U.S. Department of Labor

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

BRB Nos. 16-0532 BLA
and 16-0533 BLA

VIDA M. BAIRD (Widow of and on behalf of RAYMOND E. BAIRD)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 07/19/2017
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Sarah E. Smith (Bowles Rice, LLP), Charleston, West Virginia, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits (2007-BLA-05573 and 2013-BLA-05944) of Administrative Law Judge Morris D. Davis rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on October 21, 2005,[1] and a survivor's claim filed on September 24, 2012.[2] The miner's claim is before the Board for the second time.

Relevant to the miner's claim, in a Decision and Order issued on December 8, 2009, Administrative Law Judge Edward Terhune Miller found that the new evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total respiratory disability pursuant to 20 C.F.R. §718.204(b), and thus, that the miner failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, Judge Miller denied benefits.

On appeal, the Board vacated Judge Miller's findings that the evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), (4),[3] as Judge Miller's evaluation of the evidence did not comport with the Administrative Procedure

[1] This is the miner's fourth claim. The miner's most recent prior claim, filed on November 8, 1996, was denied by Administrative Law Judge Joseph E. Kane on December 14, 1998 for failure to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Miner's Claim (MC) Director's Exhibit 1. Upon the miner's request for modification, Administrative Law Judge Jeffrey Tureck denied the claim on March 17, 2004, for failure to establish either a change in conditions or a mistake in a determination of fact, pursuant to 20 C.F.R. §725.310. *Id*.

[2] Claimant, the miner's widow, was pursuing the miner's claim on his behalf. Claimant was also pursuing her own survivor's claim. However, claimant died on October 20, 2015, while both claims were still pending. *See* Exhibit A to Employer's October 24, 2016 Motion to Remand.

[3] Pursuant to 20 C.F.R. §718.202(a)(2), (a)(3), the Board noted that there were no biopsy or autopsy results to be considered, and that none of the presumptions listed at 20 C.F.R. §718.202(a)(3) was applicable in this miner's claim filed after January 1, 1982 in which the record contained no evidence of complicated pneumoconiosis. *Baird v. Westmoreland Coal Co.*, BRB No. 10-0254 BLA, slip op. at 7 (Dec. 23, 2010) (unpub.).

Act (APA).[4] *Baird v. Westmoreland Coal Co.*, BRB No. 10-0254, slip op. at 6-7 BLA (Dec. 23, 2010) (unpub.). Turning to the issue of total respiratory disability, the Board affirmed Judge Miller's findings that the new evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Id*. at 8. However, the Board vacated Judge Miller's finding that the new pulmonary function studies failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) because Judge Miller did not resolve the discrepancy in the miner's reported heights and failed to explain, in accordance with the APA, the comparative weight he accorded the individual pulmonary function studies, including the pre-bronchodilator and post-bronchodilator results. *Id*. at 7-8. The Board further vacated Judge Miller's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) that the medial opinion evidence was not sufficient to establish total disability because the Board found that Judge Miller had conflated the issues of total respiratory disability and disability causation. *Id*. at 8-9. Finally, the Board instructed the administrative law judge to consider on remand whether the miner could invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4) (2102).[5]

On August 12, 2012, while the miner's claim was pending at the Office of Administrative Law Judges on remand, the miner died. Following the miner's death, claimant filed her survivor's claim, and at the request of the parties, the miner's claim was remanded to the district director for consolidation with the survivor's claim. The district director awarded benefits in the survivor's claim, and employer requested a hearing before an administrative law judge. Both claims were transferred to the Office of Administrative Law Judges for a consolidated hearing before Administrative Law Judge Morris D. Davis (the administrative law judge).

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

[5] Section 411(c)(4) provides a rebuttable presumption that a miner was 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 or pulmonary impairment are established. 30 U.S.C. §921(c)(4) (2102); 20 C.F.R. §718.305(b). On remand, the record was reopened to provide the parties an opportunity to submit additional evidence relevant to the change in law occasioned by the reinstatement of Section 411(c)(4).

In a Decision and Order dated May 16, 2016, which is the subject of the current appeals, the administrative law judge considered the miner's claim pursuant to Section 411(c)(4). He credited the miner with thirty-one years of qualifying coal mine employment and found that the new evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption. Accordingly, he awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement pursuant to Section 932(*l*), 30 U.S.C. §932(*l*) (2012). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer asserts that because claimant died in October 2015, and no party has been named to represent the interests of claimant's estate, the administrative law judge's Decision and Order awarding benefits should be vacated and the matter remanded to the district director to determine whether a proper party exists. Employer additionally argues that, in the miner's claim, the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption.[6] Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. In the survivor's claim, employer argues that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the awards of benefits in both the miner's and survivor's claims.

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.[7] 33 U.S.C. §921(b)(3), as incorporated by 30

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had thirty-one years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7-8.

[7] The record reflects that the miner's last coal mine employment was in Virginia. Hearing Transcript at 15. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

Justiciability of Appeals

On October 24, 2016, employer filed a Motion to Remand, stating that it had recently learned that claimant died on October 20, 2015, before the administrative law judge issued the May 16, 2016 Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits, and without any notice of her death being provided to the court or the parties. Employer's Motion to Remand at 1-2. Therefore, employer asserted that "there was no party with standing to pursue the claims" and employer requested that the Board cancel the briefing schedule on appeal, vacate the administrative law judge's decision and order, and remand the case for appropriate action. *Id*. at 2.

The Director responded in opposition to employer's motion, asserting that even if there was no one to pursue the claims in lieu of claimant, a justiciable controversy remained between employer and the Black Lung Disability Trust Fund (the Trust Fund) because the Trust Fund paid interim benefits when employer declined to initiate payment, which the Director will seek to recoup. Director's Response to Employer's Motion to Remand at 3-4. Given the Trust Fund's corresponding financial interest in defending the award, the adversity between the Trust Fund and employer is thus sufficient to rebut any suggestion of non-justiciability. *Id*. In addition, the Director argued that if the Board affirmed the awards of benefits, the determination of the proper payee could be made by the district director after the Board's decision, pursuant to 20 C.F.R. §725.545.

On December 22, 2016, the Board denied employer's Motion to Remand, holding that the miner's claim did not abate upon his death and any benefits he is due are payable to certain persons in descending level of priority pursuant to 20 C.F.R. §725.545(c). December 22, 2016 Order at 2. In addition, the Board noted that a person proceeding as a successor in interest is not required to show dependency pursuant to 20 C.F.R. §725.360(b). *Id*. Finally, the Board held that adjudication of the present claims must continue in order to determine whether employer is liable for the reimbursement of the benefits paid by the Trust Fund. *Id*., *citing* 20 C.F.R. §725.602.

On appeal, employer resurrects its arguments from its Motion to Remand, arguing that there is no justiciable controversy in this case as a result of the death of the claimant, and the absence of any substitution. Employer specifically states that "[u]ntil such time as an administrator of the claimant's estate is determined and properly appointed, there is no [c]laimant in this case and no proper party representing the interests of the [c]laimants, either directly or as his or her estates." Employer's Brief at 9. For the reasons set forth in the Board's December 22, 2016 Order, we reject employer's argument. The adversity

between the Trust Fund and employer is sufficient to maintain the justiciability of these appeals. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 538 n.4, 22 BLR 2-429, 2-438-39 n.4 (7th Cir. 2002); *accord Eastern Assoc. Coal Co. v. Director, OWCP* [*Vest*], 578 Fed. Appx. 165, 166 n.1 (4th Cir. 2014); *Ispat/Inland, Inc. v. Director, OWCP* [*Lentz*], 422 Fed. Appx. 153, 154 n.1 (3d Cir. 2011); 30 U.S.C. §934(b).

The Miner's Claim

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

Considering the evidence relevant to total disability, the administrative law judge initially noted that the Board had affirmed the prior findings that all of the new arterial blood gas studies are non-qualifying and that there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii),(iii); Decision and Order at 11. Thus, the remaining issues were whether claimant established total disability through pulmonary function study or medical opinion evidence, pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the three new pulmonary function studies of record, conducted on February 13, 2006, November 8, 2006, and January 4, 2008. Decision and Order at 11-15; Miner's Claim (MC) Director's Exhibits 12, 13; MC Claimant's Exhibit 2. In keeping with the Board's remand instruction to determine the miner's height, the administrative law judge noted that the record contains nineteen reported height measurements for the miner from 1979 to 2011, with heights reported as short as 67.25 inches and as tall as 70 inches.[8] Decision and Order at 9. Considering this wide disparity, the administrative law judge initially determined that the height of 67.25 inches reported by Dr. Castle on March 11, 1997 was erroneous because:

> it is three-quarters of an inch less than any of the 19 other heights posted . . . which all fell within a two-inch range from 68 to 70 inches, and it is three quarters of an inch shorter than the height Dr. Castle reported when he examined [the m]iner again nine years later on November 8, 2006.

[8] The administrative law judge noted that he did not include every reported height that appeared in a treatment record because he was "not confident that a height measurement was actually taken on each of those hospital or doctor's office visits." Decision and Order at 8 n.4.

Id. In addition, the administration law judge discounted the heights reported by the miner's primary care physician, Dr. Litton, on April 21, 2005 and April 6, 2011:

> unlike the others who should have taken an exact measurement in order to assess the results of the pulmonary function [studies], Dr. Litton was [the m]iner's primary care physician and there is no indication that it was necessary for him to obtain a precise height for purposes of treating any of [the m]iner's health issues.

Id. Of the sixteen remaining height values, the administrative law judge accorded less weight to the heights recorded as a whole number, stating that "a health care professional who went to the trouble of recording [the m]iner's height down to the f[r]action of an inch likely made a conscientious effort to take an accurate measurement." *Id*. Thus, the administrative law judge credited Dr. Paranthaman's reported height of 69.75 inches, Dr. Dahhan's reported heights of 69.5 inches and 68.1 inches, and Dr. Baker's reported height of 68.5 inches. Noting that these four heights were still widely disparate, the administrative law judge averaged them to find that the miner's "correct" height was 68.96 inches. *Id*. at 10.

Using the values listed in Appendix B for the closest greater height of 69.3 inches,[9] the administrative law judge found that the pulmonary function study administered by Dr. Baker on February 13, 2006 produced qualifying pre-bronchodilator values.[10] Decision and Order at 12, 15; MC Director's Exhibit 12. Post-bronchodilator values were not taken. The administrative law judge found that the study administered by Dr. Castle on November 8, 2006, produced qualifying pre-bronchodilator values, but non-qualifying post-bronchodilator values. Decision and Order at 11-13, 15; MC Director's Exhibit 13. Finally, the administrative law judge found that the study administered by Dr. Craven on January 4, 2008 also produced qualifying pre-

[9] The administrative law judge mistakenly stated that the appropriate values were those for "a male who is 69.1 [inches] tall," a height value not contained in Appendix B. *See* 20 C.F.R. Part 718, Appendix B; Decision and Order at 12. However, the qualifying values listed in the administrative law judge's decision are actually those for a height of 69.3 inches, which is the correct closest greater height listed in Appendix B. *Id.*

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

bronchodilator values, and that post-bronchodilator values were not taken. Decision and Order at 13-15; MC Claimant's Exhibit 2.

Based on the Department of Labor's recognition that post-bronchodilator values do not provide an adequate assessment of a miner's disability, the administrative law judge gave greater weight to the pre-bronchodilator values. Decision and Order at 12-13, *citing* 45 Fed. Reg. 13,682 (Feb. 29, 1980). Evaluating the pulmonary function studies as a whole, and according equal weight to each of the three pre-bronchodilator studies, the administrative law judge found that they established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*. at 14-15.

Finally, turning to the new medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Castle, and Rosenberg, and found that "all three of the physicians are in agreement" that without bronchodilator treatment, the miner's respiratory or pulmonary impairment rendered him unable to perform the heavy labor required of his last coal mine job. Decision and Order at 23; MC Director's Exhibits 12, 13, 50, 54, 55, 86; MC Employer's Exhibits 1, 6. Weighing all of the relevant new evidence together, the administrative law judge found that claimant established total disability by a preponderance of the evidence, pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 23.

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Employer contends that the administrative law judge was wrong to "ignor[e]" the actual heights recorded by the doctors, "speculat[e] about reasons for differences," and "rely[] upon some [heights] more than other[s] only because they were not whole numbers." Employer's Brief at 15. Employer asserts that it is claimant's burden to prove the miner's true height. Further, employer asserts that by relying on a "fictional," averaged height instead of the height recorded on each study by the medical professional, the administrative law judge essentially relied on evidence not contained in the record. Employer's Brief at 11-19. Employer contends that the administrative law judge compounded this error by "round[ing] up" the miner's height to the nearest table height listed in 20 C.F.R. Part 718, Appendix B. *Id.* at 17.

We note that the United States Court of Appeals for the Fourth Circuit and the Board have held that where there are substantial differences in the recorded heights among the pulmonary function studies of record, an administrative law judge must make a factual finding to determine a miner's "correct" height.[11] *See Toler v. E. Associated*

[11] The Board specifically instructed the administrative law judge on remand "to resolve the discrepancy in [the miner's] reported heights and provide a rationale for his

Coal Corp., 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Further, as the Director correctly asserts, an administrative law judge may rely on an average height, even if no study in the record lists that precise height. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Director's Brief at 4. While employer asserts that the credibility determinations made by the administrative law judge in resolving the miner's height were not based on "real evidence" but were purely speculative, employer has not explained how further analysis of the pulmonary function studies would have changed the administrative law judge's ultimate 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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). We note that pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the medical opinions of Drs. Baker, Castle, and Rosenberg, weighed as a whole, established that the miner was totally disabled based on the values of his pre-bronchodilator pulmonary function studies.[12] Decision and Order at 22-23; MC Director's Exhibits 12, 13 at 6, 50 at 4-5, 54 at 26-27, 86 at 18. Employer raises no challenge to this finding on appeal. *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Further, no physician suggested, as employer

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weighing of the pulmonary function study evidence." *Baird*, BRB No. 10-0254 BLA, slip op. at 8.

[12] Based on the pre-bronchodilator pulmonary function study Dr. Baker performed, he opined that the miner was totally disabled by chronic obstructive pulmonary disease. Decision and Order at 16; MC Director's Exhibit 12. The administrative law judge noted that Dr. Castle was not asked whether, from a respiratory standpoint, the miner could perform his usual coal mine work without bronchodilator medication. Decision and Order at 18. The administrative law judge further noted, however, that when asked whether the miner could perform his usual coal mine work despite his pulmonary impairment, even with a bronchodilator, Dr. Castle stated, "I can't be sure." Decision and Order at 18, 23; MC Director's Exhibit 54 at 26-27. Dr. Castle explained that the lack of Department of Labor guidelines for a man of the miner's age made it difficult to determine if the post-bronchodilator values would be qualifying. MC Director's Exhibit 54 at 26-27. Dr. Rosenberg opined that, due to his significant obstructive lung disease, "in a non-bronchodilator state [the miner] would be considered disabled." MC Director's Exhibits 50 at 4-5, 86 at 18.

contends, that the later study demonstrated that the miner was not totally disabled. Thus, employer's arguments do not establish reversible error.[13]

We further reject employer's contention that the administrative law judge failed to adequately weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b)(2). Employer's Brief at 10-11. The administrative law judge acknowledged the non-qualifying nature of the miner's blood gas studies, but permissibly found that the new pulmonary function studies and medical opinions, taken together, establish "by a preponderance of the evidence that [the] [m]iner was totally disabled" by a respiratory or pulmonary impairment. *See Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984) (because blood gas studies and pulmonary function studies measure different types of impairment, the results of a qualifying pulmonary function study are not called into question by a contemporaneous normal blood gas study). Therefore, as the administrative law judge adequately considered all of the contrary probative evidence, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), we affirm the administrative law judge's finding that the new evidence,[14] when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *Id.*

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

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] There is no record or judicially noticed evidence which supports the administrative law judge's crediting of fractional heights over non-fractional heights. Thus, the administrative law judge's height determinations may be questionable.

[14] The administrative law judge permissibly found, and employer does not contest, that the evidence from the miner's prior claims lacked probative value due to its age. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 23 n.19.

establishing that claimant has neither legal nor clinical pneumoconiosis,[15] or by establishing that "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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Relevant to the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Baker, Castle, and Rosenberg. Decision and Order at 30-35; MC Director's Exhibits 12, 13, 50, 54, 55, 86; MC Employer's Exhibits 1, 6. Dr. Baker examined the miner on behalf of the Department of Labor on February 13, 2006 and diagnosed the miner with legal pneumoconiosis, in the form of chronic bronchitis and chronic obstructive pulmonary disease (COPD), significantly related to and substantially aggravated by coal mine dust exposure. Decision and Order at 30; MC Director's Exhibit 12. Dr. Castle opined that the miner did not suffer from pneumoconiosis, but suffered from mild to moderate airway obstruction due to bronchial asthma, unrelated to coal mine dust exposure. MC Director's Exhibit 13 at 5-6; MC Director's Exhibit 54 at 29-30. Dr. Rosenberg similarly opined that the miner had moderate airway obstruction due to a chronic asthmatic condition, and not due to coal mine dust exposure. MC Director's Exhibit 50 at 4-5. The administrative law judge discredited the opinions of Drs. Castle and Rosenberg as poorly reasoned and inadequately explained, credited Dr. Baker's opinion as well-reasoned, and found that the evidence as a whole did not rebut the presumed existence of legal pneumoconiosis. Decision and Order at 30-35.

Employer contends that the administrative law judge improperly relied on a smoking history of fifteen pack-years in assessing the medical opinion evidence on rebuttal. Employer's Brief at 19. Employer specifically asserts that the miner reported inconsistent smoking histories, and at times reported smoking two packs per day, so "[a] comprehensive review of [the miner's] smoking history in the record supports a more significant history." *Id. at 20*. We disagree.

[15] "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). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

The length and extent of the miner's smoking history is a factual determination committed to the administrative law judge's discretion. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). "Based on [the] [m]iner's testimony and on the information he provided the various physicians" over a twenty-five year period, the administrative law judge found that the miner reported having smoked anywhere from a half of a pack a day, to between one and two packs a day, before quitting in the late 1940s. Decision and Order at 10. Finding that the amount the miner reported was "about evenly distributed in the one-half to one and a half pack per day range[,]" the administrative law judge permissibly concluded that "the mid-point, one pack per day, is the best estimate and results in a smoking history of [fifteen] pack-years." *Id.* Because the record reflects that the administrative law judge considered the complete range of the miner's reported smoking histories and explained his resolution of the conflicting evidence, we affirm the administrative law judge's permissible determination that fifteen pack-years "was the best estimate" of the miner's smoking history. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

We also reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Castle and Rosenberg. Employer's Brief at 23-25. The administrative law judge correctly noted that both Drs. Castle and Rosenberg relied, in part, on the reversibility of the miner's impairment following bronchodilators as a reason for eliminating coal mine dust exposure as a cause of the impairment. Decision and Order at 32, 34; MC Director's Exhibits 54 at 30, 86 at 7-9. However, the administrative law judge further noted that the miner's FEV1 values were qualifying for total disability even after bronchodilator use. Decision and Order at 32; MC Director's Exhibit 13. In light of this factor, the administrative law judge permissibly concluded that Drs. Castle and Rosenberg did not adequately explain why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his remaining obstructive impairment. *See Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); Decision and Order at 32, 34.

Employer also asserts that the administrative law judge selectively considered the opinions of Drs. Castle and Rosenberg. Employer's Brief at 23, 25. Contrary to employer's contention, the administrative law judge recognized that Drs. Castle and Rosenberg provided multiple reasons in support of their conclusions that coal mine dust exposure did not contribute to claimant's obstructive impairment. Decision and Order at 16-22. The administrative law judge permissibly discounted their opinions, however, for

the aforementioned reason. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

As the administrative law judge provided a valid basis for discrediting the opinions of Drs. Castle and Rosenberg, these findings are affirmed.[16] *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Kozele*, 6 BLR at 1-382 n.4; Decision and Order at 30-35. We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis.[17] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis. *Id.*

[16] Because it is employer's burden to establish rebuttal, and the administrative law judge permissibly discredited the opinions of employer's doctors, any error in weighing Dr. Baker's opinion for purposes of rebuttal is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); 20 C.F.R. §718.305(d)(1). The administrative law judge noted that Dr. Baker diagnosed legal pneumoconiosis based on the results of his physical examination and objective testing. Decision and Order at 30; MC Director's Exhibit 12. Dr. Baker acknowledged that both cigarette smoking and coal mine dust exposure can cause an obstructive impairment. MC Director's Exhibit 12. Dr. Baker explained, however, that the fact that the miner had not smoked in fifty-seven years, but had more than thirty years of coal dust exposure, supported his conclusion that the miner's impairment was "significantly related to and substantially aggravated by dust exposure from his coal mine employment." *Id.* The administrative law judge considered that Dr. Baker only examined the miner once, and did not have the benefit of any evidence developed later. Decision and Order at 30. The administrative law judge concluded that his opinion was well reasoned, however, because it was supported by the objective medical evidence, was not contrary to the science relied upon by the Department of Labor in promulgating the regulations, and was not disproven by any of the evidence or opinions developed later. *Id.* Beyond asserting that the administrative law judge "did not apply the same scrutiny" to Dr. Baker's opinion that he did to the other medical opinions, employer points to no specific error in the administrative law judge's evaluation of Dr. Baker's opinion. Employer's Brief at 22.

[17] Thus, under the facts of this case, we need not address employer's contentions of error regarding the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

The administrative law judge next considered whether employer could establish rebuttal by showing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 35-36. The administrative law judge rationally discounted the opinions of Drs. Castle and Rosenberg that the miner's totally disabling respiratory impairment was not caused by pneumoconiosis because neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the presence of the disease. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *see also Toler*, 43 F.3d at 116, 19 BLR at 2-83; Decision and Order at 35-36. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and we affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4) (2012).

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant established each fact necessary to demonstrate her entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 26; *see* 30 U.S.C. §932(*l*). As the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's determination that claimant is derivatively entitled to receive survivor's benefits pursuant to Section

422(*l*).[18] 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the Decision and Order Awarding Miner's Benefits and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[18] As we have affirmed the administrative law judge's award of benefits pursuant to Section 422(*l*), it is not necessary that we address employer's arguments that claimant failed to establish death due to pneumoconiosis pursuant to 20 C.F.R. 718.205. 30 U.S.C. §932(*l*).