

U.S. Department of Labor

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



BRB No. 15-0165 BLA

JAMES M. MELVIN )  
)  
Claimant-Respondent )  
)  
v. )  
)  
BRUSHY CREEK COAL COMPANY )  
)  
and )  
)  
OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 02/09/2016  
)  
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 of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-6104) of Administrative Law Judge John P. Sellers, III, awarding benefits 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). On January 13, 2011, claimant filed a written notice of intent to file a claim for benefits, and thereafter filed a claim form on March 16, 2011. Director's Exhibit 2.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>1</sup> the administrative law judge credited claimant with nineteen and one-half years of underground coal mine employment,<sup>2</sup> as stipulated by the parties, 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 of total disability due to pneumoconiosis at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits, beginning March 2011.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability and in finding that employer did not rebut the presumption. Claimant has not filed a response brief. The Director, Office of Workers'

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

<sup>2</sup> The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3.

Compensation Programs (the Director), responds, urging affirmance of the award of benefits. Employer filed a reply brief, reiterating its contentions on appeal.<sup>3</sup>

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

### **Invocation of the Section 411(c)(4) Presumption**

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered three pulmonary function studies conducted on April 30, 2008, September 12, 2011, and January 17, 2012. The April 30, 2008 pulmonary function study produced non-qualifying values,<sup>4</sup> both before and after the administration of a bronchodilator. Employer's Exhibit 4 at 113. The September 12, 2011, and January 17, 2012 pulmonary function studies produced qualifying values before, but non-qualifying values after, the administration of a bronchodilator. Director's Exhibits 13, 24. The administrative law judge accorded the greatest weight to the pre-bronchodilator results of the more recent studies, conducted in 2011 and 2012, based on the Department of Labor's (DOL) recognition that post-bronchodilator studies do not adequately assess disability. Decision and Order at 14.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), the administrative law judge found that the two blood gas studies of record produced non-qualifying values, and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Dr. Houser diagnosed total disability, and Drs. Repsher and Rosenberg opined that claimant is not disabled. The administrative law judge found that each of the medical opinions lacked credibility, as the physicians did not demonstrate an accurate understanding of the exertional requirements of claimant's usual coal mine work as a roof bolter. Weighing all of the evidence together, the administrative law judge accorded the greatest weight to

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<sup>3</sup> The administrative law judge's finding that claimant established nineteen and one-half years of underground coal mine employment is unchallenged. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

the more recent, qualifying pre-bronchodilator pulmonary function studies as the most probative, objective measurement of claimant's functional capacity, and found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 18.

Employer contends that the administrative law judge erred in crediting the qualifying pre-bronchodilator results of the two most recent pulmonary function studies over the results obtained after the administration of a bronchodilator. Employer's Brief at 13-18. Employer asserts that the opinions of Drs. Repsher and Rosenberg established that post-bronchodilator results are relevant to the assessment of disability. Employer's Brief at 13. Employer's contentions lack merit. Where the record contains both a pre-bronchodilator and post-bronchodilator result, and one qualifies while the other does not, the administrative law judge must weigh the values and explain the results he finds more probative. *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983). The administrative law judge did so here.

The administrative law judge explained that he accorded greater weight to the pre-bronchodilator results based on reasoning credited by the DOL in the preamble to the 1980 regulations, that although the use of a bronchodilator may aid in determining the presence or absence of pneumoconiosis, it “does not provide an adequate assessment of the miner's disability . . . .” Decision and Order at 14, *quoting* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). In assessing the credibility of the pulmonary function study evidence in this case, it was within the administrative law judge's discretion to consult the preamble as an authoritative statement of medical principles accepted by the DOL. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Consequently, the administrative law judge permissibly accorded greater weight to the more recent, qualifying, 2011 and 2012 pre-bronchodilator studies. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-25-26 (7th Cir. 2004); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc). Therefore, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer also challenges the administrative law judge's weighing of the medical opinion evidence. In addressing that evidence, the administrative law judge first considered the written “Description of Coal Mine Work and Other Employment” completed by claimant, describing his duties as a roof bolter.<sup>5</sup> Decision and Order at 15-

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<sup>5</sup> As the parties waived their right to a hearing in this case, there was no testimony for the administrative law judge to consider.

16; Director's Exhibit 4. As summarized by the administrative law judge, claimant stated that he was required to load the roof bolter "by putting '50 bundles of bolts on the pinner, each bundle weighing approximately 80 pounds.'" Decision and Order at 15, *quoting* Director's Exhibit 4. To pin the roof, "he was required to be on his knees 'with the drill above [his] head, drilling a hole in the rock . . . to put a pin (roof bolt) in it.'" *Id.* Claimant further noted that, before pinning began, he would clean the dust boxes, hang curtains and tubing, and rock dust the faces. Decision and Order at 15; Director's Exhibit 4. In addition, he "sat for 3 hours per day and stood for 8.5 hours [a day], and . . . was also required to crawl 40 feet" and "carry 80-pounds a distance of 50 feet once per day." Decision and Order at 15, *referencing* Director's Exhibit 4. Based on claimant's description, the administrative law judge found that claimant's work as a roof bolter constituted "heavy physical labor, requiring substantial heavy lifting in addition to the physical stress of being on his knees and holding the drill or pinner over his head." Decision and Order at 16.

The administrative law judge then considered the medical opinions of Drs. Houser, Repsher, and Rosenberg. Dr. Houser, who is Board-certified in Pulmonary Disease, opined that claimant does not retain the pulmonary capacity to perform his usual coal mine employment as a roof bolter, while Drs. Repsher and Rosenberg, who are both Board-certified in Internal Medicine and Pulmonary Disease, stated that claimant is not totally disabled from a pulmonary perspective, with Dr. Repsher adding that claimant "is fully fit to perform his usual coal mine work . . . ." Director's Exhibits 13, 24 at 6; Employer's Exhibits 1, 5, 6. The administrative law judge discounted the opinions of Drs. Houser, Repsher, and Rosenberg, in part, because the doctors did not demonstrate an adequate understanding of the exertional requirements of claimant's usual coal mine employment as a roof bolter. Decision and Order at 14-18.

Employer argues that the administrative law judge erred in discounting Dr. Repsher's opinion on that basis.<sup>6</sup> Employer's Brief at 12-13. Employer asserts that Dr. Repsher knew the exertional requirements of claimant's usual work as a roof bolter as evidenced by Dr. Repsher's testimony that claimant told him what they were, and because Dr. Repsher testified that he has acquired familiarity with the job duties of a roof bolter in his medical practice evaluating miners. *Id.* Employer's contention lacks merit.

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<sup>6</sup> As employer does not challenge the administrative law judge's determinations to discount the opinions of Drs. Houser and Rosenberg, as lacking an accurate understanding of the exertional requirements of claimant's usual coal mine work, these findings are affirmed. *See Skrack*, 6 BLR at 1-711.

In evaluating Dr. Repsher's opinion, the administrative law judge considered Dr. Repsher's assertions that he was familiar with the job duties of a roof bolter, and that he had watched "a roof bolt being placed."<sup>7</sup> Decision and Order at 16, *quoting* Employer's Exhibit 6 at 6. The administrative law judge correctly noted, however, that Dr. Repsher "did not indicate how long he had observed the roof bolter or whether the roof bolter he watched was required to employ the pinner while on his knees." Decision and Order at 16. The administrative law judge further noted that "Dr. Repsher did not . . . indicate that he observed the cumulative physical stress of the position over the course of a shift" and "did not elucidate what he understood to be the daily lifting, standing, crawling, and carrying requirements particular to the job of a roof bolter where the [c]laimant worked." *Id.* The administrative law judge thus rationally concluded that "Dr. Repsher did not demonstrate a convincing awareness of the specific job duties and exertional requirements of the [c]laimant's job as roof bolter," and, therefore, permissibly concluded that Dr. Repsher's opinion that claimant could "clearly" perform such work was not persuasive. *See Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 1-116, 2-120 (7th Cir. 1990); Decision and Order at 15-16; Director's Exhibit 24 at 3-4; Employer's Exhibit 6 at 5-6.

As the administrative law judge provided valid reasons for discounting the opinions of Drs. Houser, Repsher, and Rosenberg, pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm the administrative law judge's credibility determinations.<sup>8</sup>

Employer also contends that, rather than weighing all of the relevant evidence together before concluding that claimant established total disability, the administrative

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<sup>7</sup> In his written report dated January 26, 2012, Dr. Repsher identified claimant's usual coal mine employment by title only, that of roof bolter, without a further description of the work. Director's Exhibit 24 at 3. At his deposition on March 14, 2013, Dr. Repsher testified that he was "familiar with the job of a roof bolter in an underground coal mine," and "actually watched a roof bolt being placed." Employer's Exhibit 6 at 6. Dr. Repsher also testified that claimant told him what the exertional requirements of his job were, explaining only that, "Coal miners usually tell you that they had to do a lot of lifting and shoveling and walking and had injuries from time to time." *Id.* at 5-6.

<sup>8</sup> We, therefore, need not address employer's contention that the administrative law judge erred in additionally discounting the opinions Drs. Repsher and Rosenberg because they relied on the non-qualifying values of the post-bronchodilator pulmonary function studies to support their opinions that claimant is not totally disabled. Decision and Order at 14-16; Employer's Brief at 13.

law judge erred in “dismiss[ing] the [non-qualifying] arterial blood gas tests as essentially irrelevant . . . .” Employer’s Brief at 15. We disagree. Contrary to employer’s contention, the administrative law judge specifically weighed all contrary probative evidence together in finding total disability established. *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). He permissibly concluded that, although the blood gas studies were non-qualifying, they did not contradict the qualifying pulmonary function studies, because blood gas studies “measure a different form of impairment.” *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797, 1-798 (1984); Decision and Order at 14. The administrative law judge further found that because Drs. Repsher and Rosenberg lacked an accurate understanding of claimant’s job duties, their opinions were entitled to less probative weight, and thus were not sufficient to outweigh the qualifying pre-bronchodilator values of the pulmonary function studies. Decision and Order at 18. We thus affirm the administrative law judge’s finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), based on his weighing of the pulmonary function studies and other relevant evidence.

In light of our affirmance of the administrative law judge’s findings that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory 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). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

### **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 does not have either legal or clinical pneumoconiosis,<sup>9</sup> 20 C.F.R. §718.305(d)(1)(i), or by establishing that “no part of the miner’s respiratory or

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<sup>9</sup> “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 dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 18-24.

In determining whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Repsher and Rosenberg. Both Drs. Repsher and Rosenberg opined that claimant does not have legal pneumoconiosis, but instead has obstructive lung disease due to cigarette smoking and asthma unrelated to coal mine dust exposure. Director’s Exhibit 24; Employer’s Exhibits 1, 5, 6. The administrative law judge found their opinions unpersuasive, because they were inadequately explained and their reasons for eliminating coal mine dust exposure as a source of claimant’s obstructive lung disease were at odds with the medical science accepted by the DOL in the preamble to the 2001 regulatory revisions. Therefore, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 23.

Employer generally argues that the administrative law judge erred in referring to the preamble to the regulations when he assessed the credibility of its physicians’ opinions. Employer’s Brief at 18-27. We disagree. It was within the administrative law judge’s discretion to consult the DOL’s discussion of sound medical science in the preamble to the 2001 regulations, when evaluating the reasoning of the medical opinions in this case. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103. Further, contrary to employer’s contention, the administrative law judge did not utilize the preamble as a legal rule, but permissibly consulted it as a statement of medical principles that were accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Blue Mountain Energy v. Director, OWCP [Gunderson]*, 805 F.3d 1254, 1259-62 (10th Cir. 2015); *Peabody Coal Co. v. Director, OWCP [Opp]*, 746 F.3d 1119, 1125-26, 25 BLR 2-581, 2-594-98 (9th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 802-03, 25 BLR 2-203, 2-211-12 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313, 25 BLR 2-115, 2-125 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011).

Drs. Repsher and Rosenberg eliminated coal mine dust exposure as a source of claimant’s obstructive lung disease, in part, because they found a significant reduction in claimant’s FEV1/FVC ratio. Such a reduction, in their view, is characteristic of obstruction due to smoking, but not of lung disease caused by coal mine dust exposure. Decision and Order at 19-20; Director’s Exhibit 24 at 5, 7-8; Employer’s Exhibit 1 at 5; Employer’s Exhibit 5 at 20; Employer’s Exhibit 6 at 16. The administrative law judge permissibly discredited this reasoning as inconsistent with the medical science accepted

by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,937, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Looney*, 678 F.3d at 313, 25 BLR at 2-125; Decision and Order at 20. Contrary to employer's contention, the fact that Dr. Rosenberg cited more recent medical literature did not require the administrative law judge to conclude that advancements in science have negated the medical literature addressing the effects of coal mine dust exposure on the lungs that was endorsed by the DOL in the preamble. *See Shores*, 358 F.3d at 490, 23 BLR at 2-25-26; *see also Sterling*, 762 F.3d at 491-92, 25 BLR at 2-644-45.

The administrative law judge also permissibly found that neither doctor adequately explained why he believed that coal mine dust exposure did not aggravate or exacerbate claimant's smoking-related impairments.<sup>10</sup> *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 21-22. Further, he permissibly discredited Dr. Repsher's explanation that it was significant that claimant had not been exposed to coal mine dust since 1996 as being based on principles inconsistent with the DOL's acknowledgement that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); 65 Fed. Reg. at 79,943; *see RAG American Coal Co. v. OWCP [Buchanan]*, 576 F.3d 418, 426-27, 24 BLR 2-223, 2-234-35 (7th Cir. 2009); *Shores*, 358 F.3d at 490, 23 BLR at 2-25-26; Decision and Order at 22; Director's Exhibit 24 at 4, 6. The administrative law judge also reasonably discounted Dr. Rosenberg's explanation that the irreversible portion of claimant's obstructive impairment was attributable to airway remodeling, because Dr. Rosenberg did not cite to any objective evidence to support his conclusion that such remodeling had occurred. *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *Burns*, 855 F.2d at 501; Decision and Order at 22-23; Employer's Exhibit 5 at 9-10. For the foregoing reasons, we affirm the administrative law judge's finding that the opinions of Drs. Repsher and Rosenberg were not sufficiently

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<sup>10</sup> The administrative law judge correctly noted that, in concluding that claimant's obstructive impairment was not due to coal mine dust exposure, Drs. Repsher and Rosenberg relied, in part, on their opinion that the degree of reversibility on claimant's pulmonary function studies is more consistent with obstruction caused by cigarette smoking. Decision and Order at 21. The administrative law judge reasoned that the fact that claimant's pulmonary function testing demonstrated reversibility does not alone establish that claimant's nineteen and one-half years of coal mine dust exposure played no significant role in the development of claimant's disabling pulmonary impairment. *Id.*

credible to disprove the existence of legal pneumoconiosis.<sup>11</sup> Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

With regard to the second method of rebuttal, the administrative law judge stated that, for the same reasons he discredited the opinions of Drs. Repsher and Rosenberg, that claimant's obstructive impairment is unrelated to coal mine dust exposure, he found that their opinions were insufficient to rebut the presumption that claimant's total disability was not due to pneumoconiosis. Decision and Order at 24. Employer generally challenges the administrative law judge's finding, but sets forth no specific argument pertaining to its physicians' opinions. Employer's Brief at 27. Based on our affirmance of the administrative law judge's analysis of the opinions of Drs. Repsher and Rosenberg regarding legal pneumoconiosis, set forth above, we also affirm his determination that employer did not establish that claimant's total disability was not due to pneumoconiosis. See *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); see also *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

### **Date for the Commencement of Benefits**

Although not raised by the parties, an error is evident on the face of the administrative law judge's decision regarding the commencement date of claimant's benefits. Specifically, the administrative law judge found that the evidence did not establish the month in which claimant became totally disabled due to pneumoconiosis. Decision and Order at 24-25. For the following reasons, we hold that the administrative law judge erred as a matter of law in setting the commencement date of benefits. See *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8, 20 BLR 2-1, 2-10 n.8 (4th Cir. 1995) (holding that review of an issue "may proceed (even completely sua sponte) when the equities require"); *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1-446 (1986).

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<sup>11</sup> Because we have affirmed the administrative law judge's credibility determinations regarding the opinions of Drs. Repsher and Rosenberg on the grounds stated above, we need not address employer's additional arguments that the administrative law judge erred in discrediting those opinions. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 20-27.

The administrative law judge correctly noted that where the evidence does not establish the month in which the miner became totally disabled due to pneumoconiosis, benefits commence as of the month in which the claim was filed. 20 C.F.R. §725.503(b). However, the administrative law judge misidentified the month of filing as being March 2011, the month in which claimant submitted a claim form. As noted *supra*, claimant filed with the district director a written, signed notice of intent to file a black lung claim on January 13, 2011. Director's Exhibit 2 at 6.

Pursuant to 20 C.F.R. §725.305, a written statement indicating an intention to claim benefits, signed by a claimant, is considered the filing date if the claimant files the prescribed claim form within six months of being notified by the district director of the need to file the form. 20 C.F.R. §725.305(a)(1), (b).

Consistent with 20 C.F.R. §725.305, upon receipt of claimant's notice of intent, the district director notified claimant that his entitlement to benefits would be protected back to the date the district director received the notice of intent, as long as claimant filed the claim form within six months. Director's Exhibit 2 at 5. As claimant timely filed his claim form on March 16, 2011, his claim is considered to have been filed as of January 13, 2011. 20 C.F.R. §725.305(a)(1), (b); *see Marx v. Director, OWCP*, 870 F.2d 114, 118, 12 BLR 2-199, 2-204-05 (3d Cir. 1989). Consequently, we modify the administrative law judge's decision to reflect that benefits shall commence as of January 2011. 20 C.F.R. §§725.305(b), 725.503(b).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, as modified to reflect January 2011 as the month and year from which benefits commence.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge