U.S. Department of Labor

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

BRB No. 20-0155 BLA

KENNETH C. LAMB	)	
	)	
Claimant-Respondent	)	
	)	
BRODY MINING, LLC	)	DATE ISSUED: 06/30/2021
	)	
and	)	
	)	
ENCOVA INSURANCE	)	
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer and its Carrier.

Cynthia Liao (Elena S. Goldstein, Deputy 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: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05931) rendered on a claim filed on April 29, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 29.81 years of underground coal mine employment and found he is totally disabled by a respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, it contends the administrative law judge erred in finding Claimant invoked the Section 411(c)(4) presumption, and erred in determining it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Benefits Review Board to reject Employer's challenge to the constitutionality and applicability of the Section 411(c)(4) presumption. Employer has filed a reply brief addressing Claimant's response brief.[2]

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

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen 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) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established 29.81 years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 14.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See*

by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 29-32. In *Texas*, the district court held that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Act are now moot. *California v. Texas*, __ U.S. ___, No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, 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 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 weigh all relevant supporting evidence against all relevant contrary evidence. *See 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).

The administrative law judge found Claimant established total disability based on the pulmonary function studies, blood gas studies, medical opinions and the evidence as a whole.[4] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); Decision and Order at 18, 20, 34. Employer argues the administrative law judge mischaracterized the blood gas studies and erred in rejecting the opinions of Drs. Basheda and Zaldivar regarding whether Claimant is totally disabled. Although Employer's argument with respect to the administrative law judge's

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 21-22.

[4] The administrative law judge determined there is no evidence of cor pulmonale with right-sided congestive heart failure, and thus Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 20.

weighing of the blood gas studies may have some merit, we affirm her finding that Claimant is totally disabled as it is otherwise supported by substantial evidence.

Pulmonary Function Studies

There are four pulmonary function studies. Dr. Green's September 14, 2016 study and Dr. Zaldivar's April 26, 2017 study had qualifying values before and after a bronchodilator was administered; Dr. Basheda's May 16, 2018 study had non-qualifying values before and after a bronchodilator was administered; and Dr. Nader's April 29, 2019 study had qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values.[5] Director's Exhibits 7, 11; Claimant's Exhibit; Employer's Exhibit 4. The administrative law judge found Dr. Basheda's pre-bronchodilator study invalid. Decision and Order at 18. Crediting the three remaining qualifying pre-bronchodilator studies, the administrative law judge found Claimant established total disability based on the pulmonary function studies. *Id*. We affirm the administrative judge's finding as it is unchallenged. 20 C.F.R. §718.204(b)(2)(i); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18.

Blood Gas Studies

The administrative law judge also considered four blood gas studies. In her table summarizing the studies, the administrative law judge found Dr. Green's September 14, 2016 resting study and Dr. Zaldivar's April 26, 2017 resting study qualifying; Dr. Basheda's May 16, 2018 resting study non-qualifying; and Dr. Nader's April 29, 2019 resting study non-qualifying but his exercise study qualifying.[6] Decision and Order at 19; Director's Exhibits 10, 17; Claimant's Exhibit 4; Employer's Exhibit 1. The administrative law judge gave less weight to Dr. Basheda's non-qualifying study because she found it did not comply with the quality standards set forth in 20 C.F.R. §718.105(b). Decision and Order at 19-20. Thus, she concluded Claimant established total disability based on two qualifying resting studies and the one qualifying exercise study. *Id*. at 20.

[5] A "qualifying" pulmonary function study or blood gas study yields results equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718, respectively. A "non-qualifying" study yields results exceeding those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] Drs. Green, Zaldivar, and Basheda did not conduct exercise studies. Director's Exhibits 10, 17; Employer's Exhibit 1.

Employer asserts the administrative law judge erred in finding Dr. Nader's exercise study qualifying.[7] Employer's Brief at 7; Claimant's Exhibit 4. It also contends she failed to consistently apply the quality standards in evaluating the evidence. Even accepting all of Employer's arguments as true, and that Claimant is unable to establish total disability based on the blood gas studies, remand is not required. Pulmonary function studies and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984). Even if the preponderance of the blood gas studies are non-qualifying, the pulmonary function studies nevertheless support a finding of total disability. Moreover, as discussed below, the administrative law judge's total disability finding is also supported by Dr. Green's opinion. Under the facts of this case, we consider any error by the administrative law judge in weighing the blood gas study evidence to be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Medical Opinions

The administrative law judge considered four medical opinions. Dr. Green conducted the Department of Labor's (DOL's) complete pulmonary evaluation on September 14, 2016, and opined Claimant is totally disabled based on the qualifying pre-bronchodilator pulmonary function study he obtained that showed severe obstruction. Director's Exhibit 10. He also opined the resting blood gas study he obtained showed "chronic respiratory failure" and hypoxemia. *Id*. In his December 7, 2017 supplemental report, Dr. Green reviewed additional evidence and concluded Claimant is totally disabled based on his own pulmonary function testing and Dr. Zaldivar's qualifying pre-bronchodilator study. Director's Exhibit 42.

Dr. Nader also opined Claimant is totally disabled based on the qualifying pulmonary function study he obtained. Claimant's Exhibit 4. He further described Claimant's blood gas study as reflecting "underlying hypoxemia" that "contributes to Claimant's total pulmonary disability." Claimant's Exhibit 4.

Dr. Basheda initially opined Claimant was not totally disabled based on the May 16, 2018 pulmonary function study conducted as part of his examination. Employer's Exhibit

[7] Dr. Nader's exercise study was conducted at an altitude between 0-2999 feet above sea level and had an arterial PCO2 value of 42. Claimant's Exhibit 4. Thus, Claimant's arterial PO2 value would have to be equal to or less than 60 in order to be qualifying. 20 C.F.R. Part 718, Appendix C. Claimant's exercise PO2 value was 68. Claimant's Exhibit 4.

1. However, after reviewing the results of Dr. Nader's pulmonary function testing, Dr. Basheda testified in his deposition that Claimant "would have difficulty . . . doing exertional work until his asthma is under control."[8] Employer's Exhibit 8 at 36.

When Dr. Zaldivar examined Claimant on April 26, 2017, he observed Claimant "was having acute bronchospasm" because he was not using enough medication to treat it and would be "unable to perform any work at all." Director's Exhibit 17. At his subsequent deposition, Dr. Zaldivar explained that Claimant had a variable respiratory impairment and, if his asthma were treated properly, he could return to his coal mine work. Employer's Exhibit 7 at 44-45. However, he did not indicate Claimant could perform his usual coal mine work without medication.[9] *Id*.

The administrative law judge found Dr. Green's opinion reasoned and documented, and sufficient to support finding Claimant is totally disabled. Decision and Order at 32, 34. She assigned less weight to the other physicians' opinions. *Id*. at 32-33. Employer does not challenge the administrative law judge's discrediting of Dr. Nader's opinion but argues she erred in crediting Dr. Green's opinion and in discrediting the opinions of Drs. Basheda and Zalidvar.

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[8] Dr. Basheda, like Dr. Zaldivar, believed Claimant was not being adequately treated for his respiratory condition. He stated "the fair and accurate way" to assess Claimant's respiratory function would be to treat him for his asthma and then do another pulmonary function study once he is "stable clinically." Employer's Exhibit 8 at 36.

[9] Dr. Zaldivar stated:

> When Doctor Basheda examined him . . . [Claimant] could do all [the] work that he wanted to do. He could do heavy manual labor. *If he takes his medications properly.*
> . . .
> When he was examined by Dr. Nader, he could do work.
> . . .
> So it's variable. *But, I guess as a whole, considering all these records, considering the way he's being treated, he might not be able to return to the coal mines. But if he's treated properly, yes, he can.* I had many asthmatics who were coal miners that worked . . . . They took their medications, and they worked.

Employer's Exhibit 7 at 44-45 (emphasis added).

Employer asserts Dr. Green's opinion is not credible because he did not have an accurate understanding of the exertional requirements of Claimant's usual coal mine work. *See* Employer's Brief at 13. We disagree. The administrative law judge determined Claimant's usual coal mine employment as a "supplyman/shuttle car operator" required "heavy exertional work."[10] Decision and Order at 15. In his report, Dr. Green described that Claimant "operated a continuous miner" and "lifted 50-60 pounds at any given time during the day." Director's Exhibit 11; *see* Director's Exhibits 4, 42. Thus, while Dr. Green did not correctly identify Claimant's job title as a supply man and shuttle operator, he had sufficient understanding of the physical demands of Claimant's work, consistent with the administrative law judge's finding that Claimant's job duties required heavy manual labor, including lifting and carrying fifty to 100 pounds varied times and distances each day.[11] Decision and Order at 14-15. Because we see no error in the administrative law judge's finding that Dr. Green had an adequate understanding of the exertional requirements of Claimant's usual coal mine work, we affirm it. *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).

Employer also argues the administrative law judge should have given Dr. Green's opinion less weight because he, like Dr. Nader, did not consider the more recent "medical records and opinions that materially conflicted with his own opinion."[12] Employer's Brief

[10] The administrative law judge noted that on Form CM-913 (Description of Coal Mine Work and Other Employment), Claimant described the exertional requirements of his last coal mine job as sitting for five hours a day, standing for four hours a day, lifting fifty to 100 pounds varied times a day, and carrying fifty to 100 pounds varied distances each day. Decision and Order at 15; Director's Exhibit 4. As Employer does not challenge the administrative law judge's finding regarding Claimant's usual coal mine work and its exertional requirements, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[11] Employer also asserts Dr. Green failed to consider that Claimant was working at the time of Dr. Green's examination. However, Dr. Green specifically noted Claimant was "working in a service station over the past year as a mechanic." Director's Exhibit 11.

[12] Dr. Green did not consider Dr. Basheda's non-qualifying May 16, 2018 pulmonary function study or Dr. Nader's non-qualifying April 29, 2019 post-bronchodilator pulmonary function study. *See* Director's Exhibits 11, 42. However, the administrative law judge found Dr. Basheda's study invalid and permissibly credited the qualifying values of the three pre-bronchodilator pulmonary function studies over Dr. Nader's non-qualifying April 29, 2019 post-bronchodilator study. Decision and Order at 17-18; *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has

at 11, *quoting* Decision and Order at 33. Contrary to Employer's contention, there is no materially conflicting evidence that Dr. Green failed to consider. Dr. Green opined Claimant is totally disabled based on the pulmonary function study he conducted. Director's Exhibits 11, 42. His opinion is consistent with the administrative law judge's finding that the three pre-bronchodilator pulmonary function studies are qualifying and establish Claimant has a totally disabling respiratory or pulmonary impairment. Decision and Order at 17-18. As we explained *supra*, the blood gas study evidence is not contrary evidence to be weighed against the qualifying pulmonary function study evidence. Because it is supported by substantial evidence, we therefore affirm the administrative law judge's finding that Dr. Green's opinion is sufficiently reasoned to support a finding that Claimant is totally disabled. Decision and Order at 32; *see Hicks*, 138 F.3d at 533; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Director's Exhibits 11, 42.

Additionally, we reject Employer's contention that the administrative law judge erred in giving little weight to the opinions of Drs. Basheda and Zaldivar. Each physician opined only that Claimant may be able to perform his usual coal mine work if he were properly treated for asthma. Employer's Exhibits 7 at 41, 44-45; 8 at 36. The proper inquiry regarding whether Claimant is totally disabled, however, is whether he is able to perform his usual coal mine work, and not whether he is able to perform that work with the use of medication. 20 C.F.R. §718.204(b)(2); *see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability . . . ."). Thus, we affirm the administrative law judge's finding that Drs. Basheda's and Zaldivar's opinions are either "vague" or "unclear" regarding whether Claimant is totally disabled and do not outweigh Dr. Green's reasoned opinion.[13] *See* 20 C.F.R. §718.204(b)(2)(iv); *Hicks*, 138 F.3d at 533; Decision and Order at 34.

Because it is supported by substantial evidence, including the qualifying pulmonary function studies and Dr. Green's opinion, we affirm the administrative law judge's finding

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cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

[13] Because the administrative law judge gave a valid reason for finding the opinions of Drs. Basheda and Zaldivar not credible, we need not address all of Employer's arguments concerning the weight she accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

that Claimant established a totally disabling respiratory or pulmonary impairment.[14] 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; Decision and Order at 34. We therefore affirm her determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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 establish Claimant has neither legal nor clinical pneumoconiosis,[15] or that "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 found Employer failed to establish rebuttal by either method.

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),

[14] Employer generally asserts Claimant's "failure to address many of [Employer's] arguments in his response . . . may be taken as forfeiting them[.]" Employer's Reply Brief at 1-2. Employer does not explain, however, the specific arguments it asserts Claimant forfeited. Moreover, Claimant specifically argues he established total disability based on the pulmonary function study evidence and Dr. Green's opinion, consistent with our holding. Claimant's Response Brief at 7. Regardless, the Board has a duty to address the arguments Employer raises on appeal, even if Claimant had not filed a meaningful response. *Formoso v. Tracor Marine, Inc.*, 29 BRBS 105 (1995).

[15] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "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).

718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-155 n.8 (2015).

Employer relies on the opinions of Drs. Basheda and Zaldivar. Dr. Basheda acknowledged Claimant's coal dust exposure placed him at risk for coal dust-induced pulmonary disease but concluded he had mild to moderate asthma that was not related to coal dust exposure. Employer's Exhibits 1, 8. Dr. Zaldivar opined Claimant's respiratory impairment was caused by asthma-chronic obstructive pulmonary disease (COPD) overlap syndrome, unrelated to coal mine dust exposure. Director's Exhibit 17; Employer's Exhibit 7. Both physicians explained that while Claimant's obstructive impairment was not completely reversible after bronchodilation, any fixed airway obstruction he had was due to lung remodeling caused by untreated asthma. Employer's Exhibit 8 at 34-35; Director's Exhibit 17. The administrative law judge found neither physician's opinion adequately reasoned or persuasive to satisfy Employer's burden of proof. Decision and Order at 40-41.

Citing the preamble to the 2001 regulatory revisions, the administrative law judge found neither Dr. Basheda nor Dr. Zaldivar sufficiently addressed the latent and progressive nature of pneumoconiosis in excluding coal dust as a contributing cause of his asthma. Decision and Order at 41. She also determined Dr. Zaldivar did not address the additive nature of coal dust and cigarette smoke in concluding coal dust did not contribute to Claimant's respiratory impairment.[16] *Id*. at 40.

Employer argues the administrative law judge erred in evaluating the credibility of its experts based on their consistency with the preamble and improperly applied it "as a matter of law." Employer's Brief at 22; *see also* Employer's Reply Brief at 8-11. It also asserts that Drs. Basheda and Zaldivar provided well-reasoned opinions for why Claimant does not have legal pneumoconiosis. Employer's Brief at 23-24. We reject Employer's arguments.

Contrary to Employer's contention, in assessing the credibility of its medical experts, the administrative law judge did not give the preamble the force of law; rather, in determining the credibility of the medical opinion evidence, she permissibly consulted the preamble's explanation of the medical studies that the DOL relied upon as the bases for its

[16] Because Employer has the burden of proof, and the administrative law judge gave valid reasons for discrediting Drs. Zaldivar's and Basheda's opinions on legal pneumoconiosis, we need not address Employer's argument regarding the weight the administrative law judge assigned to Dr. Green's opinion that Claimant has legal pneumoconiosis. Employer's Brief at 28-29.

regulations.[17] *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314 (4th Cir. 2012); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); Decision and Order at 40-41. She also gave rational reasons for finding Drs. Basheda's and Zaldivar's opinions not credible in view of the science underlying the preamble.

As the administrative law judge accurately noted, Dr. Basheda eliminated coal mine dust exposure as a cause of Claimant's respiratory impairment because "[i]t would be improbable for [Claimant] to have existed in the coal mining environment for that period of time and be able to function without missing work if he had occupational asthma related to coal dust." Employer's Exhibit 8 at 32. Dr. Zaldivar similarly opined that Claimant's asthma is not legal pneumoconiosis because he would have been unable to work for thirty years in coal mine employment if coal mine dust exposure was a trigger for it. Employer's Exhibit 7 at 48. The administrative law judge permissibly found Drs. Basheda's and Zaldivar's opinions unpersuasive because the regulations provide that pneumoconiosis is considered to be a latent and progressive disease that may first be detected after a miner leaves coal mine employment. 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151 (1987); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 506 (4th Cir. 2015) (a medical opinion not in accord with the accepted view that pneumoconiosis can be both latent and progressive may be discredited); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); Decision and Order at 40-41. The administrative law judge noted neither physician accounted for the possibility "that Claimant's pneumoconiosis could have remained latent while he was in the mines, only for him to show symptoms later." Decision and Order at 40. She also accurately noted Dr. Zaldivar was "uncertain as to how long Claimant had asthma," further undermining the credibility

[17] Employer asserts the administrative law judge's reliance on the preamble is foreclosed by a recent executive order and that the preamble was not issued in accordance with notice-and-comment rulemaking. Employer's Brief at 26, *citing* Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 9, 2019). Multiple circuit courts and the Board have held that an administrative law judge may evaluate expert opinions in conjunction with the DOL's discussion of sound medical science in the preamble. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Obush*, 650 F.3d 248; *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16 (4th Cir. 2012); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008). We therefore reject Employer's assertion.

of his rationale. Decision and Order at 40; *see Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Additionally, the administrative law judge permissibly found that while Dr. Zalidvar diagnosed COPD due to smoking, he did not adequately explain why Claimant's coal mine dust exposure was not an additive factor, along with cigarette smoking, in causing Claimant's COPD or pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2), (b); 65 Fed. Reg. at 79,941 (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure can be additive with cigarette smoking); Decision and Order at 40.

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions based on the experts' explanations for their diagnoses, and to assign those opinions appropriate weight. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013); *Looney*, 678 F.3d at 313-14. Employer's arguments are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within her discretion in discrediting Drs. Basheda's and Zaldivar's opinions, we affirm her finding that Employer did not disprove legal pneumoconiosis.[18] *See Owens*, 724 F.3d at 558. Thus, we affirm the administrative law judge's finding that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The administrative law judge next considered whether Employer rebutted the Section 411(c)(4) presumption by establishing "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 43-44. The administrative law judge permissibly found the opinions of Drs. Basheda and Zaldivar lack credibility on the cause of Claimant's total respiratory disability as "it is not clear if either physician believed Claimant to be totally disabled." Decision and Order at 44; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 269 (4th Cir. 2002); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. We therefore affirm the administrative law judge's determination that Employer

[18] Because Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address Employer's arguments on clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Employer's Brief at 17-20.

failed to establish no part of Claimant's respiratory disability is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 43-44. Thus, we affirm her finding that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge