U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 18-0570 BLA

CLARENCE J. PRICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLGA COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 06/30/2020
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2015-BLA-05488) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on December 4, 2013.[1]

The administrative law judge found claimant established 19.08 years of underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). He therefore found claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

[1] This is claimant's fourth claim for benefits. On July 12, 2000, the district director denied his second claim, filed on January 18, 2000, because he did not establish any element of entitlement. Director's Exhibit 1. Because claimant withdrew his third claim, filed on August 22, 2012, it is considered not to have been filed. 20 C.F.R. §725.306(b); Director's Exhibit 2. Claimant did not take any further action before filing his current subsequent claim. Director's Exhibit 4. When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As claimant's January 18, 2000 claim was denied for failure to establish any element of entitlement, he has to demonstrate at least one element of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[2] Under Section 411(c)(4) of the Act, claimant is presumed totally disabled due to pneumoconiosis if he has at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine,

Employer argues the administrative law judge erred in finding claimant established over fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, and thus erred in finding claimant invoked the Section 411(c)(4) presumption. Employer further contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging affirmance of the administrative law judge's finding that claimant has more than fifteen years of underground coal mine employment.[3] Employer filed a reply brief reiterating its contentions and arguing that adoption of the Director's proposed method of computation for determining the length of claimant's coal mine employment would require the Board to engage in fact-finding, exceeding its authority.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]"[5] 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of

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and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[3] The Director, Office of Workers' Compensation Programs, also asserts the Board should affirm the administrative law judge's rejection of Dr. Zaldivar's opinion concerning legal pneumoconiosis.

[4] Because claimant's last coal mine employment occurred in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that all of claimant's coal mine work was performed underground. *See Skrack v. Island Creek*

proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination if it is based on a reasonable method of computation and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year . . . ." 20 C.F.R. §725.101(a)(32)(iii).

Because claimant's CM-911a employment history form did not provide the exact months of employment for all employers he worked for in coal mine employment, the administrative law judge relied on his SSA earnings records in conjunction with the formula at 20 C.F.R. §725.101(a)(32)(iii),[6] to calculate the length of his coal mine employment. Decision and Order at 6; Director's Exhibits 4, 6. Thus, the administrative law judge divided claimant's annual SSA-reported earnings by the average daily wage in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to determine claimant had a total of 19.08 years of coal mine employment with various employers from 1972 to 1996. Decision and Order at 6-7.

Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 5; Hearing Tr. at 21; Director's Exhibit 6.

[6] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

Employer asserts the administrative law judge's calculation of claimant's years of coal mine employment is not reasonable because he divided the equivalent work days by 125 to get the portion of a work year, which is contrary to the Board's holding in *Clark*, 22 BLR at 1-275 and the United States Court of Appeals for the Fourth Circuit's holding in *Mitchell*, 479 F.3d at 330-31.[7] Employer contends the administrative law judge should not have credited claimant with a full year of employment for any year during which he worked less than 260 days. Employer's Brief at 8. Claimant asserts the Board should affirm the administrative law judge's finding of 19.08 years of coal mine employment. The Director argues the administrative law judge did not err in finding claimant has over fifteen years of qualifying coal mine employment.

We agree with employer that the administrative law judge did not conduct the threshold inquiry of whether claimant established a calendar year of coal mine employment prior to determining if he worked at least 125 days during that year. 20 C.F.R. §725.101(a)(32); *see Clark* 22 BLR at 1-280. Rather, the administrative law judge used 125 days as the divisor for calculating the equivalent work year, thereby treating 125 days as equivalent to a year of coal mine employment. Proof that a miner's earnings exceeded the average 125-day earnings as the Bureau of Labor Statistics reports for a given year does not, in itself, establish the miner worked for one calendar year. *See Muncy*, 25 BLR at 1-27; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988). As the administrative law judge did not apply a reasonable method in determining claimant's length of coal mine employment, we cannot affirm it. *See Clark*, 22 BLR at 1-281; *Tackett v. Director, OWCP*, 12 BLR 1-11, 1-13 (1988); *Dawson*, 11 BLR at 1-60; *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus we vacate the administrative law judge's finding claimant has 19.08 years of coal mine employment and remand the case to the administrative law judge to determine the length of claimant's qualifying coal mine employment.[8] 30 U.S.C. §921(c)(4).

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[7] In *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003), the Board held the administrative law judge must determine whether a miner worked for an operator for one calendar year, or partial periods totaling one calendar year, and then determine whether his employment was regular, i.e., whether the miner actually worked as a miner for 125 days within that one-year period. *Clark*, 22 BLR at 1-280. In *Daniels Coal Co. v. Mitchell*, 479 F.3d 321 (4th Cir. 2007), the Fourth Circuit held the purpose of the 125 working days within a calendar year requirement is to show the miner had "regular" employment with the identified responsible operator, not that 125 days equals a calendar year of coal mine employment. *Mitchell*, 479 F.3d at 330-31.

[8] We decline the Director's request for the Board to calculate the length of claimant's coal mine employment. Director's Brief at 2-3. Fact-finding is within the

On remand, if the administrative law judge again finds the record does not contain sufficient evidence of the beginning and ending dates for claimant's coal mine employment,[9] his use of the formula at 20 C.F.R. §725.101(a)(32)(iii) and the "daily" wage table at Exhibit 610 to determine the length of claimant's coal mine employment is entirely discretionary. The administrative law judge may use any credible evidence to determine the dates and length of claimant's coal mine employment, and any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole.[10] 20 C.F.R. §725.101(a)(32)(ii); *see Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor

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province of the administrative law judge, not the Board. Engaging in such a calculation would go beyond a technical correction and, as employer contends, exceed the Board's authority. *See Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Reply Brief at 3.

[9] The Director states:

> Here, there are at least two periods during which the only reasonable conclusion is that [claimant] had a full year's employment relationship with a specific employer. This occurred during those periods in which [he] worked multiple years in succession for a single employer. Thus, even if the actual beginning and ending dates of employment in [his] first and last years with a specific employer are unknown, it is reasonably certain that he had a full year's employment relationship in each of the middle years.

Director's Brief at 2. More specifically, the Director correctly notes the record contains statements from Bishop Coal Company and Ogla Coal Company establishing the beginning and ending dates of claimant's coal mine employment with them. Director's Brief at 2; Director's Exhibits 8, 9.

[10] We decline to instruct the administrative law judge to use a method treating 260 days as the divisor. The regulation at 20 C.F.R. §725.101(a)(32) only requires 125 working days if a miner worked for an employer for a calendar year of 365 days. 20 C.F.R. §725.101(a)(32).

pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all relevant evidence and weigh the evidence supporting total disability against the contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Notwithstanding his finding that the weight of the pulmonary function and blood gas studies is non-qualifying,[11] the administrative law judge found claimant established total disability based on the medical opinion evidence.[12] Decision and Order at 36; *see* 20 C.F.R. §718.204(b)(2)(iv).

We reject employer's contentions the administrative law judge erred in weighing the medical opinion evidence. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinions of Drs. Martin, Habre, Zaldivar, and Basheda. Drs. Martin and Habre opined claimant has a totally disabling respiratory impairment while Drs. Zaldivar and Basheda opined he could perform his usual coal mine work with proper treatment. Decision and Order at 33-36; Director's Exhibits 20-21, 53; Claimant's Exhibit 4; Employer's Exhibits 7, 11-12. The administrative law judge gave greater weight to the opinions of Drs. Martin and Habre than to the contrary opinions of Drs. Zaldivar and Basheda to conclude claimant established total disability by a preponderance of the medical opinions. Decision and Order at 35-36.

We reject employer's argument that Dr. Martin's opinion is not well-reasoned and documented because he relied solely on his own objective test results and did not review the other objective evidence of record. Employer's brief at 12-14. A medical opinion need not be discounted because the physician did not review additional medical evidence of

[11] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[12] The administrative law judge found claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(ii) because the more recent pulmonary function studies and all of the blood gas studies were non-qualifying. Decision and Order at 11-12, 27, 33; Director's Exhibits 20-21; Claimant's Exhibits 1, 3-4; Employer's Exhibit 7. He further found the record insufficient to establish cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 33. Additionally, he determined claimant does not suffer from complicated pneumoconiosis. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.204(b)(1); Decision and Order at 31.

record. *See Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89, 1-90 n.1 (1986) (administrative law judge properly considered whether the objective data offered as documentation adequately supported the opinion). As the administrative law judge observed, based on the results of his February 4, 2014 objective testing, Dr. Martin opined claimant's significant dyspnea on minimal exertion and moderate obstruction shown on valid pulmonary function testing would prevent him from performing his usual coal mine work requiring heavy labor. Director's Exhibit 20. In addition to claimant's qualifying pre-bronchodilator pulmonary function studies, he explained claimant's post-bronchodilator values, while non-qualifying, would nonetheless prevent him from performing his usual coal mine work. He also explained claimant's non-qualifying resting blood gas study was "not at all" normal but reflected hypoxemia. Decision and Order at 12-14, 34; Director's Exhibit 53 at 7-11. While Dr. Martin testified it would be "useful" to have an exercise blood gas study and a series of pulmonary function studies to review to better assess claimant's impairment, he unequivocally stated he had sufficient evidence to conclude claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 53 at 13-17. Thus, the administrative law judge permissibly concluded Dr. Martin's opinion is well documented, "flows logically from the [objective medical] data," and is entitled to "great weight." Decision and Order at 34; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc) (it is within the administrative law judge's discretion to determine whether a physician's opinion is reasoned); Director's Exhibits 20, 53.

We also reject employer's contention the administrative law judge failed to explain his decision to credit Dr. Habre's opinion diagnosing total disability, as the Administrative Procedure Act (APA) requires.[13] Employer's Brief at 14-15. The administrative law judge correctly noted Dr. Habre examined claimant and performed objective testing that was non-qualifying. Decision and Order at 26-27, 34-35. He also correctly noted, however, that non-qualifying test results alone do not establish the absence of an impairment. *See* 20 C.F.R. 718.204(b)(2)(iv); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (claimant can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985). Rather, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precluded

[13] The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), 718.204(b)(2)(iv). As the administrative law judge observed, Dr. Habre explained the pulmonary function study showed moderate obstruction and the blood gas study showed abnormal exercise values from which he concluded claimant is unable to perform the strenuous activity his coal mine work required. Decision and Order at 34-35; Claimant's Exhibit 4. Thus, contrary to employer's argument, having found Dr. Habre relied on objective testing and explained his opinion in light of those results, the administrative law judge permissibly credited his opinion as well-documented and supported by the objective data. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (if a reviewing court can discern what the administrative law judge did and why she did it, the duty of explanation under the APA is satisfied); *see Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). As it is the province of the administrative law judge to evaluate the medical evidence and to assess its credibility and probative value, we affirm the administrative law judge's determination that Dr. Habre's opinion is credible and reject employer's argument to the contrary. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Nor is there merit to employer's contention the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Basheda. Employer's Brief at 15-20. Dr. Zaldivar opined claimant's asthma might prevent him from performing his usual coal mine work because it is not well controlled. Director's Exhibit 21; Employer's Exhibit 12 at 37. He added, however, that "assuming optimal conditions" including intensive medication, he should be able to work. He stated Dr. Habre's March 7, 2017 pulmonary function testing demonstrating a variable impairment supported that conclusion. Director's Exhibit 21 at 3-4; Employer's Exhibit 12 at 36-37, 46. Dr. Basheda similarly opined claimant has "uncontrolled persistent asthma" which would prevent him from performing his usual coal mine employment if left untreated. Employer's Exhibit 11 at 21. He also noted, however, Dr. Habre's March 7, 2017 pulmonary function studies showed significant improvement, from which he "surmise[d] claimant's asthma was under better control at that time." Employer's Exhibit 11 at 20, 24-25, 33-34. From this he concluded "once [claimant's] bronchospasm is controlled" he would be able to return to work. Employer's Exhibit 7 at 25. He reiterated, however, that whether claimant's impairment was disabling "depended[ed] on how well his asthma was controlled at the time . . . ." *Id*. at 34.

As the administrative law judge observed, despite concluding claimant is not disabled because his condition could improve with treatment, both physicians characterized claimant's asthma as uncontrolled and acknowledged his condition would continue to deteriorate without proper treatment through a process called airway

remodeling.[14] Decision and Order at 35; Director's Exhibit 21 at 3; Employer's Exhibits 11 at 13-14, 34; 12 at 13, 18, 33-34. Thus, contrary to employer's argument, the administrative law judge permissibly discredited their opinions that claimant could return to work as unpersuasive and "speculative at best." *See* 20 C.F.R. §718.204(b)(1)(i); 45 Fed. Reg. 13,682 (Feb. 29, 1980) (noting the Department of Labor's recognition that pulmonary function testing after administering bronchodilator medication does not provide an adequate assessment of a miner's disability); *U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391 (4th Cir. 1999); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 35. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv).

We further reject employer's contention that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2), with the burden on claimant to establish total disability. Employer's Brief at 20-21. The administrative law judge acknowledged the non-qualifying nature of the miner's pulmonary function studies and blood gas studies as a whole, but permissibly credited the opinions of Drs. Martin and Habre that the objective testing nonetheless reflected the existence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(iv); *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 577; *Estep*, 7 BLR at 1-905; Decision and Order at 34-35. Further, he permissibly discredited the opinions of Drs. Zaldivar and Basheda who reviewed all the objective testing in formulating their conclusions that claimant is not disabled. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 35-36. Thus, the administrative law judge both separately considered the pulmonary function study and blood gas study results, pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and integrated his consideration of the objective test results into his consideration of the medical opinions. Decision and Order at 13-29. Therefore, as the administrative law judge adequately considered all contrary probative evidence, *see Shedlock*, 9 BLR at 1-198, we affirm his finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 36.

In summary, in light of our determination to vacate the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, we must vacate the administrative law judge's finding that claimant invoked

[14] Further, Dr. Zaldivar stated he wouldn't dispute claimant might not be able to return to coal mine employment because of the natural progression of his asthma, especially if it is not treated properly, and Dr. Basheda opined airway remodeling had already occurred. Employer's Exhibits 11 at 13-14; 12 at 62-63.

the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4).[15] If, on remand, claimant establishes at least fifteen years of qualifying employment he invokes the Section 411(c)(4) presumption. The administrative law judge must then determine whether employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If claimant is unable to invoke the presumption, the administrative law judge must address whether claimant established all the elements of entitlement under 20 C.F.R. Part 718, by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The administrative law judge must explain the bases for his findings on remand in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I respectfully disagree with the majority's decision to vacate the administrative law judge's finding that claimant established at least 15 years of underground coal mine

[15] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, at this time, employer's arguments regarding rebuttal of the presumption. The administrative law judge may consider employer's arguments regarding rebuttal on remand.

employment, and thus to vacate invocation of the Section 411(c)(4) presumption that his totally disabling respiratory impairment is due to pneumoconiosis. 30 U.S.C. §921(c)(4). The administrative law judge's calculation regarding claimant's length of coal mine employment is reasonable and consistent with law and thus must be affirmed. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Under Section 411(c)(4) of the Act, a miner is presumed totally disabled due to pneumoconiosis if he has 15 years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4). The regulation applicable to determining whether a year has been established initially states that a "year" is "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). From this language, the majority concludes 125 working days establishes one year of employment only if the miner also proves he had a 365-day employment relationship with the coal mine operator. *See supra* at 5.

The regulation, however, also sets forth additional factors for determining whether the miner had a year of coal mine employment. First, if the miner worked "at least 125 days during a calendar year," he is considered to have worked one year in coal mine employment "for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i). If he worked less than 125 days, he is entitled to credit for a fractional year "based on the ratio of the actual number of days worked to 125." *Id*. Second, "to the extent the evidence permits," the administrative law judge must ascertain the beginning and ending dates of the miner's employment. 20 C.F.R. §725.101(a)(32)(ii). If his employment "lasted for a calendar year . . . it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." *Id*. Finally, if the evidence "is insufficient to establish the beginning and ending dates" of the miner's employment, or the employment "lasted less than a calendar year," the administrative law judge "may divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)." 20 C.F. R. §725.101(a)(32)(iii). The BLS data is reported at Exhibit 610 of the Coal Mine (Black Lung Benefits Act) Procedure Manual. *See Average Earnings of Employees in Coal Mining*, available at https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610.pdf. It provides the "daily earnings" and "yearly earnings (125 days)" for employees in coal mining each year from 1961 to 2017. *Id*.

The primary question in this case is whether the administrative law judge reasonably applied the formula at 20 C.F. R. §725.101(a)(32)(iii) to find claimant established at least fifteen years of coal mine employment. The majority holds he misapplied the formula by crediting claimant a full year of employment for years in which he worked only 125 days.

In rejecting the administrative law judge's methodology, the majority relies on *Daniels Co. v. Mitchell*, 479 F.3d 321 (4th Cir 2007) for the proposition that a showing of 125 working days of coal mine employment, in and of itself, can never establish one year of coal mine employment. Thus, it holds the administrative law judge's use of the formula in conjunction with Exhibit 610 is improper.

As an initial matter, the majority's reliance on *Mitchell* is misplaced. That case involved the separate question of whether the Department of Labor established "regular" employment with the named responsible operator under a prior definition of "year." *See* 20 C.F.R. §725.493(b) (2000) (a year of employment means a period of 1 year, or partial periods totaling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer). As the court held, the revised definition of "year" now found at 20 C.F.R. §725.101(a)(32), including its new provisions at subparagraphs (i) through (iii), was inapplicable to that claim because it was not yet in effect. *See Mitchell*, 479 F.3d at 334-335. Moreover, the court did not foreclose the possibility that the formula at subparagraph (iii) establishes one year of coal mine employment when it yields 125 working days. Rather, it acknowledged that the regulation "[b]y its terms . . . may be used in situations where the miner's employment lasted less than one year or 'the beginning and ending dates of the miner's coal mine employment' cannot be established." *Mitchell*, 479 F.3d at 335, *quoting* 20 C.F.R. §725.101(a)(32)(iii). The court's primary holding, that "regular" employment (a term excluded from the new definition of "year") could not be established based on 125 working days over the course of an *entire* fourteen year career, is inapplicable to this claim as both a legal and factual matter. *Mitchell*, 479 F.3d at 335-36.

Unlike the "brief and sporadic" coal mine employment at-issue in *Mitchell*, the administrative law judge noted claimant in the present claim alleged more than twenty years of coal mine employment between 1972 and 1996. Decision and Order at 6; Director's Exhibit 6. Similarly, his Social Security Administration (SSA) earnings records revealed coal mine employment income during twenty three calendar years: 1972-1982, 1984-1986, and 1988-1996, including two multi-year periods of continuous employment with Bishop Coal Company and Olga Coal Company, respectively. Decision and Order at 6-7; Director's Exhibit 13. Finding the record insufficient to establish the specific beginning and ending dates with all of claimant's coal mine employers, the administrative law judge relied on his SSA earnings records in conjunction with the formula at 20 C.F.R. §725.101(a)(32)(iii), to calculate the length of his coal mine employment. *See Tackett v.*

Director, OWCP, 6 BLR 1-839, 1-841 (1984); Decision and Order at 6; Director's Exhibit 5.

Specifically, he divided claimant's yearly income found in the SSA earnings records by the coal mine industry's average daily earnings[16] for that year as set forth in Exhibit 610 to determine the number of days worked. Decision and Order at 6; Director's Exhibits 4, 6. For years in which claimant's working days equaled or exceeded 125, the administrative law judge credited him with one year of employment; for years in which the working days were less than 125, the administrative law judge credited him with a fraction of the year. *See* 20 C.F.R. §725.101(a)(32)(i). Adding these periods of employment together, the administrative law judge determined claimant had a total of 19.08 years of coal mine employment with various employers from 1972 to 1996. Decision and Order at 6-7.

Employer contends it was not reasonable for the administrative law judge to compare claimant's yearly income to the average daily earnings for 125 days set forth in Exhibit 610, as the Board has held that 125 days by itself does not equal a year of employment. Employer's Brief at 6, *citing Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003); Employer's Reply Brief at 2-3. According to employer, if the specific beginning and ending dates cannot be ascertained, a claimant must establish something greater than a 125 working days to be credited with a full year. It asserts a reasonable method of calculation would be to credit claimant with a full year of employment only if the formula at 20 C.F.R. §725.101(a)(32)(iii) yields 260 working days, which essentially means that a miner can establish one year of coal mine employment only if he received pay 5 days per week, every week of the year (52 weeks in a year x 5 working days per week = 260 days). Under this method, employer contends claimant should be credited with a maximum of 13.85 years of coal mine employment. Employer's Brief at 8-9. As the Director asserts, however, the relevant regulations and the evidence of record belies employer's assertion.

First, there is no merit to employer's contention that the administrative law judge erred in using 125 days, rather than 260 days, as the divisor. The regulation specifically provides that if the miner worked "in or around coal mines at least 125 working days during a calendar year," he has worked "one year in coal mine employment *for all purposes under the Act*." 20 C.F.R. §725.101(a)(32)(i) (emphasis added); Director's Brief at 2. Nothing

[16] For coal mine employment from 2004 onward, however, he found claimant's average daily wage was $161.50 based on claimant's statements on his description of coal mine work forms. Decision and Order at 7; Director's Exhibit 4.

in the Act, regulations, or case law supports employer's position that only 260 working days can establish one year of employment.

The United States Court of Appeals for the Sixth Circuit, in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (2019), is the only federal court to squarely address whether a finding of 125 working days under the formula at 20 C.F.R. §718.101(a)(32)(iii) establishes one year of coal mine employment, even where the miner and employer did not have a 365-day employment relationship. In holding it does, the court determined that the "unambiguous" language of the regulation provides four distinct methods to establish one year of coal mine employment. Under the fourth method, set forth by the "plain language" of subparagraph (iii):

> [I]f the beginning and ending dates of the miner's employment cannot be determined or – even if such dates are ascertainable – if the miner was employed by the mining company for "less than a calendar year," the adjudicator may determine the length of coal mine employment by dividing the miner's yearly income from coal mine employment by the average daily earnings of an employee in the coal mining industry. If the quotient from that calculation yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. 20 C.F.R. § 725.101(a)(32)(iii). If the calculation shows that the miner worked fewer than 125 days in the calendar year, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. 20 C.F.R. § 725.101(a)(32)(i).

Shepherd, 915 F.3d at 402; *see also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir.1993) (125 working days equals "one year of work" under the prior definition of "year" applicable to invocation of statutory presumptions at 20 C.F.R. §718.201(b) (2000)).[17] To hold

[17] The court further found the employer's reliance on *Daniels Co. v. Mitchell*, 479 F.3d 321 (4th Cir 2007) unpersuasive because it "address[ed] a dispute over timing to determine whether a company was the responsible coal mine operator," specifically recognized that the formula at subparagraph (iii) "may be used in situations where the miner's employment *lasted less than one year*," and "other factors in *Mitchell* justified abstaining from using the subsection (iii) calculation." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405 (2019).

otherwise, as employer urges in this appeal, "ignores the clear language of the regulation." *Shepherd*, 915 F.3d at 401.

The Board's holding in *Clark*, 22 BLR at 1-277 does not command a different result. Like *Mitchell*, it involved application of the prior definition of the term "year" for purposes of determining the responsible operator at 20 C.F.R. §725.493 (2000). As set forth in the concurrence, the majority's additional commentary on the proper interpretation of 20 C.F.R. §725.101(a)(32)(i), (iii) was unnecessary to the resolution of the claim, as the new definition of "year" contained therein had not yet taken effect. *See Clark*, 22 BLR at 1-284 (McGranery, J., concurring); *Mitchell*, 479 F.3d at 334-335 (confirming the formula at 20 C.F.R. §725.101(a)(32)(iii) is inapplicable to claims pending on its effective date). Further, its conclusion that 125 working days is the proper divisor under the new definition only "where the [365 day] calendar year has been established" was soundly rejected by the Sixth Circuit in *Shepherd*. *Clark*, 22 BLR at 1-282; *see Shepherd*, 915 F.3d at 401-404. As the *Shepherd* court held, interpreting the "prefatory" language of 20 C.F.R. §725.101(a)(32) as requiring in all circumstances that a miner "be on the payroll of a mining company for 365 consecutive days" effectively reads out of the regulation the recognition at subparagraph (i) "that working 125 days in or around a coal mine within a calendar year will count as a year of coal mine employment 'for all purposes under the [Act]'" and the applicability of the formula at subparagraph (iii) even where "the miner's employment lasted less than a calendar year." *Shepherd*, 915 F.3d at 402-403. Thus, the majority opinion in *Clark* "misread[s] both the underlying [remedial] intent of the [Act] and the clear language of the applicable regulations." *Id*.

Second, there is no credible evidence, nor does employer contest, that claimant's extended periods of employment with at least two employers did not last for full calendar year periods totaling seven years. Specifically, as the administrative law judge found, claimant's SSA records reflect uninterrupted employment with Bishop Coal Company from 1972 to 1976, a period encompassing at least three full calendar years (1973, 1974, 1975).[18] Decision and Order at 6-7; Director's Brief at 2; Director's Exhibit 13. The administrative law judge also found claimant's SSA records establish a period of continuous employment with Olga Coal Company from 1977 to 1982, covering at least

[18] A statement from Judson Kristoff, a supervisor with Bishop Coal Company, confirms claimant's continuous employment from November 21, 1972 to July 21, 1976. Director's Exhibit 9.

four additional full calendar years (1978, 1979, 1980, 1981),[19] for a total of seven years.[20] Decision and Order at 7; Director's Exhibit 13. As the Director asserts, even accepting employer's own calculations for the remaining years based on a 260 day working year, claimant has established an additional 8.24 years, for a total of at least 15.24 years of underground coal mine employment.[21] Director's Brief at 2-3; Employer's Brief at 8-9. As employer has not set forth any basis for overturning the administrative law judge's findings that claimant established greater than 15 years of coal mine employment, I would affirm the administrative law judge's determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

As I concur in the majority's holding that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), I would

[19] A statement from Carol T. DeHaven at Olga Coal Company establishes claimant's employment from February 15, 1977 to October 4, 1982; March 5, 1984 to October 15, 1984; and February 8, 1985 to December 19, 1986. Director's Exhibit 8.

[20] While the administrative law judge could have credited Mr. Kristoff's and Ms. DeHaven's statements as establishing the beginning and ending dates of employment with Bishop and Olga, his failure to do so is harmless. For the years in which claimant's employment relationship with Bishop and Olga was less than a calendar year (1972, 1976, 1977, 1982, 1984, 1985), the administrative law judge's application of the formula at subparagraph (iii) resulted in claimant being credited with full years of coal mine employment when he worked at least 125 days, or fractions thereof when he worked less. 20 C.F.R. §718.101(a)(32)(i), (iii); *see Shepherd*, 915 F.3d at 402 (formula at subparagraph (iii) applicable "even if such dates are ascertainable—if the miner was employed by the mining company for 'less than a calendar year'"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Further, his failure to afford claimant the presumption at 20 C.F.R. §718.101(a)(32)(ii) that he worked 125 days during his seven full calendar years with Bishop and Olga (1973, 1974, 1975, 1978, 1979, 1980, 1981) is harmless, as he otherwise found claimant worked the requisite 125 days to be credited with full years of employment. *See Larioni*, 6 BLR at 1-1278.

[21] Employer prepared a chart in which it concedes claimant established .07 years in 1972; .58 years in 1976; .62 years in 1977; .45 years in 1982; .65 years in 1984; .79 years in 1985; .98 years in 1986; .09 years in 1988; .24 years in 1989; .74 years in 1990; 1 year in 1991; .61 years in 1992; .11 years in 1993; .04 years in 1994; .88 years in 1995; .39 years in 1996. Employer's Brief at 8-9. This is a total 8.24 years which, when added to the seven full year periods with Bishop Coal Company and Olga Coal Company, equals 15.24 years of coal mine employment.

affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

I would also affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. Because claimant is presumed totally disabled due to pneumoconiosis, the burden shifted to employer to establish he has neither legal nor clinical pneumoconiosis[22] or "no part of [his] 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)(i), (ii). The administrative law judge permissibly found employer failed to rebut legal or clinical pneumoconiosis or disability causation.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the opinions of Drs. Zaldivar, Basheda and Habre.[23] Decision and Order at 41-44; Director's Exhibit 21; Claimant's Exhibit 4; Employer's Exhibits 7, 11, 12. Dr. Zaldivar opined claimant does not have legal pneumoconiosis but has asthma due to genetics and biomass smoke exposure. Decision and Order at 41-42; Director's Exhibit 21; Employer's Exhibit 12. Dr. Basheda similarly attributed claimant's impairment entirely to genetic asthma. Decision and Order at 42-43; Employer's Exhibits 7, 11. Dr. Habre diagnosed

[22] 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). This definition encompasses any chronic pulmonary disease or respiratory or pulmonary impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). 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).

[23] The administrative law judge correctly noted a fourth physician, Dr. Martin, did not offer a clear opinion as to the existence of legal pneumoconiosis. Decision and Order at 41; Director's Exhibit 20.

legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Claimant's Exhibit 4. The administrative law judge accorded no weight to Dr. Zaldivar's opinion and diminished weight to Dr. Basheda's opinion, finding them not well reasoned and inadequately explained. In contrast, he found Dr. Habre's opinion reasoned and documented and entitled to great weight. Decision and Order at 43-44. Having concluded the medical opinion evidence weighs in favor of legal pneumoconiosis, the administrative law judge determined employer failed to disprove the existence of the disease. *Id.* at 44.

I reject employer's assertion the administrative law judge improperly discredited Dr. Zaldivar's opinion. Employer's Brief at 30-34. In opining the partial reversibility of claimant's obstructive impairment is inconsistent with coal mine dust exposure, Dr. Zaldivar explained the particles of coal mine dust deposit in the terminal units of the lungs, which do not have any mucous glands or smooth muscle and, therefore, cannot develop bronchospasm. Decision and Order at 41-42; Employer's Exhibit 12 at 22-23. Because bronchodilators are ineffective, broncho-reversibility does not occur in a person with a coal mine dust-related impairment. Decision and Order at 41-42; Employer's Exhibit 12 at 22-23. As the administrative law judge observed, however, in attributing claimant's asthma, with associated bronchospasm and mucous production, to biomass smoke exposure, Dr. Zaldivar explained biomass smoke is so harmful because the fume particles are extremely small and can reach the terminal units of the lungs, in contrast to coal dust particles which might not penetrate as far. Employer's Exhibit 12 at 54-56. In light of this discrepancy between whether coal dust can penetrate the terminal unit of the lungs, the administrative law judge permissibly found Dr. Zaldivar's opinion internally inconsistent and inadequately explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 35-36; Employer's Exhibit 10 at 38-39. He also permissibly found Dr. Zaldivar did not explain why biomass deposition in the terminal unit of the lungs could cause mucous production and bronchospasm "while coal mine dust—when lodged in the same location of the lungs—does not." Decision and Order at 43; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. While employer raises other allegations of error with respect to Dr. Zaldivar's opinion, it does not challenge the administrative law judge's finding that his opinion is internally inconsistent and unexplained on this point. As the administrative law judge provided a valid basis for according Dr. Zaldivar's opinion no weight that is both supported by substantial evidence and unchallenged on appeal, I would affirm it. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Skrack*, 6 BLR at 1-711; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Director's Brief at 1 n.1.

I would also reject employer's challenge to the administrative law judge's consideration of Dr. Basheda's opinion that claimant's asthma is not due to or aggravated by coal mine dust exposure. Dr. Basheda stated if coal mine dust caused claimant to suffer

asthmatic symptoms he would have suffered frequent asthma attacks and hospitalizations rendering him unable to work in the mines for as long as he did. Employer's Exhibit 11 at 15. As the administrative law judge observed, however, Dr. Basheda did not reconcile this opinion with his acknowledgement that in people who develop asthma as children, as Dr. Basheda believed was the case with claimant, it is not uncommon for their asthma to go away for a period of time, and then resurface sometime during their adult life, anywhere from their 20s to their 70s. Decision and Order at 43; Employer's Exhibit 11 at 27. Thus, contrary to employer's argument, as Dr. Basheda did not explain why claimant's childhood asthma could not have remained in remission while he was employed in the mines, the administrative law judge permissibly found his opinion "not as well reasoned" and entitled to "less weight." *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 43; Employer's Brief at 36-37.

Based on the administrative law judge's determination that Dr. Zaldivar is entitled to "no probative weight" and Dr. Basheda is "not as well reasoned," on whether claimant's impairment is related to coal mine dust exposure, employer has not met its burden to disprove legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4) (physician's opinion as to the existence of pneumoconiosis "must be supported by a reasoned medical opinion"). Moreover, even if Dr. Basheda's opinion could be given some weight, the administrative law judge permissibly gave greatest weight to Dr. Habre's diagnosis of legal pneumoconiosis in the form of chronic bronchitis due to coal mine dust exposure. Employer's Brief at 37-38.

Dr. Habre considered claimant's symptoms, medical, smoking and employment histories, x-rays and results of his physical examination and objective testing. Claimant's Exhibit 4. As the administrative law judge observed, in attributing claimant's chronic bronchitis to coal mine dust exposure, Dr. Habre explained claimant had never smoked and had been exposed to a higher than normal density of coal mine dust during his twenty years spent underground. *Id.* at 2. He further discussed in detail the mechanisms by which coal mine dust causes hyperactive and inflamed airways, excessive mucous secretion, bronchospasm and chronic obstructive pulmonary disease (COPD) even after a miner leaves the workplace. *Id.* Contrary to employer's arguments, in light of these factors the administrative law judge permissibly found Dr. Habre's opinion well documented and reasoned and consistent with the scientific premises set forth in the preamble regarding the link between coal mine dust exposure and the development of obstructive airways disease including COPD and asthma. 20 C.F.R. §718.201(a)(2); *see* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314*; Minnich*, 9 BLR at 1-90 n.1; Decision and Order at 43-44; Claimant's Exhibit 4.

Consequently, I would affirm the administrative law judge's crediting of Dr. Habre's diagnosis of legal pneumoconiosis. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Substantial evidence supports the administrative law judge's credibility determinations and the Board is not empowered to reweigh the evidence. *Compton*, 211 F.3d at 207-08*; Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As the administrative law judge permissibly accorded diminished weight to the opinions of Drs. Zaldivar and Basheda that claimant does not have legal pneumoconiosis,[24] and permissibly credited the contrary opinion of Dr. Habre, I would affirm his finding employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[25] 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

Upon finding employer did not disprove pneumoconiosis, the administrative law judge addressed whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). He permissibly found the same reasons for which he discredited the opinions of Drs. Zaldivar and Basheda that claimant does not have legal pneumoconiosis also undercut their opinions that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015); *Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 46. Thus, employer failed to

[24] Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda, any error in discrediting their opinions for other reasons would be harmless. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, I do not address employer's remaining arguments regarding the weight accorded to their opinions.

[25] Therefore I do not address employer's allegations of error in the administrative law judge's finding that employer also failed to disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 22-29.

establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the presumption and employer did not rebut it, he is entitled to benefits. I therefore would affirm the administrative law judge's award.

GREG J. BUZZARD
Administrative Appeals Judge