U.S. Department of Labor

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

BRB No. 15-0506 BLA

ROBERT B. TITCHENELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 09/14/2016
	)	
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 Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-6201) of Administrative Law Judge Thomas M. Burke, issued pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In a previous Decision and Order on Remand Denying Benefits issued on February 3, 2011,

Administrative Law Judge Daniel L. Leland denied this subsequent claim.[1] Specifically, Judge Leland determined that because the newly submitted evidence failed to establish at least one of the requisite elements of entitlement, claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant failed to establish total disability, Judge Leland also found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2]

Claimant filed a timely request for modification on January 26, 2012. Director's Exhibit 46. On August 25, 2015, Judge Burke (the administrative law judge) issued his Decision and Order Awarding Benefits, which is the subject of this appeal. The administrative law judge credited claimant with sixteen years of underground coal mine employment and found that the newly submitted medical evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Based on these determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and demonstrated 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 Section 411(c)(4) presumption. Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310, and he awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence was sufficient to establish total disability. Therefore, employer asserts that

[1] Claimant filed an initial claim for benefits on May 29, 1990, which was denied by the district director on August 22, 1990, because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until filing this subsequent claim on June 27, 2007. Director's Exhibit 3. In a Decision and Order issued on June 12, 2009, Administrative Law Judge Daniel L. Leland denied benefits, finding that claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 44. Claimant appealed, and the Board vacated Judge Leland's denial of benefits, holding that he erred in weighing the relevant medical evidence. *See Titchenell v. Valley Camp Coal Co.*, BRB No. 09-0720 BLA (Aug. 12, 2012) (unpub.); Director's Exhibits 44, 45.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

the administrative law judge erred in concluding that claimant invoked the Section 411(c)(4) presumption and demonstrated a change in an applicable condition of entitlement. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board. Employer has filed a reply brief, reiterating its arguments on appeal.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a), and implemented by 20 C.F.R. §725.310, authorizes modification of an award or denial of benefits in a miner's claim, based on a change in conditions or a mistake in a determination of fact. In considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement[5] that defeated an award in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The administrative law judge has broad discretion to correct mistakes

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant worked for sixteen years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, and that he is totally disabled by pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994). The administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Additionally, because claimant requested modification of the denial of his subsequent claim, for failure to satisfy the requirements of 20 C.F.R. §725.309, administrative law judge is required to consider whether the new evidence submitted on modification, considered along with the evidence originally submitted in the subsequent claim, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). Because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish, based on the newly submitted evidence, at least one element in order to obtain review of his claim. 20 C.F.R. §725.309(c)(2), (3); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Director's Exhibit 1.

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

The regulations provide that a miner shall be considered totally disabled if he or she has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work, and comparable gainful work. 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If total disability has been established under one or more subsections, the administrative law judge must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record to determine whether total disability has been established by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Employer specifically challenges the administrative law judge's finding that claimant established total disability based on the pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).

A. The Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge initially noted that the record contains five pulmonary function studies that were considered by Judge Leland, dated July 11, 2007, July 16, 2008, August 20, 2008, November 20, 2008, and November 25, 2008. Decision and Order at 6. With respect to whether these pulmonary function studies were qualifying[6] for total disability, the administrative law judge summarized Judge Leland's findings as follows:

> Judge Leland found in his February 3, 2011 Decision and Order that the pulmonary function study evidence was insufficient to establish total disability as he found the results to be equivocal. He considered the study dated July 11, 2007 to evidence disability, before and after bronchodilator; the study dated August 20, 2008 to evidence disability before but not after bronchodilator; and the studies dated July 16, 2008 and November 20, 2008 to be non-qualifying.

Id.

The administrative law judge then noted that two pulmonary function studies "were subsequently administered as part of the modification proceeding, by Dr. Celko on December 27, 2011 and by Dr. Renn on June 12, 2013." Decision and Order at 6; Claimant's Exhibit 7; Employer's Exhibit 4. The administrative law judge found that both of these pulmonary function studies produced qualifying values for total disability, before and after bronchodilator administration. Decision and Order at 7-8. In considering these studies, the administrative law judge specifically rejected employer's argument that the December 27, 2011 pulmonary function study conducted by Dr. Celko was not acceptable and valid. *Id*. at 8. Because the most recent pulmonary function studies produced qualifying values, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer concedes that "Dr. Renn's [June 12, 2013] pre-bronchodilator test result would qualify" for total disability under the regulatory criteria, but argues that the administrative law judge erroneously applied the table values listed in Appendix B of 20 C.F.R. Part 718 for a 71 year old coal miner in finding that the post-bronchodilator results of the June 12, 2013 also qualify for total disability. Employer's Brief in Support of Petition for Review at 15. Employer contends that if "Dr. Renn's post-bronchodilator

[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).

studies were adjusted for [claimant's] correct age," which was 74 when he took this test, "they would not represent qualifying test results." *Id*.

Contrary to employer's contention, the administrative law judge properly noted that, absent medical evidence to the contrary, pulmonary function studies performed on a miner who is over age 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old.[7] *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Employer does not dispute that, according to Appendix B of Part 718 for a 71 year old male miner, claimant's June 12, 2013 pulmonary function study produced qualifying values for total disability post-bronchodilator. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Thus, we conclude that the administrative law judge did not err in finding that Dr. Renn's test had qualifying values before and after the administration of a bronchodilator. *Meade*, 24 BLR at 1-47. Therefore, we affirm the administrative law judge's finding that the June 12, 2013 pulmonary function study is qualifying for total disability.

Employer also asserts that the qualifying December 27, 2011 pulmonary function study is invalid and that the administrative law judge erred in relying on it to find that claimant is totally disabled. Employer, however, does not explain how excluding the December 27, 2011 pulmonary function study from consideration would alter the administrative law judge's permissible finding that claimant established total disability, based on Dr. Renn's most recent qualifying pulmonary study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Thus, we affirm the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(i).

B. The Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant's usual coal mine employment was that of a "bit grinder and lampman." Decision and Order at 18. The administrative law judge then considered the medical opinions of Drs. Celko, Parker, Rasmussen, Houser, Fino, Renn, and Spagnolo on the issue of total disability. *Id*. The administrative law judge rejected the opinions of Drs. Rasmussen and Fino that claimant's pulmonary impairment is not severe enough to prevent him from performing his usual coal mine employment because their opinions were based on medical evaluations "that occurred back in 2007 and 2008." *Id*. at 18.

[7] The administrative law judge also correctly noted that Dr. Renn specifically characterized the June 12, 2013 pulmonary function study results "as showing moderately severe [impairment] with borderline significant improved obstruction." Decision and Order at 8; Employer's Exhibit 4.

Moreover, the administrative law judge noted that "[a]ll of the physicians who later [evaluated] [c]laimant's condition in 2013 and 2014, including his treating physician, Dr. Parker, and Drs. Renn and Spagnolo[,] who evaluated him at the request of [e]mployer[,] found he was unable to do his last coal mine job." *Id.*

Based on his consideration of all the medical opinions, the administrative law judge found that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18. Weighing the medical opinions and qualifying pulmonary function study evidence against the contrary probative evidence, the administrative law judge found that claimant established total disability under 20 C.F.R. §718.204(b)(2). *Id.*

Employer contends that the administrative law judge erred in relying on Dr. Spagnolo's opinion to support a finding of total disability. Employer asserts that, during his deposition, Dr. Spagnolo specifically opined that claimant "might be capable of performing bursts of heavy labor required in his last coal mine employment as a bit grinder and bath house attendant, although he could not do heavy labor consistently." Employer's Brief in Support of Petition for Review at 20. We disagree with employer that the administrative law judge did not properly evaluate Dr. Spagnolo's testimony.

In a report dated July 21, 2013, Dr. Spagnolo opined that claimant could not perform his usual coal mine employment from a pulmonary or respiratory standpoint. Employer's Exhibit 8. During his March 6, 2014 deposition, Dr. Spagnolo testified that he agreed with Dr. Rasmussen that claimant could perform "bursts of heavy labor," based on the results of the 2008 pulmonary function tests. Employer's Exhibit 13 at 13-14. However, Dr. Spagnolo also explained that in 2014, claimant's asthma and bronchiecstasis had worsened to the degree that he "would doubt if [claimant] could do heavy labor . . ." *Id.* at 14. Based on this testimony, we see no error in the administrative law judge's reliance on Dr. Spagnolo's opinion to support his finding that claimant is totally disabled.[8] As employer does not challenge the weight accorded the contrary opinions of Drs. Rasmussen and Fino that claimant is not totally disabled, *Skrack v.*

[8] We reject employer's argument that because Dr. Spagnolo identified age as a factor in claimant's respiratory impairment, his opinion is insufficient to establish that claimant is totally disabled from a respiratory or pulmonary standpoint. Contrary to employer's contention, the proper inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the presence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(ii). The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether an employer has rebutted the Section 411(c)(4) presumption by establishing that "no part" of claimant's total respiratory or pulmonary disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §§718.204(c), 718.305(d)(1)(ii).

Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983), we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[9] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order at 18. We further affirm, as supported by substantial evidence, the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on a weighing of all the contrary probative evidence. *See Fields.* 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198; Decision and Order at 18.

Because claimant established sixteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, 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). 20 C.F.R. §718.305(b). As claimant established total disability and invoked the presumption, we also affirm the administrative law judge's findings that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal[10] nor clinical[11] pneumoconiosis, or by

[9] Based on our affirmance of the administrative law judge's reliance on Dr. Spagnolo's opinion to find that claimant is totally disabled, it is not necessary that we address employer's remaining arguments that the administrative law judge also erred in basing his finding of total disability on the opinions of Drs. Parker, Celko, Houser, and Renn. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or *substantially aggravated by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

[11] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition

establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge determined that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 21. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge rejected the opinions of employer's experts, Drs. Fino, Spagnolo, and Renn, who attributed claimant's respiratory or pulmonary impairment entirely to bronchiectasis[12] and/or asthma. Decision and Order at 21-26; Director's Exhibit 44; Employer's Exhibits 4, 5. 8, 13. The administrative law judge determined that their opinions were not sufficiently explained, particularly in light of the opinion of Dr. Parker, who the administrative law judge found was the most credible physician of record, based on his credentials. Decision and Order at 25. Dr. Parker disputed the position of employer's experts that coal dust played no role in claimant's respiratory condition. Director's Exhibit 44; Claimant's Exhibits 1, 8; Employer's Exhibit 8.

Initially, employer asserts that the administrative law judge applied an incorrect rebuttal standard in considering the issue of legal pneumoconiosis, because he stated, at times, that employer's physicians did not "rule out" a causal connection between claimant's disabling respiratory impairment and coal dust exposure. Brief in Support of Petition for Review at 23. Prior to his analysis of the medical evidence, the administrative law judge correctly stated that "the burden now shifts to [e]mployer to show that the evidence does not establish legal pneumoconiosis." Decision and Order at 21; *see* 20 C.F.R. §718.305(d)(1). Although the administrative law judge referenced the term "rule out" in his consideration of the evidence on legal pneumoconiosis, this error is

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> 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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[12] The administrative law judge noted that bronchiecstasis is "an abnormal enlargement of the breathing tubes that can be associated with airway obstruction." Decision and Order at 13 *quoting* Director's Exhibit 44.

harmless, as he ultimately did not reject the opinions of employer's physicians for failing to satisfy a particular rebuttal standard. Rather, he concluded that employer's physicians did not disprove the existence of legal pneumoconiosis because the bases for their opinions were not credibly explained, or they were outweighed by the opinion of Dr. Parker. *See* 20 C.F.R. § 718.202(a)(4) (physician determination on the existence of legal pneumoconiosis "must be supported by a reasoned medical opinion."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Thus, we reject employer's assertion that the case must be remanded for consideration under the proper rebuttal standard. *Minich*, 25 BLR at 1-154-56.

With regard to his specific credibility determinations, we reject employer's assertion that the administrative law judge failed to properly consider the entirety of Dr. Fino's explanations for why claimant does not have legal pneumoconiosis. The administrative law judge noted that Dr. Fino diagnosed bronchiectasis and opined that it played "some role" in claimant's obstructive disorder. Decision and Order at 21 *quoting* Director's Exhibit 44. He also observed correctly that Dr. Fino "excluded coal mine dust exposure because learned articles 'establish that it would be unreasonable to state that some of the loss in FEV1 is related to coal mine dust in this guy, because everybody generally has an average loss, but it is small and its clinically insignificant." *Id.* As employer concedes, however, Dr. Fino submitted his opinion in 2008, and the administrative law judge found that claimant had FEV1 values that established total disability in 2013. Decision and Order at 8. The administrative law judge permissibly found that Dr. Fino did "not adequately explain why [c]laimant's coal dust exposure is not also clinically significant and contributing to his pulmonary condition except to contend *incorrectly* that [c]laimant is not totally impaired."[13] *Id*. at 21-22 (emphasis added); *see* 20 C.F.R. §718.201(b); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335 *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Furthermore, we reject employer's argument that the administrative law judge erred in giving less weight to Dr. Renn's opinion that claimant does not have legal pneumoconiosis. The administrative law judge correctly observed that, according to Dr. Renn, "the decrease in [claimant's] FEV1/FVC ratio" is "not consistent with coal workers' pneumoconiosis." Decision and Order at 22; *see* Director's Exhibit 44;

[13] Employer argues that the administrative law judge should not have rejected Dr. Fino's opinion for failing to adequately address the rebuttal issues presented in this case, because the Section 411(c)(4) presumption was not at issue in 2008, when Dr. Fino prepared his report and gave his deposition testimony. However, we see no error in the administrative law judge's analysis because it properly reflects claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985).

Employer's Exhibit 4. The administrative law judge acted within his discretion in rejecting Dr. Renn's rationale based on the FEV1/FVC ratio, as "the preamble to the revised regulations indicates that the Attfield and Houdos study analyzed pulmonary function data (in particular the FEV1, FVC and *FEV1/FVC ratio*) and found a clear relationship between dust exposure and a decline in pulmonary function." Decision and Order at 22 (emphasis added); *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013).

Additionally, the administrative law judge permissibly discounted the explanations given by Drs. Renn and Spagnolo that claimant's obstructive respiratory impairment is due almost entirely to asthma because claimant showed reversibility in his respiratory condition after administration of a bronchodilator. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Dr. Renn stated that claimant's "ventilatory testing revealed only 'borderline' improvement of bronchoreversibility." Decision and Order at 22, *quoting* Employer's Exhibit 14 at 25. In addition, Dr. Renn testified that claimant "had eight pulmonary function tests from July 18, 1990 through June 12, 2013 and, of those pulmonary function tests," three tests "show that he has significant improvement following inhaled bronchodilators, so [claimant] has a bronchoreversible or at least a *partially bronchoreversible* airway obstruction." Employer's Exhibit 14 at 20 (emphasis added). Dr. Spagnolo also described that the "pulmonary function study results were variable and had a good response to bronchodilator of 14%, 19% and 12%," which he characterized as "significant reversibility." Decision and Order at 24; Employer's Exhibit 13.

The administrative law judge observed correctly that the "fact that there is some reversibility [on pulmonary function testing] does not preclude a finding that legal pneumoconiosis exists."[14] Decision and Order at 24; s*ee Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). Thus, we affirm the administrative law judge's rejection of the rationales given by Drs. Renn and Spagnolo for why claimant has asthma and not legal pneumoconiosis. *See 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).

[14] The administrative law judge also noted that Dr. Renn relied on Dr. Parker's treatment of claimant with bronchodilator and anti-inflammatory medications, but that "Dr. Parker testified that he prescribes bronchodilators for [c]laimant because his condition has some reversibility[,] but not complete." Decision and Order at 24; Employer's Exhibit 6 at 6.

We also conclude the administrative law judge acted within his discretion in crediting Dr. Parker's opinion that bronchiectasis is not a significant cause of claimant's pulmonary impairment as being "more in accord with the evidence of record."[15] Decision and Order at 23; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335 (4th Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Specifically, the administrative law judge found support in the record for Dr. Parker's description of claimant's bronchiectasis as being no more than "mild." Decision and Order at 23. He noted that April 1, 2009 CT scan, read by Dr. Meyer, "does not provide an impression of bronchiectasis." *Id.*; Director's Exhibit 52. He observed correctly that Drs. Renn and Spagnolo also described that the CT scan showed "*mild* diffuse bronchial wall thickening" consistent with bronchiecstasis," Decision and Order at 23; Director's Exhibit 52; Employer's Exhibits 13, 14. Further, Dr. Renn stated that an August 20, 2008 CT scan revealed "bronchiectasis primarily in the superior segment of the left lower lobe." Director's Exhibit 44. The administrative law judge found this corroborated Dr. Parker's explanation that if claimant suffered from bronchiectasis, it was mild because it did not involve more than one segment of the lung.[16] Decision and Order at 23.

Moreover, contrary to employer's assertions, the administrative law judge's decision to accord "determinative" weight to Dr. Parker's opinion that claimant's bronchiectasis is not severe enough to explain claimant's respiratory condition, based on Dr. Parker's credentials, was permissible. Decision and Order at 25; *see Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20, 1-23 (1988). Decision and Order at 25. Although the administrative law acknowledged that "Dr. Renn and Dr. Spagnolo have excellent qualifications," he rationally concluded that Dr. Parker's credentials rendered his opinion more persuasive:

> Dr. Parker was on staff of NIOSH until 1998, then took a full-time position at West Virginia University, becoming chief of pulmonary and critical care

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[15] In so doing, the administrative law judge permissibly gave less weight to Dr. Renn's opinion that claimant's respiratory condition was due to bronchiectasis and not legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998).

[16] In his December 5, 2008 deposition, Dr. Parker testified that Dr. Renn was "incorrect in attributing [claimant's] moderate to severe expiratory airflow obstruction to focal bronchiectasis[.]" Claimant's Exhibit 8 at 68-70. Dr. Parker explained that if claimant "has just this superior segment of his left lower lobe involved with bronchiectasis, it won't cause a fall in his FEV1 that's as severe as his[.]" *Id*. He further noted that, in order to cause a larger degree of airflow obstruction, the bronchiectasis must "be bilateral, both lungs . . . so it can be diffuse." *Id.*

> in 2000. At NIOSH, he was the chief or acting chief of the clinical investigation branch and the coal workers' x-ray surveillance program, including B-reader certification program which he ran from 1991 to 1998. He is a NIOSH B-reader, has taught the ILO classification system for dust related lung diseases, has served as a consultant to both the World Health Organization and the International Labor Office in the teaching of the recognition of pneumoconiosis, and was a consultant for the revision of the ILO classification system in 2000. He has engaged in substantial research in the lung disease of coal miners. His curriculum [vitae] includes thirty-nine publications in peer review journals and is co-editor of a book entitled Occupational Lung Disease: An International Perspective. He contributed to several chapters in the 1995 NIOSH publication entitled Criteria for a Recommended Standard; Occupational Exposure to Respirable Coal Mine Dust. Dr. Parker also has a significant clinical practice including patients with occupational lung diseases ranging from mineral dust, asbestos, coal and silica, to occupational asthma, and hypersensitivity pneumonitis, and other lung diseases . . . .

Decision and Order at 25-26, *citing* Claimant's Exhibit 8a and Employer's Exhibit 6; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336. Employer's general assertion that Dr. Parker is biased is rejected. *See Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20, 1-23 n.4 (1992); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc) (holding that it is error to discredit, as biased, a medical report prepared for litigation absent a specific basis for finding the report to be unreliable).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Cochran*, 718 F.3d at 323, 25 BLR at 2-264-65; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis and is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[17]

[17] Because employer bears the burden of proof on rebuttal, it is not necessary to address employer's assertions of error with regard to the weight accorded claimant's experts, Drs. Rasmussen and Houser, who diagnosed that claimant has legal

To the extent that we have affirmed the administrative law judge's findings that the opinions of Drs. Fino, Renn, and Spagnolo are not credible to establish that claimant's disabling obstructive respiratory impairment is not legal pneumoconiosis (a respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by coal dust exposure), we affirm the administrative law judge's determination that these same opinions are insufficient to establish that "no part" of claimant's disability was due to pneumoconiosis, as defined at 20 C.F.R. §718.201. 20 C.F.R. 718.305(d)(1)(ii); *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal at C.F.R. §718.305(d)(1)(ii), and we affirm the award of benefits. Decision and Order at 26; *see Bender*, 782 F.3d at 137; *Minich*, 25 BLR at 1-159.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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pneumoconiosis. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011);