U.S. Department of Labor

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

BRB No. 15-0474 BLA

ROSA L. MILLER (Widow of CURTIS M. MILLER) Claimant-Respondent v. NATIONAL MINES CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/15/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Second Remand of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonburg, Kentucky, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Second Remand (07-BLA-05582) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on May 25, 2006,[1] and is before the Board for the third time.[2]

In its last decision, the Board addressed employer's appeal of the award of benefits under Section 411(c)(4)[3] of the Act, 30 U.S.C. §921(c)(4) (2012). The Board affirmed the administrative law judge's unchallenged finding that the miner had twenty-six years of underground coal mine employment,[4] but vacated the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Miller v. Nat'l Mines Corp.*, BRB No. 14-0185 BLA, slip op. at 3 n.3, 4-7 (Jan. 9, 2015)(unpub.). Specifically, the Board held that the administrative law judge mischaracterized one of the pulmonary function studies of record when he found that it was qualifying[5] for total disability, and that error affected his determination that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Miller*, slip op. at 4-5. Therefore, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), and remanded the case for him to reconsider whether the pulmonary function study evidence established total disability and, if so, whether all of the relevant evidence weighed

[1] Claimant is the surviving spouse of the miner, who died on July 17, 2005. Director's Exhibit 13.

[2] The Board previously set forth the full procedural history of this case. *Miller v. Nat'l Mines Corp.*, BRB No. 14-0185 BLA, slip op. at 2-3 (Jan. 9, 2015)(unpub.).

[3] If a miner had fifteen or more years of underground or substantially similar coal mine employment and had a totally disabling respiratory or pulmonary impairment, Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1980) (en banc).

[5] 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).

together established total disability.[6] *Miller*, slip op. at 7. Because the Board vacated the administrative law judge's finding of total disability, it also vacated his finding that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis.[7] *Id.* The Board instructed the administrative law judge that if claimant invoked the Section 411(c)(4) presumption, he was to determine whether employer rebutted the presumption.[8]

On remand, the administrative law judge found that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4). The administrative law judge further 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 the evidence established total 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

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[6] The Board rejected employer's allegations of error regarding the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), when he found that it neither established nor refuted a finding of total disability. Specifically, the Board rejected employer's argument that the administrative law judge mischaracterized Dr. Rosenberg's opinion as contradictory regarding the extent of the miner's impairment. *Miller*, slip op. at 6. Further, the Board rejected employer's argument that the administrative law judge mischaracterized Dr. Jarboe's opinion as supportive of a finding of total disability. *Miller*, slip op. at 7 n.11. The Board noted that the administrative law judge ultimately discounted Dr. Jarboe's opinion because he found that it was based, in part, on unreliable blood gas studies. *Id.* Accordingly, the Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Miller*, slip op. at 7.

[7] The Board also vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, and declined to address, as premature, employer's objections to the administrative law judge's rebuttal finding. *Miller*, slip op. at 7 n.12.

[8] The Board further instructed that if the administrative law judge determined that the evidence did not establish total disability and that claimant was therefore unable to invoke the Section 411(c)(4) presumption, he was to address whether claimant satisfied her burden to establish all elements of entitlement under 20 C.F.R. Part 718. *Miller*, slip op. at 8.

further contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer replies, reiterating its contentions on 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. 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

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). The administrative law judge considered four pulmonary function studies conducted on August 2, 2000, August 3, 2000, April 8, 2002, and October 7, 2002. Director's Exhibit 25 at 3, 4, 9; Director's Exhibit 27 at 140, 144. All of these studies are contained in the miner's medical treatment records.[9] Only the April 8, 2002 study reported values obtained both before and after the administration of a bronchodilator.

The August 2, 2000 pulmonary function study produced qualifying values, and the August 3, 2000 pulmonary function study produced non-qualifying values. The April 8, 2002 pulmonary function study produced qualifying values both before and after the administration of a bronchodilator. The October 7, 2002 study produced non-qualifying values. The administrative law judge correctly noted that, because the miner's pulmonary function studies were not generated in connection with a claim for benefits, they are not subject to the quality standards set forth at 20 C.F.R. §718.103 and Appendix B. Decision and Order at 7-8; *see 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 were sufficiently reliable to support a finding regarding total disability, despite the inapplicability of the quality standards.[10]

[9] Employer also designated the October 7, 2002 pulmonary function study as evidence in its affirmative case under 20 C.F.R. §725.414.

[10] 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 Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a

The administrative law judge considered employer's argument that the August 2, 2000 and August 3, 2000 pulmonary function studies, administered by Dr. Henson, should be found unreliable because they were performed while the miner was hospitalized for pancreatitis. The administrative law judge rejected this argument because the record contained no medical evidence that pancreatitis is an acute respiratory illness or condition. Decision and Order at 7. The administrative law judge also considered and rejected employer's argument that the August 2, 2000 pulmonary function study was unreliable because, according to employer, it was taken while the miner had a strong cough. The administrative law judge found that there was no medical evidence "that a 'strong cough' is an acute respiratory illness sufficient to merit disqualification" of the August 2, 2000 pulmonary function study. *Id*.

The administrative law judge further considered that both of the August 2000 pulmonary function studies included three sets of flow-volume loop tracings. Addressing employer's argument that neither study identified the miner's cooperation and comprehension in performing the tests, the administrative law judge found that there was no indication that the miner did not cooperate, and noted that employer submitted no "evidence suggesting the [m]iner put forth poor effort . . . ." Decision and Order at 8. The administrative law judge therefore found that the August 2, 2000 and August 3, 2000 pulmonary function studies were sufficiently reliable.

Turning to the April 8, 2002 pulmonary function study, the administrative law judge noted that it included two flow-volume loops, but concluded that since the study was performed during treatment, it was sufficiently reliable despite the lack of three flow-volume loops. Decision and Order at 8. The administrative law judge further noted that although employer was correct that the administering physician, Dr. Harrison, did not specifically describe the miner's effort on the study, the notation "good job" appeared beneath the study results, and there was no notation suggesting that the miner gave a poor effort. *Id*. Additionally, the administrative law judge noted that Dr. Harrison relied on the April 8, 2002 pulmonary function study results to recommend that the miner enter a pulmonary rehabilitation program, "suggesting [that Dr. Harrison] thought they were reliable for treating the [m]iner's condition." Decision and Order at 9; Director's Exhibit

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> claim for benefits" governed by 20 CFR [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).

25 at 10. The administrative law judge therefore found that the April 8, 2002 pulmonary function study was sufficiently reliable to be considered.

Finally, the administrative law judge addressed whether the October 7, 2002 pulmonary function study, also administered by Dr. Harrison, was sufficiently reliable. The administrative law judge noted that this pulmonary function study included only one flow-volume loop, but he declined to "strictly appl[y]" the quality standards, given that the study "was derived from the [m]iner's treatment records . . . ." Decision and Order at 9. Additionally, while noting employer's allegation that the pulmonary function study did not identify the miner's cooperation and comprehension, the administrative law judge found that there was "no evidence indicating the [m]iner put forth poor effort . . . ." *Id*. The administrative law judge therefore found that the October 7, 2002 pulmonary function study was sufficiently reliable.

Weighing the pulmonary function studies, the administrative law judge noted that the August 2, 2000 pulmonary function study was qualifying, and that the August 3, 2000 pulmonary function study was non-qualifying. The administrative law judge rejected employer's argument that the differing results one day apart indicated that the miner did not have a chronic, disabling respiratory impairment. Specifically, the administrative law judge noted that, although the August 3, 2000 pulmonary function study was non-qualifying, its values were close to qualifying. Decision and Order at 8, 10.

The administrative law judge then weighed the April 8, 2002, qualifying pulmonary function study and the October 7, 2002, non-qualifying study. The administrative law judge declined employer's request to accord greater weight to the October 7, 2002 pulmonary function study because it was the most recent study of record. Instead, the administrative law judge found that the April 8, 2002 pulmonary function study was "somewhat more probative of the [m]iner's condition," because it included two trials, and it "demonstrate[d] [that] the [m]iner was disabled even with the assistance of bronchodilators . . . ." Decision and Order at 10.

Based on the foregoing analysis, the administrative law judge found that the preponderance of the pulmonary function study evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer challenges the administrative law judge's determination that the four pulmonary function studies contained in the miner's treatment records were sufficiently reliable, noting that "[n]one of the tests identified [the miner's] cooperation and comprehension . . . ." Employer's Brief at 16. A party challenging the reliability of an objective test must demonstrate how a defect or omission "renders the study unreliable." *Orek v. Director, OWCP*, 10 BLR 1-51, 54 (1987). The administrative law judge found

that there was no evidence that claimant put forth poor effort on the studies,[11] and employer does not explain how the lack of a notation regarding the miner's cooperation and effort, standing alone, rendered the studies unreliable. We therefore reject employer's allegation of error.[12]

Employer contends that the administrative law judge erred in finding that the two August 2000 pulmonary function studies were reliable even though they were conducted when the miner was hospitalized for treatment of pancreatitis. Citing *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986), employer argues that the administrative law judge ignored uncontradicted evidence in the record establishing that pancreatitis affects a patient's respiratory status. Employer's Brief at 16, citing Employer's Exhibits 1 at 8; 3 at 19, 21. Employer's contention lacks merit.

Substantial evidence supports the administrative law judge's finding that no physician of record opined that pancreatitis is an acute respiratory illness affecting pulmonary function studies.[13] Nor did any physician state that the results of the miner's August 2000 pulmonary function studies were attributable to the effects of pancreatitis. Therefore, the factual situation that was involved in *Casella* is not present here.[14]

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[11] A review of the record does not reveal a medical opinion stating that any of the four pulmonary function studies considered by the administrative law judge was invalid or unreliable. The record further reflects that employer's physicians, Drs. Jarboe and Rosenberg, interpreted all of the miner's pulmonary function studies and concluded that they revealed a restrictive impairment. Employer's Exhibits 1 at 8-9; 2 at 10.

[12] Moreover, employer does not challenge the administrative law judge's finding that, despite lacking a specific description of effort and cooperation, the April 8, 2002 pulmonary function study was sufficiently reliable because it bore the notation "good job," and the administering physician relied on the study's results to recommend pulmonary rehabilitation for the miner. That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[13] The portions of the record cited by employer contain Dr. Rosenberg's statements that the miner's pancreatitis likely caused mild scarring seen on his x-rays, Employer's Exhibit 1 at 8, and that it affected his blood gas study values. Employer's Exhibit 3 at 19. Dr. Rosenberg, however, interpreted the miner's pulmonary function studies and concluded that they revealed a restrictive impairment which, in Dr. Rosenberg's view, was due to extrinsic factors such as obesity and "diaphragmatic elevation." Employer's Exhibit 1 at 8-9.

[14] In *Casella*, the Board held that an administrative law judge erred in failing to consider a physician's testimony that the miner's neuromuscular disease fully accounted

Employer argues further that the administrative law judge ignored that the miner received nebulizer treatments during his August 2000 hospitalization. Employer's Brief at 15. Employer, however, points to no evidence that those treatments were for an acute respiratory condition that affected the miner's August 2 or August 3, 2000 pulmonary function studies, or that the nebulizer treatments indicated that the miner suffered from any other condition that made that pulmonary function testing unreliable for purposes of assessing entitlement under the Act. We therefore reject employer's allegation of error.

Next, employer argues that the administrative law judge erred in rejecting its argument that the August 2, 2000 pulmonary function study was unreliable because it was taken when the miner had a "strong cough." Employer's Brief at 16, citing Director's Exhibit 27 at 149. Employer argues that when the administrative law judge found that no physician opined that a strong cough constitutes an acute respiratory illness, he misunderstood employer's argument that, under the quality standard at 20 C.F.R. Part 718 App. B(1), the effort on a pulmonary function study is unacceptable when the patient has coughed. This argument lacks merit.

As an initial matter, the quality standard employer cites does not apply to medical treatment evidence. *See Stowers*, 24 BLR at 1-89, 1-92; 20 C.F.R. §718.101(b). More importantly, the record does not disclose a factual basis for employer's argument. The report of the August 2, 2000 pulmonary function study does not indicate that the miner coughed during the study. Director's Exhibit 27 at 144-45. The portion of the record employer cites as evidence of a strong cough is an observation to that effect recorded at 3:30 a.m. on August 5, 2000, not during the August 2, 2000 pulmonary function study. Director's Exhibit 27 at 149. While the August 2000 hospitalization records include notations that the miner was observed to cough at times during his stay, the administrative law judge accurately found that no physician opined that the cough was evidence of an acute respiratory illness that affected the reliability of the miner's pulmonary function studies. Therefore, we reject employer's allegation of error. Because substantial evidence supports the administrative law judge's finding that the August 2 and August 3, 2000 pulmonary function studies were sufficiently reliable to be considered, the finding is affirmed.

Employer also argues that the administrative law judge erred in his weighing of the August 2000 pulmonary function studies. Because the August 2, 2000 pulmonary function study was qualifying, and the August 3, 2000 pulmonary function study was non-qualifying, employer argues that the administrative law judge failed to recognize the

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for the decline in his pulmonary function study results. *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131, 1-134 (1986).

disparity as evidence that the miner did not have a chronic, disabling impairment. Employer's Brief at 14-15. Employer argues that when the administrative law judge found that the difference between the two studies did not indicate the lack of a chronic impairment because the August 3, 2000 study was close to qualifying, he improperly rounded down the study's values and treated it as sufficient to establish total disability. *Id*. We disagree.

The record reflects that the administrative law judge did not round down the values of the August 3, 2000 pulmonary function study; he properly characterized the study as non-qualifying. Decision and Order at 6, 8, 10. In addressing employer's argument, on remand, that the August 2 and August 3 studies reflected that the miner did not have a chronic impairment, the administrative law judge merely noted that the miner's August 3, 2000 pulmonary function study was close to qualifying.[15] The administrative law judge acted within his discretion in finding that the results of the August 3 study were not disproportionately higher than those obtained the day before. *See Baker v. N. Am. Coal Corp.*, 7 BLR 1-79, 1-80 (1984). Therefore, we reject employer's argument that the administrative law judge erred in his weighing of the August 2, 2000 and August 3, 2000 pulmonary function studies.

Turning to the administrative law judge's weighing of the April 8, 2002 and October 7, 2002 pulmonary function studies, employer argues that the administrative law judge erred in declining to accord greater weight to the October 7, 2002, non-qualifying pulmonary function study. Specifically, employer contends that the administrative law judge erred in ruling that *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), which addressed the weighing of x-ray readings based on the chronology of the x-rays, prohibited him from crediting the more recent, non-qualifying pulmonary function study. Employer's Brief at 17. We need not resolve this issue,[16] because

[15] The administrative law judge noted that "[u]sing the table value of 70.9 inches, an FEV1 value would be qualifying at 1.94 or below. The [m]iner's FEV1 on August 3, 2000 was 2.06. Moreover, both his FVC and MVV were equal to or lower than the applicable table values in Appendix B." Decision and Order at 10 n.42.

[16] We note that, contrary to the administrative law judge's analysis, although a later negative x-ray cannot be credited over an earlier positive x-ray based on recency, as both readings cannot be correct given the progressive nature of pneumoconiosis, *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-84-86 (6th Cir. 1993), a later non-qualifying pulmonary function study and an earlier qualifying pulmonary function study may accurately represent the miner's respiratory condition at the time each study was taken. Thus, recency may be a relevant consideration, along with other factors indicated by the particular evidence of record, in a qualitative analysis of the pulmonary function study evidence. *See Cooley v. Island Creek Coal Co.*, 845

employer does not challenge the administrative law judge's reasons for according greater weight to the April 8, 2002, qualifying pulmonary function study. Specifically, the administrative law judge found that the April 8, 2002 pulmonary function study was "more probative of the [m]iner's condition" than the October 7, 2002 study, because it involved two trials, and "demonstrate[d] [that] the [m]iner was disabled even with the assistance of bronchodilators . . . ." Decision and Order at 10. As this finding is not challenged, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Based on the foregoing discussion, we hold that substantial evidence supports the administrative law judge's analysis of the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). We, therefore, affirm the administrative law judge's finding that the preponderance of the pulmonary function study evidence established total disability.[17]

Employer next challenges the administrative law judge's finding regarding the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Jarboe and Rosenberg. The administrative law judge stated that he "adhere[d] to" his prior finding that, although Dr. Jarboe's opinion weighed in favor of total disability, it merited less weight because it was based, in part, on blood gas studies the administrative law judge found to be unreliable.[18] Decision and Order at 12. Further, the administrative law judge "adhere[d] to" his prior finding that Dr. Rosenberg's opinion on the issue of total disability was "contradictory,"

F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

[17] Additionally, we hold that even if the August 2, 2000 and August 3, 2000 pulmonary function studies are not considered, substantial evidence supports the administrative law judge's finding that the pulmonary function study evidence established total disability. As discussed above, the administrative law judge credited the April 8, 2002 qualifying pulmonary function study over the October 7, 2002 non-qualifying study, and we have affirmed that finding.

[18] As the Board noted in its last decision, the administrative law judge considered eight arterial blood gas studies contained in the miner's treatment records. The administrative law judge determined that because those studies were performed during hospitalizations for acute cardiac or respiratory illnesses, they were not reliable indicators of the miner's pulmonary function, and did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Miller*, slip op. at 6 n.10.

and he discounted it for that reason. Decision and Order at 13. The administrative law judge again found that the medical opinion evidence neither established, nor precluded, total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer contends that the administrative law judge mischaracterized the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). We decline to address this argument. The administrative law judge, on remand, reiterated findings already affirmed by the Board. Employer raises the same arguments the Board rejected previously, *supra*, n.6, when it affirmed the administrative law judge's credibility determinations with respect to the opinions of Drs. Jarboe and Rosenberg, and affirmed his finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). The Board's holdings on those issues constitute the law of the case, and employer has not shown that an exception to the law of the case doctrine applies here. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Employer next contends that the administrative law judge erred when he found that all of the relevant evidence, weighed together, established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically contends that the administrative law judge erred in relying on the blood gas studies of record that he found did not establish total disability, and in relying on the treatment notes and medical opinions that he did not credit as affirmative evidence of total disability. Employer's Brief at 19. This contention lacks merit.

The administrative law judge found that the preponderance of the pulmonary function study evidence established total disability, that the blood gas study evidence was not sufficiently reliable to establish total disability, and that the medical opinion evidence and treatment notes neither established, nor weighed against, total disability. Decision and Order at 10-13. Therefore, he permissibly concluded that when all the evidence was weighed together, it established that the miner was totally disabled. *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). Consequently, we affirm the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established that the miner had twenty-six years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

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

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[19] or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 18-21.

In addressing whether employer established that the miner did not have legal pneumoconiosis,[20] the administrative law judge considered the opinions of Drs. Jarboe and Rosenberg. Dr. Jarboe opined that the miner did not have legal pneumoconiosis, but suffered from moderate restrictive lung disease that was due to congestive heart failure and obesity. Employer's Exhibits 2 at 10-12; 4 at 17, 20-22. Dr. Rosenberg opined that the miner did not have legal pneumoconiosis, but suffered from a restrictive lung impairment related to obesity and elevation of the diaphragm. Employer's Exhibits 1 at 8-9; 3 at 17, 20.

The administrative law judge found that neither opinion was sufficiently reasoned or persuasive to establish that the miner did not have legal pneumoconiosis. Specifically, the administrative law judge found that Drs. Jarboe and Rosenberg relied on negative x-rays to conclude that the miner's restrictive lung disease was not related to coal mine dust exposure, thereby conflating the concepts of clinical and legal pneumoconiosis. Decision and Order at 19, 20. Further, the administrative law judge discounted Dr. Jarboe's opinion because the doctor relied, in part, on the fact that the miner's restrictive lung disease developed years after he left coal mine employment, and the miner went on to develop heart disease and other illnesses. Decision and Order at 20. Finally, the administrative law judge found that neither physician adequately addressed or explained

[19] "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).

[20] The administrative law judge did not make a definitive finding on whether employer established that the miner did not have clinical pneumoconiosis, but found that, even assuming the miner did not have clinical pneumoconiosis, employer failed to disprove legal pneumoconiosis. Decision and Order at 16-19, 22.

why the miner's twenty-six years of coal mine dust exposure did not also contribute to, or aggravate, the miner's restrictive impairment, along with the other causes the doctors identified. Decision and Order at 19, 21.

Employer argues that the administrative law judge applied an improper rebuttal standard when he discounted the opinions of Drs. Jarboe and Rosenberg for failing to explain why coal mine dust did not also contribute to the miner's restrictive impairment. Employer contends that the administrative law judge required its experts to "eliminat[e] the possibility of disease causation," essentially requiring medical certainty from them, rather than a reasoned medical opinion that the miner did not have legal pneumoconiosis. Employer's Brief at 20-22. This argument lacks merit.

The administrative law judge permissibly questioned the opinions of Drs. Jarboe and Rosenberg that the miner's restrictive impairment was due solely to obesity, heart disease, and an elevated diaphragm, because he found that the physicians failed to adequately explain how they eliminated the miner's coal dust exposure as a source of his disabling impairment.[21] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015). Because the regulation defining pneumoconiosis provides that legal pneumoconiosis encompasses chronic respiratory and pulmonary diseases or impairments "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), the administrative law judge properly considered whether the doctors adequately addressed whether coal mine dust substantially aggravated the miner's respiratory or pulmonary impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007).

Substantial evidence supports the administrative law judge's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore reject employer's argument that the administrative law judge applied an improper standard in determining

[21] The administrative law judge found that, while Dr. Jarboe "attributed the [m]iner's pulmonary condition to cardiac illness, his reasoning does not explain why the [m]iner's restrictive impairment could not have multiple causes, including coal dust exposure." Decision and Order at 21. The administrative law judge found that "the critical flaw in Dr. Rosenberg's analysis is that it does not contemplate the possibility that the [m]iner's restrictive impairment could have multiple causes." Decision and Order at 19. Specifically, the administrative law judge found that, "[e]ven if some extrinsic factors contributed to the [m]iner's restrictive impairment, Dr. Rosenberg did not explain how the coal dust the [m]iner was exposed to during . . . twenty-six years of coal mine employment did not also contribute." *Id.*

whether employer proved that the miner did not have legal pneumoconiosis, and hold that the administrative law judge permissibly discounted the opinions of Drs. Jarboe and Rosenberg.[22] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discounted the opinions of Drs. Jarboe and Rosenberg, we affirm his finding that employer failed to establish that the miner did not have legal pneumoconiosis. 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. *See* 20 C.F.R. §718.305(d)(2)(i).

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2)(ii). The administrative law judge rationally discounted the opinions of Drs. Jarboe and Rosenberg, that the miner's death from respiratory failure was unrelated to pneumoconiosis, because Drs. Jarboe and Rosenberg did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 22-24. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of the miner's death was caused by pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2)(ii).

[22] Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Jarboe and Rosenberg, we need not address employer's challenges to the administrative law judge's other reasons for discounting their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge