 21-22. This argument lacks merit. Dr. Castle opined that claimant is totally disabled "as a whole man" by a combination of his age, "tobacco smoke induced airway obstruction," obesity, and coronary artery disease. Employer's Exhibit 5 at 7. As the administrative law judge found, Dr. Castle did not address whether claimant's respiratory or pulmonary impairment, standing alone, would prevent claimant from performing his usual coal mine employment. *Id*. Therefore, his opinion did not constitute contrary probative evidence under 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in rejecting Dr. Rosenberg's opinion. We disagree. In his initial report, Dr. Rosenberg noted that claimant's December 12, 2012 pulmonary function study "reveal[ed] a moderate degree of airflow obstruction with a significant bronchodilator response." Director's Exhibit 14 at 4. Dr. Rosenberg concluded that, "[b]ased on [claimant's] post-bronchodilator [pulmonary function study] measurements, [claimant] would not be considered disabled from performing his previous coal mine job or other similarly arduous types of labor." *Id*. The administrative law judge permissibly found Dr. Rosenberg's reliance on post-bronchodilator testing to be unpersuasive because "the question is whether a miner has adequate pulmonary function to perform his job, and not whether he is able to perform his job after he takes medication." Decision and Order at 18; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; 45 Fed. Reg. at 13,682. Moreover, as discussed *supra*, the administrative law judge rationally discounted Dr. Rosenberg's opinion because he found unpersuasive Dr. Rosenberg's reliance on the Knudson equations to conclude that claimant's January 19, 2016 pulmonary function study was not indicative of total disability. *Id*.

Employer argues that Dr. Baker's opinion does not support a finding of total disability, because Dr. Baker opined that claimant is totally disabled by old age, and not a respiratory or pulmonary impairment. Employer's Brief at 21. This argument lacks merit. In his September 8, 2012 report, Dr. Baker diagnosed claimant with a moderate obstructive ventilatory defect, based on the September 8, 2012 pulmonary function study. Director's Exhibit 12. Because the FEV1 and FEV1/FVC values were qualifying, Dr. Baker opined that claimant "is totally disabled and would not have the pulmonary ability to perform the duties required in his last coal mine job." *Id*. In his first deposition, Dr.

Baker agreed with employer's counsel's description that Dr. Castle's March 20, 2013 pulmonary function study did not produce qualifying values for total disability. Employer's Exhibit 4 at 18. However, in a subsequent deposition, Dr. Baker reiterated that claimant is totally disabled, based on the pulmonary function study results that revealed a moderate obstructive ventilatory defect.[15] Claimant's Exhibit 5 at 9-10. Employer points to no statement by Dr. Baker undermining the physician's opinion that claimant is totally disabled by a respiratory or pulmonary impairment. Therefore, contrary to employer's argument, the administrative law judge did not err in finding that Dr. Baker's opinion supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv).

Moreover, the administrative law judge rationally found that Dr. Baker's opinion was well-reasoned and documented because his "conclusion is based upon relevant work and medical histories, two physical examinations[,] and the objective testing he administered." Decision and Order at 18; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19, 20 BLR 2-360, 2-374 (6th Cir. 1996); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We also affirm the administrative law judge's conclusion that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 19. In light of our affirmance of the

[15] In a supplemental report, Dr. Baker discussed the results of the January 19, 2016 pulmonary function study, and explained that claimant was totally disabled based on the qualifying FEV1 value, which he explained was "the best indicator of one's ability to perform work." Claimant's Exhibit 4. Dr. Baker reiterated that claimant "has a totally disabling pulmonary impairment." *Id.* In a second supplemental report, Dr. Baker addressed Dr. Rosenberg's opinion that one can extrapolate the pulmonary function study values to determine if they are qualifying for total disability for an eighty-four year old miner. Claimant's Exhibit 6. Although Dr. Baker conceded that age may affect the results of pulmonary function studies, and attempted to extrapolate the values himself, he stated that he was not sure that extrapolating FEV1 values "would be totally representative of what [claimant's] pulmonary function tests would be for a perfectly normal [eighty-four] year old gentleman." *Id*. Moreover, he concluded that "regardless of the formula used, [he] would still feel [that claimant] would be impaired [from] working in the coal mine industry." *Id.*

administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2),[16] we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 23.

In determining whether employer established that claimant does not have legal pneumoconiosis,[18] the administrative law judge considered the medical opinions of Drs. Castle and Rosenberg. Decision and Order at 24-29. Both doctors opined that claimant does not have legal pneumoconiosis, but has an obstructive ventilatory impairment that is due solely to cigarette smoking. Director's Exhibit 14; Employer's Exhibits 5, 8. The administrative law judge found that neither physician's opinion was persuasive because the opinions were "not well-reasoned and [were] poorly supported." Decision and Order at 28. Additionally, the administrative law judge found that aspects of Dr. Rosenberg's opinion were "contrary to the [p]reamble to the [2001 revised] regulations." *Id*. The

[16] The administrative law judge additionally considered the evidence from claimant's prior claims and found that it merited less weight due to its age. Decision and Order at 19. That finding is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

[17] "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).

[18] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 23.

administrative law judge therefore found that employer failed to establish that claimant does not have legal pneumoconiosis.[19]

Employer contends that the administrative law judge applied an improper rebuttal standard by requiring its physicians to rule out the possibility that coal dust contributed to claimant's obstructive lung disease in order to disprove that claimant has legal pneumoconiosis. Employer's Brief at 30. We disagree.

The administrative law judge correctly stated that in order to establish the first method of rebuttal, employer must establish that claimant "did not have legal or clinical pneumoconiosis . . . ." Decision and Order at 19. The administrative law judge also properly noted that legal pneumoconiosis includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 24, *quoting* 20 C.F.R. §718.201(b). In discounting the opinions of Drs. Castle and Rosenberg, the administrative law judge did not, as employer asserts, require these physicians to "rule out" all contribution from coal dust exposure to claimant's obstructive impairment in order to disprove legal pneumoconiosis. Rather, as will be set forth, *infra*, the administrative law judge concluded that neither Dr. Castle nor Dr. Rosenberg adequately explained why he completely excluded coal dust exposure as a significant contributor to claimant's obstruction. *Id*. Consequently, as the administrative law judge applied the correct rebuttal standard in evaluating whether employer disproved the existence of legal pneumoconiosis, employer's assertion of error is rejected.[20] *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Employer further contends that, by referring to the preamble to the 2001 revised regulations when discrediting its medical opinions that claimant's obstructive impairment is unrelated to coal mine dust exposure, the administrative law judge rendered the Section 411(c)(4) presumption irrebuttable and deprived employer of a fair hearing. Employer's Brief at 30-32. Contrary to employer's contention, the administrative law judge did not

[19] The administrative law judge also considered Dr. Baker's opinion diagnosing claimant with legal pneumoconiosis. Director's Exhibit 12. The administrative law judge found Dr. Baker's opinion to be well-reasoned and documented and accorded it "substantial weight." Decision and Order at 28-29.

[20] Moreover, based on the administrative law judge's determination that the opinions of Drs. Castle and Rosenberg were not adequately reasoned to support their own conclusions, Decision and Order at 24-28, they were found not sufficiently credible to rebut the presumed existence of legal pneumoconiosis, regardless of the standard.

use the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted the preamble as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). We therefore reject employer's contention that the administrative law judge rendered the Section 411(c)(4) presumption irrebuttable and denied employer a fair adjudication by consulting the preamble when he weighed the medical opinion evidence.

With respect to the administrative law judge's specific credibility determinations, we reject employer's argument that the administrative law judge erred in his analysis of the opinion of Dr. Castle. Employer's Brief at 29. As summarized by the administrative law judge, Dr. Castle opined that claimant does not suffer from legal pneumoconiosis because his pulmonary function studies "indicated a significant degree of variability in the [FVC and FEV1 values] over time, which he asserted was not consistent with a fixed, irreversible process due to coal mine dust." Decision and Order at 28; Employer's Exhibit 5. The administrative law judge permissibly found that Dr. Castle did "not adequately explain why the [c]laimant's variability necessarily eliminated a finding of legal pneumoconiosis," because he did not explain "why he believed that coal dust exposure did not exacerbate" claimant's obstructive impairment. Decision and Order at 28; *see* 20 C.F.R. §718.201(b) (including within definition of legal pneumoconiosis "any chronic . . . respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment"); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

We also reject employer's argument that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. Employer's Brief at 25-30. Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's obstructive respiratory impairment, in part, because he found a significant reduction in claimant's FEV1/FVC ratio. Director's Exhibit 14; Employer's Exhibit 8. Dr. Rosenberg opined that this reduction was inconsistent with obstruction due to coal mine dust exposure. *Id.* Contrary to employer's argument, the administrative law judge permissibly found that this aspect of Dr. Rosenberg's reasoning conflicted with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive lung disease, which can be shown by a reduction in the FEV1/FVC ratio.[21] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491, 25 BLR at 2-645.

[21] Employer argues that Dr. Rosenberg relied on medical literature "published after the issuance of the preamble" to support his conclusion with respect to the FEV1/FVC ratio. Employer's Brief at 26-27. A review of Dr. Rosenberg's reports does

Dr. Rosenberg also excluded coal mine dust exposure as a cause of claimant's chronic bronchitis because claimant's coal mine dust exposure ended in 1992. Employer's Exhibit 8. He opined that there is no support for the position that coal mine dust "l[ies] dormant in the lungs and then starts aggravating bronchitis over twenty years after last exposure." *Id.* The administrative law judge noted that Dr. Rosenberg's opinion "appears to be based on a conclusion that . . . [c]laimant did not develop symptoms of a pulmonary impairment until 20 years after he ceased working in the mines." Decision and Order at 27. However, the administrative law judge correctly noted that claimant "told Dr. Baker in 2012 that he had attacks of wheezing, daily productive cough, and chronic bronchitis for 20 years" and that "Dr. Rosenberg recorded that the [c]laimant complained of worsening shortness of breath for the past 20 years." Decision and Order at 27; Director's Exhibits 12, 14. Finding that the record "documents ongoing [pulmonary] symptoms . . . . that date back to 1992," the administrative law judge rationally found Dr. Rosenberg's reasoning to be unsupported and, therefore, unpersuasive. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Cornett*, 227 F.3d at 577, 22 BLR at 2-123; Decision and Order at 27.

Moreover, contrary to employer's argument, the administrative law judge permissibly found Dr. Rosenberg's reasoning to be inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first

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not disclose support for employer's argument. The articles and studies Dr. Rosenberg cited to support his opinion regarding the disproportionate reduction of FEV1 compared to FVC were published in 1962, 1965, 1975, 1978, and 1995. Director's Exhibit 14 at 4-5, 9. Although Dr. Rosenberg included citations to studies and articles after 2001, he did not reference those articles to support the proposition that *coal mine dust exposure* does not cause a reduction in the FEV1/FVC ratio. Director's Exhibit 14. Dr. Rosenberg cited a 2011 study to support the proposition that "subjects among the general population [have] a proportional decrease in the FVC and FEV1 such that the FEV1/FVC ratio was generally preserved." *Id.* at 4-5. He stated further that restriction was not present in the subjects, that there are different causes for this functional pattern, and that "simply relying on a reduced FEV1/FVC ratio for defining the presence or absence of obstructive lung disease will miss a significant portion of individuals having airways disease." *Id.* Employer has not shown how these articles invalidated the science underlying the preamble regarding the potential of coal mine dust exposure to cause clinically significant obstructive lung disease with a reduced FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91, 25 BLR 2-633, 2-644-45 (6th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the [p]reamble").

become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 739, 25 BLR 2-675, 2-685-86 (6th Cir. 2014); Decision and Order 27-28.

Additionally, as summarized by the administrative law judge, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis because smoking causes greater injury to the lungs than does coal mine dust exposure. Decision and Order at 26. Specifically, Dr. Rosenberg referenced the Attfield and Hodous study, which he indicated establishes that coal mine dust causes a loss of only 2-3 cc of FEV1 per year of exposure, in contrast to the greater loss of FEV1 that is caused by smoking. Director's Exhibit 14 at 6-7. However, the administrative law judge recognized that, in the preamble, "the DOL has noted that the average decline of FEV1 in coal miners in the Attfield and Hodous study cannot be used to cover the fact that the decline is much greater among certain susceptible individuals," and that "a susceptible minority of miners" develop clinically significant obstructive lung disease from coal mine dust exposure. Decision and Order at 26, *citing* 65 Fed. Reg. at 79,941. The administrative law judge therefore permissibly found that Dr. Rosenberg did not adequately explain why claimant could not be one of the susceptible miners who develops clinically significant obstructive lung disease from coal mine dust exposure, or explain why claimant's years of coal mine dust exposure did not contribute to his obstructive impairment. *See* 20 C.F.R. §718.201(b); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Substantial evidence supports the administrative law judge's credibility determinations regarding the opinions of Drs. Castle and Rosenberg, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).

Upon finding that employer was unable to disprove the existence of legal pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 30. The administrative law judge rationally discounted the disability causation opinions of Drs. Castle and Rosenberg because neither physician diagnosed claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Decision and Order at 30. We, therefore, affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was

caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the award of benefits.[22]

III. BENEFITS COMMENCEMENT DATE

The administrative law judge found that the evidence does not establish when claimant became totally disabled due to pneumoconiosis, and therefore awarded benefits as of July 2012, the month in which claimant filed his claim. Decision and Order at 31. Employer contends that the administrative law judge erred, because the record reflects that claimant was not totally disabled as late as March 30, 2013, and that total disability was first established based on Dr. Baker's January 19, 2016 pulmonary function study. Employer's Brief at 33.

Employer's argument lacks merit. Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

[22] Employer argues that the administrative law judge should have denied benefits because claimant was laid off in 1992 and, therefore, "[p]ulmonary problems did not prevent him from working in 1992," and because claimant is currently totally disabled by old age, a non-respiratory condition. Employer's Brief at 19, 22-23, *citing Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994). Contrary to employer's argument, the Sixth Circuit has held that a pre-existing disability or co-existing non-respiratory impairment does not defeat entitlement to benefits under the Act if the miner is able to establish total disability due to pneumoconiosis. *See e.g., Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216-17, 20 BLR 2-362, 2-370-71 (6th Cir. 1996). Moreover, in claims such as this one, filed after January 19, 2001, the applicable regulation states that a nonpulmonary condition that causes an independent disability unrelated to the miner's pulmonary disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a).

The administrative law judge's finding of total disability was based, in part, on his finding that the September 8, 2012 pulmonary function study was qualifying for total disability, and on Dr. Baker's opinion that claimant was totally disabled based on the September 8, 2012 pulmonary function study. Director's Exhibit 12. The medical evidence credited by the administrative law judge, however, establishes only that claimant became totally disabled at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*., 8 BLR 1-105, 1-109 (1985). Substantial evidence supports the administrative law judge's finding that "the record does not establish when [c]laimant first became disabled." Decision and Order at 31. Because employer failed to rebut the Section 411(c)(4) presumption, claimant established that he is totally disabled due to pneumoconiosis. The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Consequently, we affirm the administrative law judge's finding that benefits shall commence as of July 2012, the month and year in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

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

JONATHAN ROLFE
Administrative Appeals Judge