

BRB No. 13-0561 BLA

SAMUEL A. RAMSEY, SR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 09/03/2014
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5499) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a miner’s claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012)(the Act).¹ The administrative law judge credited claimant with at least thirty-one years of underground coal mine employment, and adjudicated this claim, filed on January 11, 2010, pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the weight of the evidence sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and determined that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits, commencing as of December 2008.

On appeal, employer contends that the administrative law judge did not apply the appropriate standard in rendering his findings on rebuttal, and that he erred in weighing the relevant evidence. Employer also challenges the administrative law judge's determination of the appropriate date for the commencement of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the administrative law judge applied the proper rebuttal standard. Employer has filed a reply brief in support of its position.³

¹ On January 10, 2013, the administrative law judge granted claimant's request that the case be decided on the record, and cancelled the hearing.

² Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, amended Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

³ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established greater than fifteen years of underground coal mine employment, the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer initially contends that the administrative law judge improperly and prejudicially restricted employer to the two rebuttal methods provided to the Secretary of Labor as set forth in 30 U.S.C. §921(c)(4), contrary to the statutory language and the holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013)(Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. Employer also argues that the administrative law judge erred in applying the "rule out" standard on rebuttal when addressing whether employer established that claimant is not totally disabled due to pneumoconiosis. Employer maintains that operators must be able to establish rebuttal with proof that claimant's pneumoconiosis is mild and that his totally disabling respiratory impairment was the product of another disease. Employer's Brief at 6-23. Contrary to employer's argument, since the medical opinions supportive of employer's burden did not diagnose pneumoconiosis as defined at 20 C.F.R. §718.201, employer could not establish rebuttal with proof that "claimant's pneumoconiosis is mild and that the totally disabling respiratory impairment was the product of another disease." Employer's Exhibits 1, 6, 7, 8, 9, 10; Director's Exhibit 26; *see Owens*, 724 F.3d 550, 25 BLR 2-339. The administrative law judge stated that the amended Section 411(c)(4) presumption may be rebutted with proof that the miner does not have pneumoconiosis or that the respiratory or pulmonary impairment did not arise out of coal mine employment, noting that the United States Court of Appeals for the Fourth Circuit has held under 20 C.F.R. §718.305 (2001) that an employer must "effectively. . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. Decision and Order at 26; *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-4 (4th Cir. 1980). Similarly, the implementing regulation that was promulgated after issuance of the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Claimant's Exhibit 9 at 14-15.

§718.305(d)(1)(ii);⁵ *see Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1071, BLR (6th Cir. 2013) (no meaningful difference exists between the “played no part” standard and the “rule-out” standard). We conclude that the administrative law judge applied the correct rebuttal standard in this case.

Turning to the merits, employer challenges the administrative law judge’s finding that the evidence was insufficient to rebut the presumed fact of legal pneumoconiosis⁶ pursuant to amended Section 411(c)(4). Specifically, employer maintains that the administrative law judge failed to adequately explain his finding that the opinions of Drs. Spagnolo and Zaldivar were insufficient to prove that claimant does not have legal pneumoconiosis, in violation of the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer’s Brief at 28-31.

After consideration of the administrative law judge’s Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge’s decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. After finding that employer successfully rebutted the presumption of clinical pneumoconiosis,⁷ the administrative law judge accurately summarized the conflicting medical opinions of record and determined that the opinions of Drs. Spagnolo⁸ and Zaldivar,⁹ that there is insufficient evidence of legal

⁵ We find no merit to employer’s argument that Section 718.305 is invalid, as the statutory interpretation of the Director, Office of Workers’ Compensation Programs, is consistent with congressional intent and entitled to deference. *See* 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013); *Spese v. Peabody Coal Co.*, 19 BLR 1-47, 1-53 (1995).

⁶ Legal pneumoconiosis refers to “any chronic lung disease or impairment and its sequelae arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

⁷ Clinical pneumoconiosis is defined as “those diseases recognized by the medical community as pneumoconiosis, *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).

⁸ Dr. Spagnolo provided a consulting report dated November 14, 2010; a deposition on November 9, 2011; a supplemental report dated December 4, 2011; and a supplemental report dated January 1, 2012. He noted a medical history that included hypertension, tobacco abuse (20-25 years), an irregular heart rhythm, arthritis, sleep apnea, anemia and asthma. He found insufficient evidence of either clinical or legal pneumoconiosis, and diagnosed obstructive chronic bronchial asthma that was likely

pneumoconiosis and that no part of claimant's disabling respiratory impairment is due to coal dust exposure, were entitled to little weight. Decision and Order at 9-13, 20-21; Employer's Exhibits 1, 6, 7, 8, 9, 10; Director's Exhibit 26. The administrative law judge determined that Drs. Spagnolo and Zaldivar both diagnosed asthma, aggravated by smoking, which led to lung remodeling and resulted in a severe chronic pulmonary obstruction. The administrative law judge observed that Dr. Spagnolo relied on a coal mine employment history of forty years ending in 1989, and a smoking history of twenty to twenty-five years ending in 1968, and that Dr. Zaldivar relied on a coal mine employment history of thirty-seven years ending in 1989, and a smoking history of one-half pack per day for twenty-four to twenty-five years, ending in 1968. Decision and Order at 11-13; Director's Exhibit 26; Employer's Exhibits 1, 4, 6-10. While both doctors opined that coal dust exposure did not cause or contribute to claimant's asthma, the administrative law judge found that their opinions were undermined by Dr. Spagnolo's admission that coal dust exposure could aggravate asthma, a position that is consistent with the view of the Department of Labor, as expressed in the preamble to the regulations. Decision and Order at 21; Employer's Exhibit 6 at 49-53; *see* 65 Fed. Reg. 79,920, 79,939-43 (Dec. 20, 2000); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 25 BLR 2-255 (4th Cir. 2013). It was rational for the administrative law judge to consider both medical opinions in light of Dr. Spagnolo's statement, that coal dust exposure can aggravate asthma, and to search both opinions for persuasive explanations of their determinations that the miner's many decades of coal dust exposure had not aggravated his asthma. Thus, the administrative law judge acted within his discretion in concluding that Drs. Spagnolo and Zaldivar failed to adequately or persuasively explain why claimant's lengthy coal dust exposure was not a contributing or aggravating cause of his asthma. Decision and Order at 21; *see Cochran*, 718 F.3d at 326, 25 BLR at 2-266-67 (employer's doctors failed to justify their conclusion that the miner's coal dust exposure had not aggravated his asthma); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012).

triggered and further worsened by claimant's cigarette smoking. EX 1 at 4. EX 1, 6, 7, 9.

⁹ Dr. Zaldivar examined claimant on June 23, 2010; provided a deposition on December 13, 2011; and wrote a supplemental opinion on January 2, 2012. He opined that there was insufficient evidence to diagnose either clinical or legal pneumoconiosis. He diagnosed a severe, irreversible, and totally disabling obstructive impairment due to asthma with contribution from smoking. He excluded coal dust as a causative factor because claimant has lung remodeling due to late-diagnosed asthma; a family history of asthma; a history of smoking; and no radiographic evidence of coal dust. Employer's Exhibit 8 at 30-31, 41; Employer's Exhibit 10; Director's Exhibit 26.

The evaluation of medical evidence and the determination of whether a physician's report is adequately reasoned and documented is properly a credibility matter for the finder-of-fact. *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 (4th Cir. 1997); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). As the administrative law judge has provided at least one valid reason for discounting the opinions of Drs. Spagnolo and Zaldivar, we need not address employer's remaining arguments regarding the administrative law judge's weighing of their opinions. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d at 478, 25 BLR 2-1 (6th Cir. 2010); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-4; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

Employer next argues that the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to reject the disability causation opinions of Drs. Zaldivar and Spagnolo. Employer contends that because the existence of legal pneumoconiosis was established by presumption, the opinions of Drs. Zaldivar and Spagnolo are not contrary to any affirmative findings made by the administrative law judge. Employer's Brief at 31-35. Contrary to employer's contention, the administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Zaldivar and Spagnolo on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074 (rejecting the employer's contention that an administrative law judge may not discredit a disability causation opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found); Decision and Order at 30. Therefore, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Lastly, employer contends that the administrative law judge erred in awarding benefits as of December 2008. Employer asserts that the administrative law judge substituted his own conclusions for those of a physician and failed to explain how Dr. Akkina's treatment records support a diagnosis of total disability due to pneumoconiosis. Employer argues that the earliest commencement date of benefits is January 2010, the month in which claimant filed his claim for benefits. Employer's Brief at 35-37. We disagree. In determining the date for the commencement of benefits, the administrative law judge noted that benefits are payable beginning with the month of onset of total disability due to pneumoconiosis, and found that Dr. Akkina's examination records

establish that claimant was totally disabled “as early as December 2008.” Decision and Order at 30. The record reflects that Dr. Akkina’s treatment records contain a December 11, 2008 consultation report diagnosing claimant with COPD and asthma, as well as qualifying pulmonary function studies obtained on May 23, 2007 and September 12, 2008 showing “severe obstructive lung disease with no significant bronchodilator response.” Claimant’s Exhibit 7. Because it is supported by substantial evidence, we affirm the administrative law judge’s determination that benefits should commence as of December 2008. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues that the administrative law judge applied the appropriate standard on rebuttal of the amended Section 411(c)(4) presumption. However, I respectfully dissent from my colleagues’ decision to affirm the administrative law judge’s finding that employer failed to rebut the amended Section 411(c)(4) presumption, and from their conclusion that the appropriate date for the commencement of benefits is December 2008.

In finding the medical opinion evidence insufficient to rebut the presumption of legal pneumoconiosis, the administrative law judge mischaracterized the opinions of Drs. Spagnolo and Zaldivar and failed to provide sufficient rationale for his findings. Drs. Spagnolo and Zaldivar opined that claimant’s obstructive impairment is due to his long-term asthma, with contribution from cigarette smoking that likely led to lung remodeling.

The administrative law judge discounted the opinion of Dr. Spagnolo on the grounds that the physician “admitted” that claimant’s cessation of smoking “would not have played a role in triggering and worsening his air flow obstruction,” and “admitted” that “decades old coal mine dust exposure could aggravate the asthma.” Decision and Order at 21. The administrative law judge found that these admissions also undermined Dr. Zaldivar’s opinion. *Id.* Contrary to the administrative law judge’s finding, Dr. Spagnolo testified that “obviously if [claimant] stopped smoking, it is not going to precipitate an asthma attack,” but that “when he was smoking, it could have made it worse” and “it also could have made . . . the fixed airway problems less responsive because of lung remodeling, could indeed have made that worse.” Employer’s Exhibit 6 at 27. Similarly, when asked if claimant’s lungs reverted to normal after he stopped smoking a number of years ago, Dr. Zaldivar responded “No, they never do. Once the damage occurs, it occurs.” Dr. Zaldivar further testified that cessation of smoking does not confer immunity from a rapid loss of pulmonary function in the future. Employer’s Exhibits 8 at 15; 6 at 48. Additionally, while Dr. Spagnolo agreed that coal dust exposure may trigger an exacerbation of asthma, he testified that “[t]here’s nothing in the record that said [claimant] had exacerbations while he was down in the mine and I don’t think [coal dust exposure] led to any fixed airway obstruction.” Employer’s Exhibit 6 at 52. Thus, contrary to the administrative law judge’s finding, Dr. Spagnolo did not agree that “decades old coal mine dust exposure could aggravate [claimant’s] asthma,” as he specifically stated that there was no evidence that coal dust exposure aggravated or contributed to claimant’s condition in this case. Further, the administrative law judge failed to explain how Dr. Zaldivar’s opinion was undermined by Dr. Spagnolo’s “admissions.” Employer’s Exhibits 6 at 49, 52-53. Lastly, the administrative law judge discounted the doctors’ opinions because “both experts insisted that the lack of any observable dust burden on the lungs militates against a pneumoconiosis diagnosis, a position not in accord with the scientific views adopted by the Department of Labor.” Decision and Order at 21. Contrary to the administrative law judge’s determination, the Department of Labor declined to add language to 20 C.F.R. §718.202(a)(4) to the effect “that a negative chest x-ray cannot form the basis of a physician’s reasoned findings of no pneumoconiosis,” concluding that,

only a physician can determine the diagnostic value of a negative x-ray in assessing the presence or absence of a respiratory or pulmonary disease in a particular miner. The law only prohibits making the negative x-ray the sole and conclusive basis for ruling out the disease.

65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000). As both Dr. Spagnolo and Dr. Zaldivar considered other objective evidence of record in ruling out legal pneumoconiosis, the administrative law judge erred in discounting their opinions on the basis that they relied on negative x-rays. Employer’s Exhibits 1, 6, 7, 8, 9, 10; Director’s Exhibit 26. Dr. Zaldivar specifically stated that the negative x-ray evidence was not the sole basis for his

diagnosis, “it is only one more bit of information.” Employer’s Exhibits 6 at 39-40; 8 at 73. Because the administrative law judge did not conduct a proper analysis of the relevant evidence in determining whether employer established rebuttal of the amended Section 411(c)(4) presumption, I would vacate the administrative law judge’s rebuttal findings, and remand this case for further consideration of the testimony of Drs. Spagnolo and Zaldivar, and a reevaluation of their opinions.

With regard to the date of onset, I agree with employer that the administrative law judge’s discussion of the evidence and the rationale he provided are insufficient to support a commencement date of December 2008 for the payment of benefits. While the administrative law judge acknowledged that “benefits are payable beginning with the month of the onset of total disability due to pneumoconiosis,” the only explanation he provided was that “Dr. Akkina’s medical treatment and examination records establish the diagnosis as early as December 2008,” and that “the onset date of disability is evident from the record.” Decision and Order at 30. As Dr. Akkina’s December 2008 diagnosis was stable “COPD/asthma,” and he never explicitly stated that claimant was totally disabled due to pneumoconiosis, the administrative law judge’s explanation is clearly insufficient to support his finding. Thus, I would remand this case for further consideration of the relevant evidence and findings in accordance with the APA.

ROY P. SMITH
Administrative Appeals Judge