U.S. Department of Labor

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

BRB No. 16-0230 BLA

ELLIS R. TRAYLOR Claimant-Respondent v. ANDALEX RESOURCES, INCORPORATED and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/02/2017 DECISION and ORDER

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

Thomas E. Springer III (Springer Law Firm, PLLC), Madisonville, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05802) of Administrative Law Judge Colleen A. Geraghty (the administrative law judge), rendered on a subsequent claim filed on August 13, 2012,[1] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with fifteen years and one month of surface coal mine employment in conditions substantially similar to those in an underground mine, and found that the evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The

[1] Claimant filed his first claim for benefits on February 27, 2009, which was denied by the district director on November 30, 2009 based on claimant's failure to establish total respiratory disability. Director's Exhibit 1 at 3, 133. Because claimant did not further pursue this claim, it was deemed administratively closed. Claimant filed the current claim for benefits on August 13, 2012, which is pending herein. Director's Exhibit 3.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b).

[3] Where 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). Claimant's prior claim was denied because he did not establish a totally disabling respiratory or pulmonary impairment. Therefore, to obtain review of the merits of his claim, he had to submit new evidence establishing the

administrative law judge further found that employer failed to rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its prior contentions. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

A. Length of Coal Mine Employment

Employer initially challenges the administrative law judge's length of coal mine employment determination. Employer argues that the administrative law judge's finding of fifteen years and one month of coal mine employment is unsupported by the record.

Under the regulations and the relevant case law, claimant bears the burden of establishing the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). Because the Act does not provide specific guidelines for calculating the time spent in coal mine employment, the administrative law judge is granted broad discretion

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existence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §725.309(c)(3), (4).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as 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 7.

in deciding this issue, and his or her determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

In this case, the administrative law judge noted that claimant alleged sixteen years of surface coal mine employment, and testified that he worked for employer from 1977 to 1993. Decision and Order at 5. The administrative law judge accepted employer's records as establishing the beginning and ending dates of claimant's coal mine employment. *Id*. at 6; Director's Exhibit 17. Those records indicate that claimant worked for employer from June 16, 1982 until September 15, 1993, and for related companies from September 6, 1977 to August 17, 1979 and July 14, 1980 to June 15, 1982. Considering employer's employment history records, together with claimant's hearing testimony and the Social Security Administration (SSA) earnings report, the administrative law judge found that claimant established fifteen years and one month of coal mine employment in conditions substantially similar to those in an underground mine.[5] Decision and Order at 5-7.

On appeal, employer argues that the period between September 6, 1977 and August 17, 1979, together with the periods of July 14, 1980 through June 15, 1982, and June 16, 1982 through September 15, 1993, totals only fourteen years, one month, and one week. Employer's Brief at 13. Employer's calculation is in error. Employer contends that the period from July 14, 1980 to September 15, 1993 reflects only twelve years and two months of work; however, it reflects thirteen years and two months of work. Adding thirteen years and two months of work from July 14, 1980 to September 15, 1993 to the one year, eleven months, and eleven days of work between September 6, 1977 and August 17, 1979 yields a total of fifteen years and one month of work, as correctly calculated by the administrative law judge.

Employer also asserts that the administrative law judge erred in crediting claimant with a full year of employment in 1978. Employer's Brief at 13-15. Specifically, employer notes that claimant's earnings in 1978 were lower than he received for working just seven and one-half months in 1979,[6] and asserts that the administrative law judge

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant's surface coal mine work occurred in conditions substantially similar to those in an underground coal mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

[6] Employer relies on claimant's Social Security Administration (SSA) earnings report, documenting that he earned $18,000.00 in 1978 and $19,000.00 in 1979, and the

erred in relying on claimant's unclear and conflicting testimony to resolve this disparity. We disagree.

The administrative law judge specifically addressed employer's argument that claimant's earning for 1978 do not reflect twelve months of employment. In finding employer's argument to be unconvincing, the administrative law judge noted that claimant's testimony that he earned a higher salary each year could explain the difference in pay between 1978 and 1979.[7] Decision and Order at 6, *citing* Hearing Transcript at 43. Moreover, the administrative law judge emphasized that employer's "own employment records indicate [c]laimant was employed for a full calendar year in 1978, and there is no contrary evidence . . . ."[8] Decision and Order at 6. Because the administrative law judge permissibly based her determination on the totality of the evidence, including "[e]mployer's employment records, [c]laimant's testimony and [c]laimant's social security records," and because her computations are supported by substantial evidence, we affirm the administrative law judge's finding that claimant established fifteen years

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starting and ending dates for claimant's employment in 1979, documented by employer's records. Employer's Brief at 13; *see* Director's Exhibit 7.

[7] Claimant specifically testified. "[e]ach year, you made more money, you know. You got raises." Hearing Transcript at 43.

[8] Employer argues that the administrative law judge's decision fails to account for claimant's testimony that there were breaks in his employment when he was off work as he transferred from one job to the next, or when there was a strike or a flood. Employer's Brief at 13-14. Contrary to employer's argument, the administrative law judge specifically stated that her finding of fifteen years and one month of coal mine employment was consistent with claimant's testimony that he was off work for a short period of time after leaving one coal mining job. Decision and Order at 6. Further, employer concedes that claimant's testimony is not clear and employer acknowledges that, at the hearing, the administrative law judge indicated that it is unreasonable to expect claimant to remember very specific things that happened thirty years ago. Employer's Brief at 13-14; Hearing Transcript at 44-45. In light of these factors, employer has not shown that the administrative law judge's failure to specifically address claimant's references to possible periods of strike or flood throughout his career constitutes reversible error. *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"); Hearing Transcript at 41, 43-44.

and one month of coal mine employment. *See Muncy*, 25 BLR at 1-27; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 6.

B. Total Disability

In considering whether claimant established total disability, the administrative law judge initially found that the new pulmonary function study and blood gas study evidence was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (ii), and that there was no evidence of cor pulmonale with right-sided congestive heart failure at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11-14. Before analyzing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the evidence of record regarding claimant's usual coal mine work.[9] *Id.* at 15. Based on her review of the evidence, the administrative law judge determined that claimant's usual coal mine work was as a driller on a surface mine, and required heavy labor. *Id.*

Employer argues that the administrative law judge erred in concluding that claimant's last coal mine job required heavy manual labor. We disagree. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has recognized that it is the job of the administrative law judge to evaluate conflicting evidence, draw appropriate inferences, and assess probative value. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Tennessee Consolidated 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, 1-155 (1989) (en banc).

In determining the exertional requirements of claimant's usual coal mine work as a driller, the administrative law judge observed correctly that "Heavy Work" is classified by the Dictionary of Occupational Titles as "[e]xerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects." Decision and Order at 15 n.13. The administrative law judge also considered claimant's hearing testimony, and the information he provided on his Description of Coal Mine Work form. *Id.* at 15. Specifically, the administrative law

[9] A miner's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). To determine claimant's usual coal mine work, the administrative law judge considered the employment histories and work descriptions set forth in claimant's claim forms, his deposition testimony, and his hearing testimony. Decision and Order on Remand at 4-7; Director's Exhibits 1, 2, 5, 26, 50; Claimant's Exhibit 3.

judge noted that claimant described his job as a driller as involving heavy lifting, including assisting mechanics with repairing equipment and loading holes with bags of dynamite powder. Decision and Order at 15, *citing* Director's Exhibit 5. In addition, the administrative law judge noted claimant's testimony that he worked seven days a week for ten to twelve hours per day, and that he walked alongside the drag drills pulling the compressor that furnished the power to the drill behind him, walking a mile or two from one pit to the next beside the drill. Decision and Order at 15, *citing* Hearing Transcript at 28-29. The administrative law judge further noted claimant's testimony that on the highwall drills, he had to change drill bits which weighed 30-35 pounds, grease and clean the equipment, and "break the steels," which involved lifting 15-20 pounds. *Id*.

Contrary to employer's argument, the administrative law judge was not required to determine whether the lifting requirements described by claimant precisely matched the definition of "Heavy Work" contained in the Dictionary of Occupational Titles. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989) (reliance on the Dictionary of Occupational Titles is within the discretion of the administrative law judge). Rather, the administrative law judge permissibly considered all of the relevant evidence and rationally determined that claimant's usual coal mine work involved heavy labor. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155.

After determining the exertional requirements of claimant's usual coal mine work, the administrative law judge considered the new medical opinions of Drs. Chavda, Baker, Rosenberg, and Selby. Decision and Order at 14-19. The administrative law judge correctly noted that Drs. Chavda, Baker, and Rosenberg all opined that claimant lacked the respiratory capacity to perform his last coal mine job, while Dr. Selby did not offer an opinion as to whether claimant is totally disabled.[10] Decision and Order at 18; Director's Exhibits 17, 20. Based on the disability opinions of Drs. Baker, Chavda, and Rosenberg, and her consideration of the record evidence as a whole, the administrative law judge found that the weight of the medical opinion evidence supported a finding of total disability. Decision and Order at 18-19.

Initially, contrary to employer's argument, the administrative law judge permissibly determined that Drs. Chavda, Baker, and Rosenberg "demonstrate[d] an adequate understanding of the exertional requirements of [claimant's] usual coal mine

[10] Dr. Selby examined claimant on November 7, 2013, and diagnosed a mild obstructive pulmonary disease, with partial reversibility, but did not address whether claimant was totally disabled or whether he could return to his usual coal mine work. Employer's Exhibit 8 at 4-5.

employment." *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 15. The administrative law judge specifically noted that Dr. Chavda described claimant's job duties as a driller and stated that claimant "used rock and highwall drills to cut into limestone in the pit of the mine," did some heavy lifting, "assisted the mechanics repairing equipment," and "loaded holes with bags of dynamite." Decision and Order at 16, *citing* Director's Exhibit 11 at 26. The administrative law judge further observed that Dr. Baker noted claimant worked as a driller[11] and that Dr. Rosenberg reviewed claimant's medical records, which include Dr. Chavda's report describing claimant's work as a driller. Decision and Order at 16-17. As the administrative law judge's finding is supported by substantial evidence, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

We further reject employer's argument that the opinions of Drs. Chavda, Baker, and Rosenberg are not adequately reasoned to support a finding of total disability as they rely on pulmonary function studies that the administrative law judge found were not sufficient to establish total disability.[12] The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

[11] In addition, Dr. Baker stated that claimant "is totally and permanently disabled for working in the coal mining industry." Claimant's Exhibit 6. Thus, it was his opinion that claimant was unable to engage in any coal mine employment. *Id.*

[12] Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that the record contains three new pulmonary function studies dated September 12, 2012, June 7, 2013, and November 7, 2013. Decision and Order at 13; Director's Exhibit 11; Claimant's Exhibit 3; Employer's Exhibit 8. The September 12, 2012 study, administered by Dr. Chavda, was obtained without the use of a bronchodilator and had non-qualifying values for total disability. Director's Exhibit 11. The June 7, 2013 pulmonary function study, administered by Dr. Baker, had non-qualifying pre-bronchodilator and post-bronchodilator results, although Dr. Baker noted that claimant's FEV1 was qualifying on both tests. Claimant's Exhibit 3. The November 7, 2013 pulmonary function study, administered by Dr. Selby, had qualifying pre-bronchodilator results, but non-qualifying post-bronchodilator results. Employer's Exhibit 8. The administrative law judge initially accorded less weight to Dr. Selby's study because it lacked information regarding claimant's effort and cooperation. Decision and Order at 13. Noting that Dr. Chavda's pulmonary function study produced valid, qualifying values, but Dr. Baker's study produced non-qualifying values nine months later, the administrative law judge found the pulmonary function study evidence to be "equivocal"

> Where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii) . . . of this section . . . total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine employment].

20 C.F.R. §718.204(b)(2)(iv). Further, the Sixth Circuit has held that a doctor can offer a reasoned medical opinion diagnosing total disability, even though the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005).

In finding that the disability opinions of Drs. Chavda, Baker, and Rosenberg are sufficiently reasoned to establish total disability despite her determination that the pulmonary function studies do not establish total disability at 20 C.F.R. §718.204(b)(2)(1), the administrative law judge noted that Dr. Chavda examined claimant on September 12, 2012, noted claimant's job duties as a driller, and diagnosed a moderate to severe obstructive airway disease, mild restrictive airway disease, and mild reduction in DLCO. Director's Exhibit 11 at 26, 30. Dr. Chavda opined, based on claimant's pulmonary function study, that claimant's respiratory impairment is totally disabling. *Id*.

The administrative law judge also considered that Dr. Baker examined claimant on June 7, 2013, noted claimant's coal mine employment as a driller, and diagnosed chronic obstructive pulmonary disease based on a moderate obstructive impairment, minimal resting arterial hypoxemia, and chronic bronchitis. Decision and Order at 16-17; Claimant's Exhibit 6 at 1, 3-4. Dr. Baker opined that claimant's mild restriction artificially elevated his FEV1/FVC ratio, and that claimant's FEV1 values met federal guidelines for disability. *Id*. Further, the administrative law judge noted that Dr. Baker specifically explained that "most pulmonary specialists feel the FEV1 is the best indicator to determine one's ability to work," and on that basis he concluded that claimant's respiratory impairment prevents him from performing the duties of his last coal mine job. *Id*.

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and, therefore, insufficient to establish total respiratory disability. Decision and Order at 13.

Finally, the administrative law judge noted that Dr. Rosenberg reviewed claimant's medical records, including the reports of Drs. Chavda and Baker, and diagnosed a disabling obstructive impairment based on a significant reduction in claimant's FEV1 and FVC values. Decision and Order at 17; Employer's Exhibit 6 at 2b, 11. Dr. Rosenberg further opined that this decline occurred over a relatively short time frame, and that by 2012 claimant was disabled by his obstruction. *Id*. at 11.

In this case, the administrative law judge permissibly determined that Drs. Chavda, Baker, and Rosenberg offered reasoned opinions that claimant's respiratory impairment disables him from performing the heavy manual labor required in his usual coal mine work, as each based his opinion on either his physical examination of claimant or his review of claimant's medical records, an understanding of claimant's work history, and the results of pulmonary function testing reflecting significantly reduced FEV1 and FVC values. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. To the extent employer asserts that Dr. Chavda's opinion is undermined by his reliance on a pulmonary function study that the administrative law judge found was in conflict with Dr. Baker's later non-qualifying study, employer has not explained how further analysis of the medical opinions would have changed the administrative law judge's finding that claimant is totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 16, *referencing* Decision and Order at 13.

As the administrative law judge found, all of the physicians who offered an opinion on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv), Drs. Chavda, Baker, and Rosenberg, diagnosed claimant as totally disabled based on the values of his pulmonary function studies. Decision and Order at 18; Director's Exhibit 11; Claimant's Exhibit 6; Employer's Exhibits 6, 13. Dr. Baker was aware that his study was non-qualifying, but found total disability based on his examination, and the reduction in FEV1 in particular. Further, Dr. Rosenberg considered all of the pulmonary function study evidence of record, including the qualifying studies conducted by Drs. Chavda and the subsequent non-qualifying studies conducted by Dr. Baker, in reaching his conclusion that claimant is totally disabled by a respiratory impairment. Employer's Exhibit 4 at 35-36. As employer points to no contrary probative evidence that could undermine the administrative law judge's determination that the opinions of Drs. Chavda, Baker, and Rosenberg are "consistent with [c]laimant's recent [pulmonary function studies], as well as his description of his job duties and his physical abilities and, therefore, are sufficient

to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv), it is affirmed.[13]

We further affirm the administrative law judge's finding that, weighing all of the relevant evidence together, the medical opinion evidence of total disability at 20 C.F.R. §718.204(b)(2)(iv) outweighed the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i),(ii), and that claimant established total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Therefore, we also affirm the administrative law judge's determinations that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and established invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[13] Employer also argues that the administrative law judge failed to consider the medical evidence indicating that claimant is disabled for work by a non-respiratory impairment, i.e. the effects of obesity, deconditioning, heart disease, and his advanced age. Employer's Brief at 18. The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precluded the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (2)(iv). The etiology of the miner's pulmonary impairment relates to the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b), (d); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015). In this case, Drs. Baker, Chavda, and Rosenberg each opined that claimant is totally disabled by a pulmonary or respiratory impairment, as reflected by the results of his pulmonary function testing. Further, to the extent Drs. Baker, Chavda, and Rosenberg opined that claimant is also disabled due to his age, contrary to employer's contention, the administrative law judge specifically noted employer's argument and correctly found that it has no merit under the current regulations. Decision and Order at 19, *citing* 20 C.F.R. §718.204(a) (stating that any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis).

establishing that claimant has neither legal nor clinical pneumoconiosis,[14] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of employer's experts, Drs. Rosenberg and Selby. Dr. Rosenberg reviewed the medical evidence and diagnosed a disabling obstructive impairment likely due to bronchiolitis or possible asthma,[15] but unrelated to coal mine dust exposure. Employer's Exhibit 6 at 11-12. Dr. Selby examined claimant on November 7, 2013 and diagnosed mild, partially reversible, obstructive pulmonary disease caused, in part or in whole, by asthma. Employer's Exhibit 8 at 4. Dr. Selby additionally opined that claimant "may have" emphysema from cigarette smoking,[16] and that it was the cause of any irreversible obstructive disease. *Id*. The administrative law judge determined that the opinions of employer's experts were insufficiently reasoned to establish that claimant does not have legal pneumoconiosis. Decision and Order at 33.

Employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. We disagree. As summarized by the administrative law judge, Dr. Rosenberg excluded coal mine-dust exposure as a cause of claimant's obstructive impairment based, in part, on his opinion that claimant's rapid decline in FEV1 and FVC

[14] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[15] Dr. Rosenberg noted that nothing in claimant's medical records indicated a marked airway reversibility, which he said characterizes asthma, but claimant did have a "mild but significant" response to bronchodilators at times. Employer's Exhibit 6 at 12.

[16] The administrative law judge found a twenty-eight pack-year smoking history, noting that claimant and the doctors consistently reported a one pack per day smoking habit from 1952 to 1980. Decision and Order at 8.

between 2009 and 2013, far removed from his coal mine employment, is uncharacteristic and inconsistent with legal pneumoconiosis. Decision and Order at 31, *citing* Employer's Exhibit 6 at 2b, 11-12. The administrative law judge permissibly found that Dr. Rosenberg's opinion failed to take into account the record evidence of an obstructive impairment prior to the period of rapid decline. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 31.

The administrative law judge also considered Dr. Rosenberg's opinion that claimant's impairment is not due to coal mine-dust exposure because, as a surface miner, claimant was not exposed to dust levels sufficient to contribute to his impairment. Decision and Order at 27, 31; Employer's Exhibit 6 at 11-12. The administrative law judge permissibly discredited Dr. Rosenberg's opinion as based on generalities, rather than on the specifics of claimant's case, as Dr. Rosenberg did not know how much dust claimant was actually exposed to, or how many hours he worked per year. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03, 25 BLR 2-203, 2-210-12 (6th Cir. 2012); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 32. We, therefore, affirm the administrative law judge's discounting of Dr. Rosenberg's opinion as supported by substantial evidence and in accordance with law. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

Employer additionally argues that the administrative law judge erred in discrediting Dr. Selby's opinion. The administrative law judge noted that Dr. Selby opined that claimant does not have coal workers' pneumoconiosis, and further stated that claimant's partially reversible obstruction is due to asthma, and any remaining irreversible obstruction is due to claimant's considerable second-hand smoke exposure. Decision and Order at 32; Employer's Exhibit 8 at 4. The administrative law judge permissibly found that, as Dr. Selby did not adequately explain why claimant's years of coal mine-dust exposure could not have caused or contributed to any of the conditions he observed, Dr. Selby's opinion is not sufficiently credible to assist employer in establishing that claimant does not have legal pneumoconiosis.[17] *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(a)(2); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); Decision

[17] The definition of legal pneumoconiosis encompasses chronic respiratory or pulmonary impairments significantly related to, or substantially aggravated by, dust exposure in coal mine employment. In rebutting the presumption of legal pneumoconiosis, employer is called upon to establish that, more likely than not, the claimant's chronic respiratory impairment is not significantly related to, or substantially aggravated by coal mine dust. *See* 20 C.F.R. §718.201.

and Order at 32. Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Selby's opinion.

Because the administrative law judge permissibly found that the medical opinions of Drs. Rosenberg and Selby, the only opinions supportive of employer's burden, "are insufficient for the [e]mployer to meet its burden of establishing no legal pneumoconiosis," we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[18] *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 33.

Further, as employer has not separately challenged the administrative law judge's finding that it failed to rebut the presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4)(2012); *Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

[18] Because it is employer's burden to affirmatively rebut the Section 411(c)(4) presumption, we decline to address employer's allegation that the opinions of Drs. Baker and Chavda are speculative and not well-reasoned and documented. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 24-28.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge