BRB No. 10-0265 BLA

HARVEY G. ELKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TROJAN MINING, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/28/2011
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Trojan Mining, Incorporated (employer) appeals the Decision and Order – Award of Benefits (2007-BLA-5308) of Administrative Law Judge Thomas F. Phalen, Jr.,

rendered on a miner's claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). In a Decision and Order dated December 17, 2009, the administrative law judge credited claimant with twenty-six years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator, and that the evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator because it did not employ claimant for a cumulative period of one year. On the merits, employer challenges the administrative law judge's determination regarding the length and extent of claimant's smoking history. Employer further argues that the administrative law judge erred in weighing the medical opinions as to the issues of the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to employer's appeal, asserting that the administrative law judge properly found that employer was the responsible operator. The Director, however, declines to address employer's arguments on the merits of claimant's entitlement to benefits.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Claimant filed three prior claims for benefits on February 15, 2001, April 3, 2003 and December 6, 2004, each of which was withdrawn at claimant's request. The prior claims are associated with the case file, but have not been marked as Director's Exhibits. The current claim was filed on February 2, 2006. Director's Exhibit 2.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

I. RESPONSIBLE OPERATOR

We first address employer's argument that it has been erroneously identified as the responsible operator in this case. If a miner worked for more than one coal mine operator during his career, the responsible operator is the most recent coal mine operator to employ the miner, provided that the operator qualifies as a "potentially liable operator." 20 C.F.R. §725.495. The regulation at 20 C.F.R. §725.494 sets forth five criteria for identifying a potentially liable operator: (i) the miner's disability or death arose out of employment with that operator; (ii) the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; (iii) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year; (iv) the miner's employment included at least one working day after December 31, 1969; and (v) the operator is financially capable of assuming liability for the claim. 20 C.F.R §725.494(a)-(e).

From a procedural standpoint, after a claim is filed, the district director determines, based on employment information provided by the miner, whether there is a potentially liable operator pursuant to 20 C.F.R. §725.494. The district director issues a Notice of Claim to each potentially liable operator he identifies, requesting that each operator either accept or contest liability for benefits. 20 C.F.R. §725.407(b), (c). After the time for responding to the Notice of Claim expires, the district director makes preliminary findings, contained in the Schedule for Admission of Evidence, as to the miner's entitlement and the identity of responsible operator. 20 C.F.R. §725.410(a). The named responsible operator then has thirty days to respond and/or submit evidence accepting or rejecting the district director's findings. 20 C.F.R. §725.412(a)(1). Based on any additional evidence submitted, the district director issues a Proposed Decision and Order containing his final determinations on entitlement and the identity of the responsible operator. 20 C.F.R. §725.418. Although the district director bears the initial burden of proving that a coal mine operator qualifies as a potentially liable operator, once that determination is made, the burden shifts to employer to present evidence to show that it is not liable for benefits.

In this case, claimant submitted a work history form in conjunction with his application for benefits that identified his employer as "Trogen [sic] Mine, Elkhorn Creek, [Kentucky]," from 1976-1990. Director's Exhibit 3. Employer provided a written statement on company letterhead, dated September 11, 1991, in which it indicated:

This is to advise that [claimant] was employed by our company as follows:

From	To
05/01/90	Present

Employment with Sun Glo Coal Company was:

From	To
11/29/88	04/30/90

Employment with BethEnergy Mines was:

From	To
11/07/67	06/02/88 - laid off
08/05/68	12/01/82 - laid off
12/07/82	10/31/84 - laid off
11/26/84	11/28/88

Director's Exhibit 5. The letter also identified, claimant's job classifications as: "General labor, shuttle car operator, roof driller, roof bolter and mobile equipment operator." *Id*.

On February 6, 2006, the district director issued a Notice of Claim to employer advising that it had been named as a potentially liable operator. Director's Exhibit 23. Employer controverted the claim but did not submit any evidence pertaining to the responsible operator issue. Director's Exhibits 24, 25. On June 26, 2006, the district director issued a Schedule for the Admission of Additional Evidence, finding that, while employer did not employ claimant for a cumulative period of one year,[3] the September 11, 1991 letter confirmed that there was a successor relationship between BethEnergy Mines, Sun Glo Coal Company (Sun Glo) and employer, and that claimant had over one year of cumulative employment with Sun Glo. Thus, the district director determined that employer, as a successor operator to Sun Glo, is liable for benefits. Director's Exhibit 26. On October 12, 2006, the district director issued a Proposed Decision and Order, wherein employer was designated the responsible operator pursuant to 20 C.F.R. §§725.494 and 725.495. Director's Exhibit 46. Employer subsequently requested a hearing and the case was assigned to the administrative law judge.

On September 30, 2008, employer filed a motion to dismiss, asserting that the district director did not meet his burden of establishing that it is a *potentially liable*

[3] The record establishes that claimant did not work for employer for one continuous year with employer, as claimant stopped work in July 1990 due to a work-related injury.

operator pursuant to 20 C.F.R. §725.494. In his Decision and Order issued on December 17, 2009, the administrative law judge found that employer is the responsible operator, and explained:

> The evidence supports a finding that [employer] and Sun Glo were in a predecessor/successor relationship, and that [c]laimant was employed for the duration of one year by Sun Glo. Therefore the evidence relied upon by the [d]istrict [d]irector establishes that [employer] last employed [c]laimant for a period of one year or more. Accordingly, I find that the [d]istrict director met his burden of proving that [employer] is a potentially liable operator.
>
> . . .
>
> I find that [employer] has failed to present sufficient evidence establishing that it is not a potentially liable operator. Furthermore, it has failed to shift liability to another potentially liable operator. I therefore find that [employer] is properly designated as the responsible operator.

Decision and Order at 9.

Employer asserts on appeal that the administrative law judge erred in relying on the September 11, 1991 letter to establish a successor relationship between it and Sun Glo because "the letter does not elaborate on the relationship, if any between the companies" and "it does not disclose any basis for concluding that Trojan meets any of the criteria necessary to establish such a successor relationship." Employer's Brief in Support of Petition for Review at 11. Employer notes that the Social Security Administration Statement of Earnings for claimant lists different identification numbers and different addresses for employer and Sun Glo, supporting a conclusion that they were separate corporate entities. Employer further states that "[sharing] book-keeping services does not make two companies the same company nor does it convert one company into a successor of the other." *Id*. Finally, employer maintains that claimant's testimony alone is insufficient to establish a successor relationship. Employer's arguments are rejected as they are without merit.

A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Certain transactions are also deemed to create successor operator liability: "(1) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization . . . (2) If an operator ceases to exist by reason of a liquidation into a parent

or successor corporation; or (3) If an operator ceases to exist by reason of a sale of substantially all its assets, or as a result of merger, consolidation or division." 20 C.F.R. §725.492(b)(1)-(3). A potentially liable operator must carry the burden of producing evidence to support its theory that it was not a successor to a miner's earlier employer where information is within its exclusive control. *See Ridings v. C & C Coal Co.*, 6 BLR 1-227, 1-231 (1983).

We hold that substantial evidence supports the administrative law judge's finding that employer qualifies as a successor operator in this case because it acquired the coal mining business, or substantially all of the assests thereof, of Sun Glo, which was formerly BethEnergy Mines.[4] *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 7. Citing 20 C.F.R. §725.492(b)(1), the administrative law judge reasonably questioned why employer had information pertaining to claimant's prior work with Sun Glo and BethEnergy Mines if there was no successor relationship between these companies: "In order to provide the dates of employment, [employer] would have to have had the [c]laimant's employment records from the prior companies. This convincingly suggests that [employer] retained at least some assets from Sun Glo and BethEnergy."[5] Decision and Order at 8; *see generally Donovan v. McKee*, 845 F.2d 70, 10 BLR 2-133 (4th Cir. 1988).

The administrative law judge also permissibly credited claimant's testimony as "compelling evidence" that employer was a successor operator:

> Claimant testified that he worked for a mining company called Beth Elkhorn which then changed names to become BethEnergy Mines. He states that the location of the mine remained the same. In 1988, BethEnergy changed its name to become Sun Glo Coal Company. Claimant testified that the mine again changed names to become Trojan Mining. Although he had difficulty remembering the names of the supervisors, [c]laimant testified that the foreman and superintendant remained the same when the company transitioned from Sun Glo to Trojan

[4] The Social Security Administration Itemized Statement of Earnings reflects that Sun Glo Coal Company (Sun Glo) went bankrupt. Director's Exhibit 6.

[5] We agree with the Director, Office of Workers' Compensation Programs, that the September 11, 1991 letter "proves that the company name simply changed from one day to the next without interruption in the mining operation," as claimant worked for BethEnergy Mines on November 28, 1998 but for Sun Glo on the next day, November 29, 1998, and for Sun Glo on April 30, 1990, but for employer on the next day, May 1, 1990. Director's Brief at 5.

> Mining and that the people who appeared to be the owners of the company were the same. He further explained that[,] although the company changed names, the mine, the equipment, and the crew remained the same.

Decision and Order at 8; *see* Hearing Transcript at 44-48.

Additionally, we reject employer's argument that the administrative law judge erred in shifting the burden to employer to prove that it is not the proper responsible operator. Employer's Brief in Support of Petition for Review at 12, *citing* Decision and Order at 7-9. The administrative law judge permissibly found, based on the September 11, 1991 letter, that the district director satisfied his burden to properly identify employer as a potentially liable operator. The administrative law judge also correctly noted that employer did not submit any evidence before the district director to dispute the district director's finding. Thus, because the district director satisfied his initial burden to prove that employer is a potentially liable operator, by meeting the criteria set forth at 20 C.F.R. §725.494, the burden shifted to employer to establish that it should be dismissed as the responsible operator, either because it is financially incapable of paying the benefits, or because there is a potentially liable operator that more recently employed claimant pursuant to 20 C.F.R. §725.494(c). 20 C.F.R. §725.495(c); *see* 65 Fed. Reg. 79920, 79,999-80,000 (Dec. 20, 2000). Because employer has not submitted any argument or evidence proving that it is financially incapable of paying benefits or that there is a potentially liable operator that more recently employed claimant, we affirm the administrative law judge's finding that employer is the responsible operator.

II. MERITS OF ENTITLEMENT

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

The administrative law judge found that claimant established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), giving controlling weight to the opinions of Drs. Rasmussen and Baker, that claimant's chronic obstructive pulmonary disease (COPD) is due, in part, to coal dust exposure, over the contrary opinions of Drs. Rosenberg and Vuskovich, that claimant's respiratory condition is unrelated to his coal mine employment. The administrative law judge also determined that claimant was totally disabled from performing his usual coal mine work, and that his disability was due

to legal pneumoconiosis, based on the opinions of Drs. Rasmussen and Baker, pursuant to 20 C.F.R. §718.204(b), (c).

A. Smoking History

Employer first contends that the administrative law judge erred in crediting claimant's testimony that he had a six year history of smoking one pack per day, and that he quit smoking fifty years prior to the hearing. Employer maintains that a carboxyhemoglobin test, obtained by Dr. Rasmussen in April 2006, proves that claimant has carbon levels consistent with an ongoing smoking habit. Employer asserts that since the administrative law judge's smoking history determination is "pivotal to his credibility findings," the Board must vacate his finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), and disability causation at 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review at 12-14. We disagree.

The administrative law judge acknowledged that there was some discrepancy in the record regarding the length of claimant's smoking history, and accurately summarized the conflicting evidence as follows:

> Claimant testified that he is a former smoker and has not smoked in fifty years. Claimant also testified that his wife smokes up to two cigarettes per day, but he is not in the house when she is smoking. Dr. Rasmussen indicated that [c]laimant smoked one pack per day for ten years, quitting in 1966. However, during his second examination he reported [c]laimant began smoking in 1954, smoking about a pack of cigarettes daily until he quit in 1960. This equates to a six pack year smoking history. Dr. Baker reported a six pack year smoking history. Dr. Rosenberg noted [c]laimant smoked a minimal amount for six years during his twenties, and had not smoked for fifty years. He also called into question the accuracy of [c]laimant's reported smoking history due to the elevated carboxyhemoglobin fraction from April 12, 2006. After reviewing the medical records, Dr. Vuskovich indicated in his summary that "[claimant's] standardized cigarette smoke exposure was [ten] pack years. On August 9, 2002, however, Dr. Gooch encourage[d] [claimant] to avoid smoking. On April 12, 2006, Dr. Rasmussen documented that [claimant's] arterial blood carboxyhemoglobin fraction was 4.4%. This was consistent with a pack-per day cigarette smoker."

Decision and Order at 19-20, *quoting* Employer's Exhibit 6; *see* Hearing Transcript at 42-43. In resolving the conflict in the evidence, the administrative law judge found that Drs. Rosenberg and Vuskovich had only "speculated" that claimant was smoking at the time

of the April 12, 2006 carboxyhemoglobin test, and that they did not persuasively explain why the results could not also be attributed to claimant's exposure to second-hand smoke, given that claimant testified that his wife was smoker.[6] Decision and Order at 24 n.23; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge further noted that a subsequent carboxyhemoglobin test, taken four months after Dr. Rasmussen's examination, revealed different results. Thus, the administrative law judge concluded that "the weight of the evidence supports a finding that [c]laimant smoked for six years at the rate of one pack of cigarettes per day, and has not smoked in fifty years." Decision and Order at 20.

We reject employer's assertion that the administrative law judge erred in relying on claimant's testimony with regard to the length and extent of his smoking history. It is well-established that the administrative law judge's determination of a witness's creditability is entitled to deference. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218, 20 BLR 2-360, 2-374 (6th Cir. 1996). Furthermore, since the administrative law judge fully credited the miner's testimony, "[a]ny discrepancy in the evidence regarding [the subject of his testimony] was therefore implicitly resolved in his favor." *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-553 (6th Cir. 2002). In addition, contrary to employer's contention, the administrative law judge also had discretion to determine what significance, if any, to attribute to the carboxyhemoglobin testing. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's determination regarding the length and extent of claimant's smoking history as it is supported by substantial evidence. Decision and Order at 20; *see Clark*, 12 BLR at 1-151.

[6] Dr. Vuskovich reported, based on the results of the April 12, 2006 carboxyhemoglobin test, that claimant "*probably* smoked a pack of cigarettes, and that "[it] is *unlikely* that second hand smoke would cause such a high level." Employer's Exhibit 6 (emphasis added). Dr. Rosenberg stated that "the validity of [claimant's] smoking history needs to be questioned, based on his elevated carboxyhemoglobin level of 4.4 [percent]," obtained by Dr. Rasmussen, but the administrative law judge noted that Dr. Rosenberg did not address the fact that claimant's carboxyhemoglobin level was measured at 0.1 percent during Dr. Rosenberg's examination, four months later, "nor does he address how these levels may have been impacted through second-hand-smoke." Decision and Order at 26; *see* Director's Exhibit 18.

B. Legal Pneumoconiosis

Employer next contends that the administrative law judge erred in weighing the medical opinion evidence and in finding it sufficient to establish the existence of legal pneumoconiosis. Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered four medical opinions. Dr. Rasmussen examined claimant on April 12, 2006, at the request of the Department of Labor (DOL). Director's Exhibit 13. He noted a ten year history of smoking and that claimant worked from 1958 to 1990 in the coal mines as a roof bolter and pan operator, which he considered to require heavy manual labor. He obtained a positive chest x-ray for pneumoconiosis and diagnosed "COPD/[e]mphysema," which he attributed to coal dust exposure and cigarette smoking. *Id*. Based on the results of claimant's pulmonary function study and arterial blood gas test, Dr. Rasmussen opined that claimant had "at least minimal loss of lung function" caused by a minimal obstructive ventilatory impairment and a mild oxygen transfer impairment. *Id*. He noted that the two risk factors for claimant's impairment were smoking and coal dust exposure and opined that "[c]oal mine dust has caused a significant portion of [claimant's] lung disease, which can be classified as emphysema." *Id*. In a July 5, 2006 supplemental report, Dr. Rasmussen explained that claimant was unable to perform his usual coal mine work because his degree of respiratory impairment "would not allow [claimant] to perform exercise up to 25ml/kg/min" and his impairment in oxygen transfer would cause him "to become hypoxic if he exercised at a level consistent with his last coal mine job." Director's Exhibit 15. Dr. Rasmussen performed a second examination on March 8, 2007, and reported that the pulmonary function testing showed a moderate respiratory impairment and that the arterial blood gas studies showed significant impairment in oxygen transfer. Claimant's Exhibit 1. He reiterated his opinion that claimant had x-ray evidence of pneumoconiosis, COPD due, in part, to coal dust exposure, and is totally disabled as a result of his coal dust exposure. *Id*.

Dr. Rosenberg examined claimant on August 14, 2006 and also reviewed the medical report of Dr. Rasmussen. Director's Exhibit 18. He opined that claimant does not suffer from clinical pneumoconiosis or emphysema, but does suffer from a disabling obstructive impairment. *Id*. However, he concluded that the pattern of obstruction was not consistent with coal dust exposure, explaining as follows:

> When epidemiological investigations have studied how this respiratory parameter varies in relationship to coal mine dust exposure . . . it has been determined that the FEV1% does not generally fall to any significant extent. Specifically, with respect to [claimant], one can appreciate that his FEV1% is highly reduced to 56% (normal generally 70% or higher). Thus, his pattern of obstruction is not consistent with a coal mine dust related form of obstructive lung disease. Rather, a reduced FEV1% characteristically is seen in the presence of smoking-related COPD. While

> obviously [claimant's] six year remote smoking would not be sufficient to cause airways disease, the validity of his smoking history needs to be questioned, based on his elevated carboxyhemoglobin level . . . .

Id. Dr. Rosenberg opined that claimant likely developed "bronchiolitis, an inflammatory condition of the airways that is a condition of the general public." *Id*. He reiterated his opinion in supplemental reports dated October 8, 2008 and October 23, 2008. Employer's Exhibits 7, 9.

Dr. Baker examined claimant on August 29, 2008, and diagnosed heart disease, coal workers' pneumoconiosis, based on an x-ray and claimant's history of coal dust exposure, COPD with a moderate obstructive defect, based on pulmonary function testing, and chronic bronchitis, by history. Claimant's Exhibit 2. He further stated:

> [Claimant] also has legal pneumoconiosis. He has chronic obstructive airway disease with a moderate obstructive defect and chronic bronchitis. These can be caused by coal dust exposure. He has only a [six] pack year history of smoking and has not smoked for many years. This would not be considered enough exposure to cigarette smoke to cause any significant symptoms. On this basis, I feel his condition has been caused primarily by his coal dust exposure and his condition has been significantly contributed to[,] or substantially aggravated by[,] dust exposure in the coal mine employment.

Id. He further opined that claimant is totally disabled as demonstrated by FEV1 values below disability standards, with all the diagnosed conditions fully contributing to the disability. *Id*.

Dr. Vuskovich reviewed claimant's medical records and issued a report on October 1, 2008. Employer's Exhibit 6. He opined that claimant does not suffer from either clinical or legal pneumoconiosis, and that claimant does not have a disabling respiratory impairment. *Id*. He noted that claimant's pulmonary function testing showed an obstructive respiratory impairment that is "substantially reversible" and opined that the pattern of impairment is not compatible with coal workers' pneumoconiosis. *Id*. He opined that claimant has asthma or "a medication-induced obstructive impairment (not a disease)" or a combination of both. *Id*. In a supplemental report dated October 20, 2008, Dr. Vuskovich reviewed Dr. Baker's examination findings and discussed the fact that claimant's pulmonary function had deteriorated in a short span of time. He attributed claimant's pulmonary function study results to the "pulmonary effects" of gastroesophageal reflux disease (GERD) and stated that "considering all the information

[claimant's] pulmonary disease is more consistent with GERD[-]related pulmonary disease than with coal workers[']s pneumoconiosis." Employer's Exhibit 10.

In weighing the conflicting medical opinions, the administrative law judge found the opinions of Drs. Rosenberg and Vuskovich, that claimant's respiratory condition is unrelated to coal dust exposure, to be insufficiently reasoned and entitled to less weight. Decision and Order at 27. In contrast, the administrative law judge found that the opinions of Drs. Baker and Rasmussen were well-documented and well-reasoned, noting that their opinions were supported by the objective medical data of record, and that each physician had excellent qualifications. *Id*. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] *Id*. at 28.

On appeal, employer asserts that the administrative law judge selectively analyzed the evidence and erred in finding Dr. Rosenberg's opinion, that claimant's disabling COPD is due to smoking or bronchiolitis, was not reasoned. We disagree. The administrative law judge found that Dr. Rosenberg excluded coal dust exposure as a cause of claimant's COPD based on his belief that "a reduced FEV1% characteristically is seen in the presence of smoking-related COPD." Decision and Order at 25, *quoting* Director's Exhibit 18. The administrative law judge found that Dr. Rosenberg's opinion is contrary to the regulations, observing that "it would not have made sense for the Department of Labor to permit miners to use a decreased FEV1/FVC to establish disability if . . . a substantially decreased FEV1/FVC rules out pneumoconiosis."[8]

[7] The administrative law judge also considered claimant's treatment records from Whitesburg Appalachian Regional Hospital, but found that they did not establish either clinical or legal pneumoconiosis. Decision and Order at 19; Claimant's Exhibit 5.

[8] Employer argues that the administrative law judge erred in citing to *M.A.* [*Amburgey*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (unpub.) because it is unpublished and involved a different opinion by Dr. Rosenberg with respect to a different claimant. Contrary to employer's argument, however, the administrative law judge may consider unpublished decisions in reaching his credibility findings. *See Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000) (holding that the court is permitted to consider the persuasive reasoning of unpublished opinions). Furthermore, we reject employer's assertion that the administrative law judge erred in relying on *Amburgey* because, in that case, the Board considered Dr. Rosenberg's discussion of the FEV1/FVC ratio to be contrary to the regulations, but "Dr. Rosenberg's opinion in this case does not rely on that ratio as a basis for his opinion." Employer's Brief in Support of Petition for Review at 16. We note that Dr. Rosenberg has specifically acknowledged that the terms FEV1 percent and FEV1/FVC ratio are interchangeable: "[T]he functional definition of [COPD], as reported by Pauwels in the

Decision and Order at 25, *quoting M.A.* [*Amburgey*] *v. Jones Fork Operation*, BRB No. 08-0308 BLA (Jan. 16, 2009) (The Department of Labor cites with approval studies that report that coal dust exposure results in decreased FEV1/FVC values); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); 65 Fed. Reg. 79940, 79943 (Dec. 20, 2000). Contrary to employer's assertion, the administrative law judge had discretion to accord less weight to a medical opinion that is at odds with the science relied upon by the Department of Labor in promulgating the revised regulations.[9] *See Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Additionally, the administrative law judge permissibly found that Dr. Rosenberg's opinion was "based on generalities" because he did not explain how smoking could account for claimant's respiratory condition if claimant had only a minimal smoking history. Decision and Order at 26; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark*, 12 BLR at 1-151. Thus, we affirm the administrative law judge's decision to accord Dr. Rosenberg's opinion less weight pursuant to 20 C.F.R. §718.202(a)(4).

We also reject employer's assertion that the administrative law judge erred in finding Dr. Vuskovich's opinion to be "internally inconsistent" and entitled to less weight regarding the existence of legal pneumoconiosis. The administrative law judge properly noted that Dr. Vuskovich opined that claimant does not have legal pneumoconiosis, and specifically stated in his October 1, 2008 report, that "without consistent wheezes there was no physical examination evidence of COPD." Decision and Order at 26, *quoting* Employer's Exhibit 6. However, in his October 20, 2008 addendum, Dr. Vuskovich

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Global Initiative for Chronic Obstructive Pulmonary Disease and supported by the American Thoracic Society and World Health Organization, is a decrease in the FEV1 divided by FVC (FEV1/FVC), *also termed the FEV1%*." Director's Exhibit 18 (emphasis added) (internal abbreviations omitted). Thus, Dr. Rosenberg's opinion is contrary to the regulations, regardless of whether he used the term FEV1 percent or FEV1/FVC ratio.

[9] The administrative law judge had discretion to find that Dr. Rosenberg failed to explain the basis for his diagnosis of bronchiolitis and permissibly found that, while Drs. Rosenberg and Vuskovich disagreed with Dr. Rasmussen that claimant has emphysema, they did not explain their opinions in light of the positive x-ray evidence for emphysema and treatment notes that also reference the disease. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 27.

acknowledged that "other physicians[,] including Dr. Rasmussen and Dr. Rosenberg[,] recorded abnormal pulmonary function findings[,] including basilar crackles, wheezing, and decreased breath sounds with scattered rhonchi." Decision and Order at 27, *quoting* Employer's Exhibit 8. The administrative law judge permissibly found that Dr. Vuskovich "failed to clarify his opinion in light of these conflicting notations" and, given his initial opinion that claimant does not have COPD, failed to reconcile his diagnosis of asthma, "which he acknowledges is a form of COPD." Decision and Order at 27. Thus, we affirm the administrative law judge's finding that Dr. Vuskovich's opinion is insufficiently explained and entitled to less weight pursuant to 20 C.F.R. §718.202(a)(4). *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-151; Decision and Order at 27.

Lastly, there is no merit to employer's contention that the administrative law judge erred in finding the opinions of Drs. Baker and Rasmussen to be well-documented and well-reasoned. The administrative law judge specifically gave less weight to the diagnoses of clinical pneumoconiosis by Drs. Baker and Rasmussen, because he found that their reliance on positive x-ray evidence was contrary to his own finding that the x-ray evidence was negative for clinical pneumoconiosis. Decision and Order at 24-25. With respect to the issue of legal pneumoconiosis, the administrative law judge properly found that both Drs. Baker and Rasmussen "diagnosed COPD and emphysema based on their clinical findings, symptomoloy, and [c]laimant's medical history." *Id*. at 27. He found that their opinions took into account claimant's smoking and work histories and that their conclusions were "better supported by the objective data of record, including the pulmonary function and arterial blood gas testing." *Id*. The administrative law judge found that the opinions of Drs. Baker and Rasmussen were "bolstered by their excellent qualifications."[10] *Id*. He further noted that Dr. Baker had performed the most recent examination of claimant and that Dr. Rasmussen had the opportunity to examine claimant

[10] Employer contends that the administrative law judge ignored that Drs. Rosenberg and Vuskovich are equal, if not better than, those of Drs. Baker and Rasmussen. We disagree. The administrative law judge discussed the qualifications of all the record physicians, but did not rely on credentials to resolve the conflict in the evidence. Contrary to employer's argument, the administrative law judge did not give less weight to Drs. Rosenberg and Vuskovich because he found them to be less qualified than Dr. Rasmussen. Rather, he merely acknowledged the qualifications of Drs. Baker and Rasmussen as additional support for according their opinions more weight. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark*, 12 BLR at 1-151; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988).

twice within one year, and "therefore he had a more complete picture of the progression of [c]laimant's condition." *Id*.

Because determinations regarding the credibility of the medical experts are committed to the discretion of the administrative law judge, we affirm his finding that the opinions of Drs. Baker and Rasmussen are reasoned and documented and sufficient to establish that claimant's COPD is due, in part, to his coal dust exposure. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark*, 12 BLR at 1-151. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden of proving the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Napier*, 301 F.3d at 713, 22 BLR at 2-553; *Clark*, 12 BLR at 1-151; Decision and Order at 25.

C. Total Disability

Employer also challenges the administrative law judge's finding that claimant established total disability. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), employer argues that the administrative law judge's analysis is "internally inconsistent" because, although he "recognized that [claimant] last worked as a pan operator," he determined that claimant was totally disabled, based on the physical demands of claimant's work as a roof bolter. Employer's Brief in Support of Petition for Review at 20. Employer's assertion of error is without merit.

The proper inquiry in this case is whether claimant is totally disabled from performing his *usual* coal mine work, which is not necessarily the last job that he performed. *See* 20 C.F.R. §718.204(b)(1). The administrative law judge acted within his discretion in finding that claimant's "primary position was that of a roof bolter" and that this constituted his usual coal mine work. Decision and Order at 29; *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). The administrative law judge also permissibly found that claimant's position as a roof bolter "required him to lift 200 pounds up to 12 times per day and 40 pounds consistently" and "40 to 50 pounds throughout the day," which constituted "moderately heavy to heavy" manual labor. Decision and Order at 29. Because the administrative law judge properly compared the physicians' opinions with the exertional requirements of claimant's usual coal mine work, we affirm his finding that claimant established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv), based on the opinions of Drs. Rosenberg, Rasmussen and Baker. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); Decision and Order at 30-31. We also affirm the administrative law judge's finding that claimant satisfied his burden to establish total disability, based on a consideration of all of the relevant evidence. *See Clark*, 12 BLR at 1-151; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

D. Disability Causation

We have already rejected employer's arguments relevant to the cause of claimant's disabling respiratory condition at 20 C.F.R. §718.202(a)(4), and employer does not raise any additional arguments with regard to the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Thus, we affirm, as supported by substantial evidence, the administrative law judge's award of benefits.[11]

E. Date of Onset for Commencement of Benefits

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the date of onset, i.e., the month in which the occupational pneumoconiosis progressed to the stage of total disability. 20 C.F.R. §§725.503, 727.302, 727.303; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset is not ascertainable from all the relevant evidence of record, then benefits commence with the month during which the claim was filed or review was elected under Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §§725.503(b), 727.302(c)(1); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989).

Employer contends that the administrative law judge erred in finding that claimant is entitled to benefits as of February 2006, the month in which claimant filed his claim. Employer asserts that the administrative law judge did not sufficiently explain why he was unable to determine, based on the record evidence, the date of onset of total disability. Employer specifically asserts that benefits should commence as of August 2008, the month in which Dr. Baker examined claimant and opined that he is totally disabled due to pneumoconiosis. We disagree.

Contrary to employer's argument, the administrative law judge is not required to choose the earliest report finding the miner to be totally disabled, in determining the date from which benefits are payable. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987). The onset date is not established by the first medical evidence of record indicating total disability, as such

[11] Based on our affirmance of the administrative law judge's award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)).

medical evidence indicates only that the miner became totally disabled at some time prior to the date of such medical evidence. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985). Because the administrative law judge reviewed the record and indicated that he could not determine the date when claimant became totally disabled, we affirm the administrative law judge's finding that benefits should commence as of February 2006, the month of the filing of the claim.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge