U.S. Department of Labor

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

BRB No. 17-0043 BLA

STANLEY D. STURGILL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GOOD COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 11/09/2017
	)	
AMERICAN INTERNATIONAL SOUTH	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05517) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim 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 claim filed on April 13, 2011.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[1] the administrative law judge credited claimant with more than fifteen years of qualifying coal mine employment, based on the parties' stipulation, and found that the evidence established 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 that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

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,

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established more than fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[3] 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).

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

Employer argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[4]

Pulmonary Function Studies

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies performed on August 27, 2011, November 22, 2011, October 9, 2012, February 20, 2014, March 17, 2015, and June 17, 2015.[5] The administrative law judge considered the validity of the pulmonary function studies and found that all of the studies are "probative and reliable." Decision and Order at 20.

[3] 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 3.

[4] The administrative law judge found that the blood gas study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 20. Further, because there is no evidence that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant cannot establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. at 17.

[5] The August 27, 2011, November 22, 2011, and October 9, 2012 pulmonary function studies produced qualifying values both before and after administration of a bronchodilator. Decision and Order at 17; Director's Exhibit 9; Claimant's Exhibits 1, 3. The February 20, 2014 pulmonary function study produced non-qualifying results both before and after administration of a bronchodilator. Decision and Order at 17; Employer's Exhibit 2. Finally, the March 17, 2015 study produced qualifying pre-bronchodilator values, while the June 17, 2015 study produced non-qualifying pre-bronchodilator values. Decision and Order at 17; Claimant's Exhibits 2, 13. Neither 2015 study included post-bronchodilator values. *Id.*

Finding that four of the six studies produced qualifying[6] values, including one of the two most recent studies, the administrative law judge concluded that the preponderance of the pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge erred in determining that the October 9, 2012 and March 17, 2015 pulmonary function studies are valid.[7] Employer asserts that the opinions of Drs. Rosenberg and Westerfield establish that the studies are not reliable evidence of disability. Employer's Brief at 17-20. Employer's argument lacks merit.

Initially, we reject employer's argument that because the October 9, 2012 and March 17, 2015 studies do not comply with the acceptable variability parameters set forth in 20 C.F.R. Part 718, Appendix B, the administrative law judge erred in finding them to be valid. Employer's Brief at 18-20. The administrative law judge correctly noted that because both studies were obtained in conjunction with claimant's treatment, they are not subject to the specific quality standards set forth at 20 C.F.R. §718.103 and Appendix B. Decision and Order at 18, *citing J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); 20 C.F.R. §718.101(b). The administrative law judge then considered whether the pulmonary function studies are sufficiently reliable to support a finding of total disability, despite the inapplicability of the quality standards.[8] Decision and Order at 18-20.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[7] As employer does not challenge the administrative law judge's findings that the other pulmonary function studies of record are valid, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[8] The Department of Labor's comments to the regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

The administrative law judge considered Dr. Rosenberg's opinion that the October 9, 2012 study is not valid because the two best FVC values varied by 160cc and the efforts were not maximal based on the shape of the volume-time curves. Decision and Order at 18; Rosenberg July 27, 2015 Supplemental Report.[9] The administrative law judge noted that Dr. Westerfield similarly opined that the October 9, 2012 study is not valid because it does not meet American Thoracic Society (ATS) criteria, which require no more than 5% variability between the best FEV1 and the second best FEV1, and no more than 5% variability between the best FVC and the second best FVC. Decision and Order at 18; Westerfield July 9, 2015 Supplemental Report.[10]

In rejecting their opinions, the administrative law judge accurately noted that the regulations do not contain any guidelines for the variability of FVC values. Decision and Order at 18; *referencing* Appendix B to Part 718. The administrative law judge further noted that Dr. Rosenberg's opinion that more than 160cc of variability is unacceptable is inconsistent with his assertion that his own February 20, 2014 pulmonary function study is valid because the degree of variability was within 200cc.[11] *Id*. In contrast, the

---

> The Department note[s] that [20 C.F.R.] § 718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by [20 C.F.R.] [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[9] This report was not assigned an exhibit number, but was considered by the administrative law judge.

[10] This report was not assigned an exhibit number, but was considered by the administrative law judge.

[11] At his April 15, 2015 deposition, Dr. Rosenberg was asked why he believed his February 20, 2014 study was valid, and he testified:

> Looking at the flow volume curves and the volume time curves, the efforts overall were good. The variation of the FVC and FEV1 were within a range of 200 CCs.

Employer's Exhibit 3 at 14.

administrative law judge observed that the technician who performed the October 9, 2012 study for Dr. Smiddy recorded that claimant's effort was good and that the results of the study were acceptable and reproducible. Decision and Order at 18; Claimant's Exhibit 3. Further, the administrative law judge permissibly inferred that Dr. Smiddy's reliance on the October 9, 2012 pulmonary function study to treat claimant supported the "first-hand" observation of the technician that the results of the study were acceptable. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 18-19. The administrative law judge permissibly accorded greater weight to the opinions of Dr. Smiddy and the administering technician to conclude that the October 9, 2012 study is reliable.[12] *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211-12 (6th Cir. 1997); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 231, 18 BLR 2-290, 2-297 (6th Cir. 1994); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19.

Turning to the March 17, 2015 pulmonary function study, the administrative law judge noted that Dr. Rosenberg opined that the study is invalid because only three attempts were provided. Rosenberg July 27, 2015 Supplemental Report. Dr. Westerfield also opined that the March 17, 2015 study is invalid, stating that the variability between the best FEV1 and the second best FEV1 exceeded the ATS criteria, which requires no more than 5% variability. Westerfield July 9, 2015 Supplemental Report. In contrast, the technician who performed the March 17, 2015 study indicated that the results are "acceptable and reproducible" and that claimant's effort and understanding were "good." Claimant's Exhibit 2. Dr. Emery, who ordered the test, also opined that the results were reproducible and interpreted the study as showing moderately severe obstruction. *Id.*

The administrative law judge initially found that Dr. Rosenberg's opinion that more than three attempts are necessary for a valid study was called into question by the fact that the regulations only require three tracings. *See* 20 C.F.R. §718.103(b); *see also* Appendix B (2)(ii) to Part 718; Decision and Order at 19. Further, the administrative law judge noted that Dr. Emery accepted and relied on the results of his March 17, 2015 study in assessing claimant for pulmonary treatment. Decision and Order at 19; Claimant's Exhibit 13. Based on this analysis, the administrative law judge was unpersuaded by the

[12] Claimant points out that the quality standards relating to FEV1 results require that the variation between the two largest FEV1's not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. 20 C.F.R. Part 718, Appendix B(2)(ii)(G); Claimant's Response Brief at 20-21. Claimant also correctly points out that in this instance the 100 ml difference is not exceeded, as the largest FEV1 value is 1.24 liters and the second largest value is 1.14 liters. Claimant's Response Brief at 20; Claimant's Exhibit 3.

opinions of Drs. Rosenberg and Westerfield, and permissibly concluded that the March 17, 2015 pulmonary function study is reliable evidence of disability.[13] *See Hunt*, 124 F.3d at 744, 21 BLR at 2-211-12; *Worrell*, 27 F.3d at 231, 18 BLR at 2-297; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because substantial evidence supports the administrative law judge's findings that the October 9, 2012 and March 17, 2015 pulmonary function studies are sufficiently reliable, we reject employer's contention that the administrative law judge erred in not according these studies less weight. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

We also reject employer's contention that the administrative law judge erred in declining to give "controlling weight" to the June 17, 2015 non-qualifying pulmonary function study "since it was the most recent study of record." Employer's Brief at 17. The administrative law judge properly considered this factor and initially observed that the June 17, 2015 pulmonary function study is only three months more recent than the prior qualifying study, dated March 17, 2015. Decision and Order at 19-20; *see generally Aimone v. Morrison Knudson Co*., 8 BLR 1-32, 1-34 (1985) (holding that it was proper to find that eight months is not a significant period of time separating objective evidence). Further, contrary to employer's argument, the administrative law judge permissibly considered that although the June 17, 2015 study is non-qualifying, the results are low,[14] and Drs. Emery and Westerfield opined that it demonstrated considerable impairment in claimant's lung function.[15] *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1293-

[13] Claimant also correctly points out that with respect to this study the largest FEV1 value of 1.30 liters and the second largest value of 1.22 liters are within the 100 ml difference permitted by the regulations. Claimant's Response Brief at 21; Claimant's Exhibit 2.

[14] The administrative law judge noted that the June 17, 2015 pulmonary function study results are "close to qualifying" because claimant's FEV1 value is lower than the applicable table value in Appendix B, and claimant's FVC value is 2.50 while the qualifying FVC value is 2.33. Decision and Order at 20 n.62.

[15] Dr. Emery opined that the June 17, 2015 study revealed "moderately severe obstruction" and Dr. Westerfield stated, based on the June 17, 2015 study, that claimant would be unable to perform the duties of his last coal mine employment. Decision and Order at 20; Claimant's Exhibits 13, 14.

94 (1984) (the determination of the significance of even a non-qualifying test is for a doctor); Decision and Order at 20; Employer's Brief at 17, 20. For these reasons, the administrative law judge permissibly concluded that, despite its recency, the June 17, 2015 non-qualifying study did not tip the balance of the pulmonary function study evidence.[16] Decision and Order at 20. Therefore, we affirm the administrative law judge's finding that the preponderance of the pulmonary function study evidence weighs in favor of establishing a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(i). *Id.*

Medical Opinions

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Splan, Westerfield, and Rosenberg.[17] Decision and Order at 21-22. While Drs. Splan and Westerfield opined that claimant suffers from a totally disabling respiratory impairment, Dr. Rosenberg opined that claimant retains the pulmonary capacity to perform his last coal mine work. Director's Exhibit 9; Claimant's

[16] Moreover, employer's reliance on *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993) and *Andruscavage v. Director, OWCP*, No. 93-3291 (3d Cir. Feb. 22, 1994) (unpub.) in support of its argument is misplaced. In *Coleman*, the Board upheld the administrative law judge's crediting of a qualifying pulmonary function study, which was "the most recent [study] of record by a full five years." *Coleman*, 18 BLR at 1-13. In this case, the non-qualifying June 17, 2015 study is the most recent by only three months. In *Andruscavage*, the United States Court of Appeals for the Third Circuit upheld an administrative law judge's determination to credit a more recent non-qualifying pulmonary function study over prior qualifying studies, where the most recent study produced "substantially higher values" than the prior studies. *Andruscavage*, slip op. 9-10. In this case, however, the administrative law judge specifically found that the June 17, 2015 values are not widely disparate from the March 17, 2015 values. Decision and Order at 20; Claimant's Exhibits 2, 13. Moreover, higher results are not necessarily more credible than lower results among valid pulmonary function tests. *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719, 18 BLR 2-16, 2-24 (4th Cir. 1993); *see Greer v. Director, OWCP*, 940 F.2d 88, 15 BLR 2-167 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level).

[17] In conjunction with his analysis of the medical opinions, the administrative law judge determined that claimant's usual coal mine work required frequent medium to heavy labor, including lifting, carrying, dragging, shoveling belt lines and loading supplies, as well as timbers and rock dust bags. Decision and Order at 21.

Exhibits 1, 14; Employer's Exhibits 2, 4, 5; Westerfield July 9, 2015 Supplemental Report; Rosenberg July 27, 2015 Supplemental Report. The administrative law judge found the opinions of Drs. Splan and Westerfield to be documented and reasoned and consistent with the evidence of record. Decision and Order at 21. In contrast, the administrative law judge accorded less weight to the opinion of Dr. Rosenberg as inadequately reasoned. *Id*. The administrative law judge therefore found that the weight of the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Splan and Westerfield to find a totally disabling respiratory impairment established. We disagree. The administrative law judge permissibly found their opinions well-reasoned and entitled to full probative weight, as they are supported by claimant's medical history, physical examination findings, an understanding of claimant's work history, and the objective medical evidence. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Decision and Order at 21. Contrary to employer's contention, and as the administrative law judge found, Dr. Splan explained that the results of his August 27, 2011 pulmonary function study, reflecting a moderately severe obstructive defect and mild restrictive defect, supported his conclusion that claimant cannot return to coal mine work. Decision and Order at 21; Employer's Brief at 23; Director's Exhibit 9 at 34. Further, the administrative law judge found that the preponderance of the pulmonary function studies, including the more recent studies, supports the existence of a disabling impairment. Thus, employer has not explained how, in this case, Dr. Splan's failure to review the more recent pulmonary function studies of record rendered his opinion less credible. *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 23-24.

Nor is there merit to employer's contention that Dr. Westerfield's opinion should have been discredited as equivocal. Employer's Brief at 25. In his supplemental reports, Dr. Westerfield varied his opinions in response to his review of the available medical evidence and the questions he was asked.[18] As the administrative law judge found,

[18] In his report dated November 22, 2011, Dr. Westerfield concluded that the qualifying results of the August 27, 2011 pulmonary function study reflected total respiratory disability. Claimant's Exhibit 1. In his May 8, 2015 deposition, Dr. Westerfield stated that claimant would not be disabled based on the results of the February 20, 2014 pulmonary function study but, assuming valid values, would be disabled based on the results of the October 9, 2012 and March 18, 2015 studies. Employer's Exhibit 4 at 7, 13-14. In his July 9, 2015 report, Dr. Westerfield simply

however, after considering all of the pulmonary function studies of record, Dr. Westerfield explained that based on the "energy requirements" of claimant's coal mine work, claimant is totally disabled from a respiratory standpoint. Decision and Order at 21, *quoting* Westerfield August 26, 2015 Supplemental Report. In asserting that Drs. Splan and Westerfield are inadequately reasoned and documented, employer is asking for a reweighing of the evidence, which the Board is not empowered to do. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-153 (6th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's findings that the opinions of Drs. Splan and Westerfield are entitled to "probative weight." Decision and Order at 21.

Employer also argues that the administrative law judge erred in discounting Dr. Rosenberg's opinion. Employer's Brief at 26-28. We disagree. The administrative law judge correctly noted that in opining that claimant retains the respiratory capacity to perform his usual coal mine work, Dr. Rosenberg relied on the non-qualifying results of his own February 20, 2014 pulmonary function study.[19] Decision and Order at 21; *referencing* Employer's Exhibit 3 at 22. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Rosenberg's opinion as unreasoned, because it is inconsistent with the preponderantly positive pulmonary function study evidence of record. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 21; Employer's Brief at 26-27. Thus, we affirm the administrative

---

commented on the validity of the October 9, 2012, March 17, 2015 and June 17, 2015 pulmonary functions studies, and discussed whether various elements of the studies met the regulatory criteria for disability. Westerfield July 9, 2015 Supplemental Report.

[19] Dr. Rosenberg testified that he relied on the results of his February 20, 2014 examination and testing to conclude that claimant does not have a totally disabling respiratory impairment. Employer's Exhibit 3 at 18, 20. Referencing the results of his February 20, 2014 pulmonary function study, Dr. Rosenberg explained: "[I]f you look at the FEV1 value alone, 2.1 liters, you can estimate the MVV as 35 times that value. So you're probably talking roughly 70 or 75 liters per minute. You can do pretty much anything with 75 liters per minute ventilatory capacity." *Id.* at 22.

law judge's finding that Dr. Rosenberg's opinion is unreasoned and entitled to less probative weight on the issue of total disability.[20] Decision and Order at 21.

We further affirm the administrative law judge's permissible finding that, weighing all of the relevant evidence together, the well-reasoned opinions of Drs. Splan and Westerfield, supported by the preponderantly qualifying pulmonary function study evidence, establish a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b). *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).

We have affirmed the administrative law judge's findings that claimant has more than fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, 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 establishing that claimant has neither legal nor clinical pneumoconiosis,[21] or by establishing that "no part of the miner's respiratory or pulmonary total disability was

[20] Because the administrative law judge provided a valid reason for discrediting the opinion of Dr. Rosenberg, we need not address employer's remaining arguments regarding the weight accorded to that opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 27-28.

[21] 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). 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 coal dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Relevant to the existence of legal pneumoconiosis,[22] the administrative law judge considered the medical opinions of Drs. Splan, Westerfield, and Rosenberg. Both Drs. Splan and Westerfield diagnosed legal pneumoconiosis,[23] while Dr. Rosenberg opined that claimant's respiratory impairment was probably due to his "excessive weight."[24] Employer's Exhibit 3 at 22-23. The administrative law judge determined that Dr. Rosenberg's opinion was inadequately reasoned and, therefore, was insufficient to disprove the existence of legal pneumoconiosis. Decision and Order at 25-26.

Employer contends that the administrative law judge erred in discounting Dr. Rosenberg's opinion. Employer's Brief at 29-31. This contention lacks merit. The administrative law judge accurately noted that Dr. Rosenberg attributed claimant's impairment to a "combination" of factors, but the only factor Dr. Rosenberg specifically identified was claimant's "excessive weight."[25] Decision and Order at 25, *referencing* Employer's Exhibit 3 at 22-23. Moreover, the administrative law judge permissibly questioned Dr. Rosenberg's opinion because in attributing claimant's respiratory impairment to other causes, Dr. Rosenberg failed to adequately explain why claimant's significant coal dust exposure was not also an aggravating factor.[26] *See Brandywine*

---

[22] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). Decision and Order at 26.

[23] Dr. Westerfield diagnosed legal pneumoconiosis in the form of a restrictive and obstructive ventilatory impairment due, in part, to coal mine dust exposure and possibly cigarette smoking. Claimant's Exhibit 1. Dr. Splan diagnosed legal pneumoconiosis in the form of chronic bronchitis and chronic obstructive pulmonary disease due to coal dust and tobacco smoke exposure. Director's Exhibit 9.

[24] Dr. Rosenberg noted that claimant had a BMI of 33 and anything over 30 is overweight. Employer's Exhibit 3 at 23.

[25] The administrative law judge further noted that although Dr. Rosenberg diagnosed a variable impairment based on claimant's pulmonary function study results, Dr. Rosenberg did not identify any weight gain or loss in claimant's medical history to explain the variation he identified. Decision and Order at 25; Employer's Exhibits 2, 3 at 22-23.

[26] As set forth *supra* at n.21, the regulatory definition of pneumoconiosis encompasses "any chronic pulmonary disease or respiratory or pulmonary impairment

Explosives & Supply v. Director, OWCP [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Banks*, 690 F.3d at 489, 25 BLR at 2-152-53; *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-155; Decision and Order at 26. As the administrative law judge provided a valid reason for discrediting the opinion of Dr. Rosenberg, it is affirmed. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); *see also Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

As the administrative law judge permissibly discounted the opinion of Dr. Rosenberg, the only opinion supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d at 478, 480, 25 BLR 2-1, 2-9 (6th Cir. 2010).

The administrative law judge next addressed whether employer could establish the second method of rebuttal by showing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted Dr. Rosenberg's opinion because he did not diagnose pneumoconiosis, and he found no "specific and persuasive reasons" for concluding that Dr. Rosenberg's opinion on the issue of disability causation was independent of his opinion regarding the existence of pneumoconiosis. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); Decision and Order at 26-27. As substantial evidence supports this finding, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis.

---

significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). During his April 15, 2015 deposition, Dr. Rosenberg was asked whether he believed that coal dust exposure was having an impact or partial cause in this case, and Dr. Rosenberg responded:

> Well again, I mean, it's possible. I can't totally exclude it, but I don't think it's probable. I can't exclude it.

Employer's Exhibit 3 at 25.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, claimant has established his entitlement to benefits.

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

JONATHAN ROLFE
Administrative Appeals Judge