

BRB No. 13-0235 BLA

THELMA SWORD)
(Widow of FRED SWORD))
)
Claimant-Respondent)
)
v.)
)
G & E COAL COMPANY,)
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED: 01/27/2014
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5895) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a survivor's claim filed on September 16, 2008, 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 the miner with nineteen years of underground coal mine employment, as stipulated by the parties and supported by the record, and found that the evidence established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) (2013). Therefore, the administrative law judge found that claimant invoked the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in relying on lay testimony to find total disability established at 20 C.F.R. §718.204(b)(2) (2013) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Further, employer argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.³

¹ Claimant is the widow of the miner, who died on August 17, 2008. Director's Exhibit 2. The miner filed claims for benefits on March 6, 1979 and March 17, 1999, both of which were finally denied. Miner's Claim Exhibits 1, 2. The miner's most recent claim was denied because the evidence did not establish any element of entitlement. Miner's Claim Exhibit 2.

² A recent amendment to the Act reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Relevant to this claim, Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established that the miner had nineteen years of underground coal mine

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 challenges the administrative law judge's finding that the miner had a totally disabling respiratory impairment. Specifically, employer asserts that, because the record contains medical evidence relevant to total disability, the administrative law judge erred in relying on lay testimony to find total disability established. Employer's contention has merit.

In determining whether the miner suffered from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), the administrative law judge noted that the record contained the results of three pulmonary function studies, performed in 1993, 1999, and 2002; seventeen blood gas studies, dating from 1993 to 2008; and the medical opinions of Drs. Younes, Jarboe, and Rosenberg. The administrative law judge discounted all of the pulmonary function study results, because he found that the studies were either too remote in time, or did not conform to the quality standards pertaining to pulmonary function studies. Decision and Order at 17; Director's Exhibit 11-615; *see* 20 C.F.R. §718.103 (2013). The administrative law judge similarly discounted all of the blood gas study results, finding them either outdated or unreliable, because they were performed during periods when the miner was hospitalized. Decision and Order at 17-18. The administrative law judge also found that the medical opinions lacked probative value. Specifically, the administrative law judge discounted the opinion of Dr. Younes, that the miner had a totally disabling obstructive respiratory impairment, as outdated and unreasoned. Decision and Order at 19; Miner's Claim Exhibit 2 at 53. The administrative law judge also discounted the contrary opinions of Drs. Jarboe and Rosenberg, that the miner could perform his usual coal mine work from a respiratory standpoint, because he found they were based on inaccurate assessments of the exertional requirements of the miner's last coal mining job. Decision and Order at 19-20; Employer's Exhibits 3, 4, 6, 8, 9.

employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Having discounted all of the medical evidence pertaining to total disability, the administrative law judge then noted that, pursuant to 20 C.F.R. §718.305(b) (2013), when there is no medical or relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered sufficient to establish total respiratory or pulmonary disability.⁵ Decision and Order at 20. Because the record contained only "discredited objective study evidence and unreasoned medical opinions," the administrative law judge stated that he would consider the lay testimony of claimant to determine whether total disability was established. *Id.*

The administrative law judge noted claimant's sworn statements that the miner "couldn't breathe" and "would hold [his] chest," and that his condition limited his ability to walk even short distances, or perform other activities. Decision and Order at 20; Director's Exhibit 10. The administrative law judge also considered claimant's testimony that the miner was very short of breath, "could barely make it on the hill," had to sleep propped up, and eventually used inhalers, supplemental oxygen, and breathing medications. Decision and Order at 20; Hearing Transcript at 13. The administrative law judge found the lay evidence from claimant to be credible, as she affirmed that she saw the miner regularly before he died, and because her testimony was "consistent with the extensive treatment and hospitalization notes which detail the [m]iner's persistent shortness of breath." Decision and Order at 20-21; Director's Exhibit 11.

The administrative law judge further noted that, in connection with the miner's initial claim, the miner testified that his last coal mine employment required him to shovel coal dust and put rock dust on the belt line, lift seventy-five to one hundred pounds each day, and perform general manual labor, including "bust[ing]" rocks. Decision and Order at 21. Based "on the lay testimony and treatment records, and absent medical evidence to the contrary," the administrative law judge determined that the miner did not have the "respiratory capacity to walk short distances, much less lift seventy-five pounds per day, or perform comparable work." *Id.* The administrative law judge concluded, therefore, that when considered with the lack of probative objective study evidence or medical opinions, "the lay evidence supports a finding of total disability." *Id.* Thus, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2) (2013) and invoked the Section 411(c)(4) presumption. *Id.*

⁵ The regulation at 20 C.F.R. §718.305(b) (2013), relied upon by the administrative law judge, has been revised and is now found at 20 C.F.R. §718.305(b)(4). As revised, 20 C.F.R. §718.305(b)(4), which is applicable to the present claim, is substantially similar to the provision applied by the administrative law judge. 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013).

Employer asserts that, because the record contains “substantial medical evidence,” including “several pulmonary function studies, arterial blood gas tests and multiple medical reports and treatment notes,” addressing the miner’s pulmonary status, it was not appropriate for the administrative law judge to rely on the lay testimony to find total disability established. Employer’s Brief at 11, *citing Coleman v. Director, OWCP*, 829 F.2d 3, 5, 10 BLR 2-287, 2-290 (6th Cir. 1987). We agree.

The Act provides that “[w]here there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case . . . shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis.” 30 U.S.C. §923(b). The implementing regulation at 20 C.F.R. §718.305(b)(4) clarifies that:

[I]n the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner’s physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner’s pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved.

20 C.F.R. §718.305(b)(4).

In *Coleman*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that the presence in the record of “medical evidence on the issue of disability due to a respiratory or pulmonary impairment” precludes the use of lay testimony to invoke the presumption of death due to pneumoconiosis.⁶ *Coleman*, 829 F.2d at 5, 10 BLR at 2-290. As employer asserts, and as set forth above, the record in this case contains multiple pulmonary function studies, blood gas studies, medical opinions, and treatment notes which address the miner’s pulmonary or respiratory condition prior to his death. Thus, pursuant to *Coleman*, claimant is precluded from relying on lay testimony to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.

Furthermore, while the administrative law judge stated that claimant’s testimony is “consistent with the extensive treatment and hospitalization notes which detail the

⁶ While the instant case is governed by the regulation at 20 C.F.R. §718.305(b)(4), *Coleman* was decided under an analogous lay testimony provision set forth at 20 C.F.R. §727.203(a)(5). *Coleman v. Director, OWCP*, 829 F.2d 3, 10 BLR 2-287 (6th Cir. 1987).

[m]iner's persistent shortness of breath," Decision and Order at 21, the treatment notes cannot establish the presence of a totally disabling respiratory or pulmonary impairment. The administrative law judge discounted the results of all of the pulmonary function studies and blood gas studies contained in the treatment notes, and the physicians' narrative comments do not address the degree of the miner's impairment, if any, or whether the miner retained the respiratory capacity to perform his usual coal mine work. *Id.*; Director's Exhibit 11. Therefore, we must conclude that the sole basis for the administrative law judge's finding that the miner had a totally disabling respiratory impairment, entitling claimant to invocation of the Section 411(c)(4) presumption, is lay testimony. As we cannot affirm an award of benefits in this case based solely on the lay testimony, *see* 20 C.F.R. §718.305(b)(4), claimant is not entitled to benefits pursuant to Section 411(c)(4). We, therefore, reverse the administrative law judge's award of benefits on this basis.

Further, under the facts of this case, claimant cannot establish entitlement to benefits pursuant to 20 C.F.R. §718.205(b), without the aid of the Section 411(c)(4) presumption. Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). When the Section 411(c)(4) presumption does not apply, a miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(b)(1)-(4). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 24 BLR 2-257 (6th Cir. 2010). Here, the administrative law judge specifically found that the medical opinion evidence is insufficient to carry claimant's burden of proof to establish that the miner's death was due to pneumoconiosis, and the record supports that determination.⁷

⁷ A review of the record does not disclose any medical opinion supportive of a finding that pneumoconiosis hastened the miner's death. Drs. Jarboe and Rosenberg both opined that pneumoconiosis played no role in the miner's death. Employer's Exhibits 3, 4, 6. The miner's death certificate, completed by the coroner, indicates that the cause of the miner's death was cardiac arrest, due to arteriosclerotic heart disease. Director's Exhibit 9. Dr. Younes's medical opinion is dated approximately ten years prior to the miner's death. Miner's Claim Exhibit 2 at 53. Finally, the bulk of the medical treatment notes are dated prior to the miner's death, and the medical treatment notes completed on the day of the miner's death document only the miner's symptoms of a "likely" myocardial infarction. Director's Exhibit 11 at 2-4.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reverse the administrative law judge's finding that claimant established invocation of the presumption of death due to pneumoconiosis through lay testimony, pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4). The implementing regulation at 20 C.F.R. §718.305(b)(4) specifically provides that "[i]n the case of a deceased miner, affidavits . . . from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other *relevant* evidence exists which addresses the miner's pulmonary or respiratory condition." 20 C.F.R. §718.305(b)(4) (emphasis added). Here, the administrative law judge evaluated the medical evidence in detail, and permissibly concluded that it was not relevant to the issue of total disability.

Specifically, the administrative law judge noted that the record contained the results of three pulmonary function studies performed in 1993, 1999, and 2002, all of which were non-qualifying,⁸ pursuant to 20 C.F.R. §718.204(b)(2) (2013). The

⁸ A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii) (2013).

administrative law judge initially found that, as the results of the 1993 and 1999 pulmonary function studies were obtained approximately ten or more years prior to the miner's death, they are of "little probative value." Decision and Order at 17; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). The administrative law judge found that the third pulmonary function study, while more recent, was not accompanied by three tracings or the flow volume loop, as required by the quality standards pertaining to pulmonary function studies developed in connection with a claim for benefits. Decision and Order at 17; Director's Exhibit 11-615; *see* 20 C.F.R. §718.103 (2013). Consequently, the administrative law judge discredited the 2002 study as unreliable. Therefore, the administrative law judge concluded that "the pulmonary function study evidence of record is entitled to little probative weight and neither establishes nor rules out total disability" at 20 C.F.R. §718.204(b)(2)(i) (2013). Decision and Order at 17.

The administrative law judge next considered the results of seventeen blood gas studies dating from 1993 to 2008, pursuant to 20 C.F.R. §718.204(b)(2)(ii) (2013). He found that the first two studies, dating from 1993 and 1999, were "too outdated to offer any probative value." Decision and Order at 17; *see Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Coffey*, 5 BLR at 1-404. Considering the remaining fifteen blood gas studies, dating from 2002 to 2008, the administrative law judge found that, while more recent, those studies were performed when the miner was hospitalized with severe cardiac and respiratory conditions. Decision and Order at 17-18. Reasoning that the studies are "not likely representative of the miner's true lung function" because medication and breathing treatments were administered during the hospitalizations, the administrative law judge accorded these blood gas studies "little probative weight." *Id.* at 18. Thus, the administrative law judge concluded that the blood gas study evidence of record "neither confirms nor refutes total disability." *Id.* The administrative law judge also found that, as there was no evidence of cor pulmonale in the record, claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii) (2013).

The administrative law judge also considered the opinions of Drs. Younes, Jarboe, and Rosenberg, pursuant to 20 C.F.R. §718.204(b)(2)(iv) (2013). In a report prepared in 1999, in connection with the miner's claim, Dr. Younes opined that the miner had a totally disabling obstructive respiratory impairment. Miner's Claim Exhibit 2 at 53. In contrast, based on record reviews conducted in 2011, Drs. Jarboe and Rosenberg opined that the miner was not disabled from a respiratory standpoint, but retained the pulmonary capacity to perform his usual coal mine work. Employer's Exhibits 3, 4, 6, 8, 9. The administrative law judge initially accorded "no probative weight" to Dr. Younes's opinion, finding it to be "neither well-reasoned nor sufficiently recent."⁹ Decision and

⁹ The administrative law judge found Dr. Younes's opinion to be internally inconsistent. Decision and Order at 19. The administrative law judge noted that,

Order at 19. The administrative law judge also accorded “little probative weight” to the opinions of Drs. Jarboe and Rosenberg, finding that neither physician had an accurate assessment of the exertional requirements of the miner’s last coal mining job. *Id.* at 19-20. Consequently, the administrative law judge concluded that, as there was “no reasoned medical opinion on the issue of total disability,” the medical opinion evidence “does not support a finding of total disability, but it does not preclude a finding of total disability.” *Id.* at 20.

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

I would hold that, under the facts of this case, the administrative law judge’s determination that there is no credible medical evidence of record addressing total disability equates to a finding that there is no relevant evidence that addresses the miner’s pulmonary condition. Consequently, I would hold that the administrative law judge was not precluded from relying on the lay testimony, together with the medical treatment notes, to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.

I would also hold that the administrative law judge acted within his discretion in finding that there is no credible medical evidence on the issue of total disability. The administrative law judge found that the April 15, 2002 pulmonary function study, which was performed when the miner was hospitalized, was unreliable because it lacked the requisite number of tracings. Decision and Order at 17; Director’s Exhibit 11. The Board has held that because the quality standards apply only to evidence developed in connection with a claim for benefits, they are inapplicable to hospitalization and treatment records. *J.V.S. [Stowers] v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008); *see* 20 C.F.R. 718.101(b) (2013); 64 Fed. Reg. 54,966, 54,975 (Oct. 8, 1999); 65 Fed. Reg. 79,928 (Dec. 20, 2000). However, an administrative law judge “still must be persuaded that the evidence is reliable in order for it to form a basis for a finding of fact on an entitlement issue.”¹⁰ 65 Fed. Reg. 79,928 (Dec. 20, 2000). Here, the

following his examination of the miner on March 31, 1999, Dr. Younes opined that the miner had a moderate obstructive impairment that “may” interfere with his ability to perform his last coal mine employment. *Id.*; Miner’s Claim Exhibit 2 at 50. However, in response to a questionnaire dated April 5, 1999, Dr. Younes opined that, due to his moderate obstructive impairment, the miner did not retain the respiratory capacity to perform his usual coal mine work or comparable work. Miner’s Claim Exhibit 2 at 54.

¹⁰ The comments to the revised regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

administrative law judge explained his reluctance to rely on objective test results that were obtained during the miner's hospitalizations. Decision and Order at 13. Therefore, I would reject employer's assertion that the administrative law judge erred in declining to consider the April 15, 2002 pulmonary function study results. Employer's Brief at 11. As employer raises no other challenge to the administrative law judge's findings regarding the credibility of the remaining pulmonary function studies, blood gas studies, or medical opinions, relevant to the existence of total disability, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), I would affirm the administrative law judge's findings that the record contains no credible medical evidence relevant to whether the miner suffered from a totally disabling respiratory impairment, and that, consequently, claimant could rely on lay testimony to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis.

I would also reject employer's alternative contention that, even if it were permissible for the administrative law judge to consider the lay testimony, he erred in finding that it established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) (2013). Employer's Brief at 12-15. The relevant regulation specifically provides that, where reliance on lay testimony is appropriate, "affidavits . . . from persons knowledgeable of the miner's physical condition *must* be considered sufficient to establish total disability due to a respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(4) (emphasis added). Further, as the record in the survivor's claim contains evidence that postdates the evidence in the miner's claim, the findings in the miner's claim, that the miner was not totally disabled, do not preclude claimant from establishing total disability in her survivor's claim. For the foregoing reasons, I would conclude that substantial evidence supports the administrative law judge's finding that the miner was totally disabled, and I would affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

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

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 of proof shifted to employer to establish rebuttal by disproving the existence of clinical and legal pneumoconiosis, or by proving that no part of the miner's death was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(2); 78 Fed. Reg. 59,115 (Sept. 25, 2013); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012). The administrative law judge found that employer did not meet its burden to establish rebuttal. Decision and Order at 21, 32. I would affirm this finding.

After finding that employer disproved the existence of clinical pneumoconiosis,¹¹ the administrative law judge addressed whether employer disproved the existence of legal pneumoconiosis.¹² On this issue, the administrative law judge considered the opinions of Drs. Younes, Jarboe, and Rosenberg. Dr. Younes diagnosed the miner with chronic obstructive pulmonary disease (COPD) and chronic bronchitis, based on the results of objective testing, and opined that both conditions were due, in part, to coal mine dust exposure. Miner's Claim Exhibit 2. Dr. Younes also diagnosed coronary artery disease. *Id.* Dr. Jarboe opined that the miner did not have legal pneumoconiosis because, despite the numerous references to COPD in the miner's treatment notes, the objective testing he reviewed did not reflect any airflow obstruction or restriction, or any gas exchange impairment caused by a pulmonary problem. Employer's Exhibit 4. Rather, Dr. Jarboe opined, the miner's symptoms were due to coronary artery disease and resultant congestive heart failure. *Id.* Dr. Rosenberg similarly opined that the miner did not have legal pneumoconiosis. Employer's Exhibit 3. He acknowledged that the treatment records he reviewed documented the presence of COPD, but he opined that the records lacked objective test results or clinical manifestations to confirm a diagnosis of COPD. *Id.* Dr. Rosenberg concluded that the miner's symptoms were related to his severe congestive heart failure, and not to any pulmonary impairment. *Id.*

¹¹ "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) (2013).

¹² "Legal pneumoconiosis" is defined as "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) (2013).

The administrative law judge found that Dr. Younes's opinion was "well-reasoned and well-documented on the issue of legal pneumoconiosis," but was entitled to "slightly less probative weight" due to the age of his report. Decision and Order at 29. In contrast, the administrative law judge indicated that he was "not persuaded by Dr. Jarboe that the miner did not have severe COPD arising out of coal mine employment." *Id.* at 27. The administrative law judge also found that Dr. Rosenberg's opinion was "not convinc[ing]," for much the same reasons as he did not find Dr. Jarboe's opinion persuasive. *Id.* at 28. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 29.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Jarboe and Rosenberg did not disprove the existence of legal pneumoconiosis. Employer's Brief at 19-22. I disagree. As set forth below, the administrative law judge permissibly found that the reasons given by Drs. Jarboe and Rosenberg for concluding that the miner did not have legal pneumoconiosis were not persuasive. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Initially, I would reject employer's contention that the administrative law judge applied an incorrect rebuttal standard. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish that the miner did not have pneumoconiosis. The United States Court of Appeals for the Sixth Circuit has held that "rebuttal [of the Section 411(c)(4) presumption] requires an affirmative showing . . . that the [miner did] not suffer from pneumoconiosis," and that an employer bears the burden to "affirmatively prove[] the absence of pneumoconiosis. . . ." *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 n.5, 25 BLR 2-1, 2-9, 2-12 n.5 (6th Cir. 2011). Therefore, I would reject employer's contention that the administrative law judge erred when he required employer's physicians to provide persuasive opinions establishing that the miner did not have an obstructive impairment due, in part, to his nineteen years of coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2) (2013), 718.305(d)(2)(i)(A), (B); *Morrison*, 644 F.3d at 480 n.5, 25 BLR at 2-12 n.5; Decision and Order at 21, 26-28.

In assessing the credibility of the physicians' opinions, the administrative law judge accurately noted that Dr. Jarboe opined that the miner did not have coal mine dust-related COPD, in part, because the objective testing he reviewed contained no evidence confirming the presence of a significant obstructive impairment. Decision and Order at 27-27; Employer's Exhibit 4. Similarly, the administrative law judge noted that Dr. Rosenberg eliminated legal pneumoconiosis as a cause of the miner's symptoms, in part, based on the absence of objective evidence in the record reflecting a restrictive or obstructive impairment, or a gas exchange abnormality. Decision and Order at 27-28; Employer's Exhibits 3; 6 at 9-11. The administrative law judge permissibly discounted

the opinions of Drs. Jarboe and Rosenberg, in part, because the objective testing on which they relied, including the April 15, 2002 pulmonary function and blood gas study, had been discredited. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Decision and Order at 26-28. The administrative law judge further discounted their opinions because neither physician reviewed the results of the December 13, 2001 computerized tomography (CT) scan, which was interpreted by Dr. Meyer, a Board-certified radiologist and B reader, as consistent with emphysema. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 26-28; Employer's Exhibit 2.

Therefore, contrary to employer's contentions, the administrative law judge provided valid reasons for discounting the opinions of Drs. Jarboe and Rosenberg, that the miner did not suffer from coal mine-dust-related COPD.¹³ Substantial evidence supports the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. Thus, I would 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.

In considering whether employer established that the miner's death did not arise out of coal mine employment, the administrative law judge again considered the opinions of Drs. Jarboe and Rosenberg. Dr. Jarboe opined that the miner's death was "due to a terminal cardiac event, namely, a myocardial infarction superimposed on advanced ischemic cardiomyopathy." Employer's Exhibit 4 at 10. Dr. Jarboe concluded that the inhalation of coal mine dust or the presence of coal worker[s'] pneumoconiosis did not cause, aggravate or contribute" to the miner's death. *Id.* Dr. Rosenberg similarly opined that the miner died due to "left-sided heart disease with worsening left-sided congestive heart failure and ultimately [a] myocardial infarction." Employer's Exhibit 3 at 6. Dr. Rosenberg concluded that the miner's "ultimate demise clearly had nothing to do with his past coal mine employment. Coal mine dust exposure can be ruled out as a cause for death." *Id.*

Employer argues that the administrative law judge erred in requiring Drs. Jarboe and Rosenberg to rule out the possibility that the miner's death was due to pneumoconiosis. Employer's Brief at 29-30. Employer's argument lacks merit. The implementing regulation at 20 C.F.R. §718.305(d)(2)(ii), that was promulgated after the

¹³ Thus, I would decline to address employer's arguments regarding the administrative law judge's additional reasons for discounting the opinions of Drs. Jarboe and Rosenberg, or the weight that the administrative law judge accorded to Dr. Younes's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

administrative law judge's decision, requires the party opposing entitlement in a miner's claim to establish "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)(ii); see *Morrison*, 644 F.3d at 480 n.5, 25 BLR at 2-12 n.5.

The administrative law judge found that Drs. Jarboe and Rosenberg concluded that the miner died of heart disease that was unrelated to coal mine dust exposure. Decision and Order on Remand at 38. These physicians, however, did not believe that the miner suffered from any coal mine-dust-related pulmonary impairment, contrary to the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. The administrative law judge, therefore, permissibly discounted their opinions that the miner's death was not related to pneumoconiosis. See *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). Consequently, I would affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that the miner's death did not arise out of coal mine employment. See *Copley*, 25 BLR at 1-89.

Because I would affirm the administrative law judge's findings that employer did not disprove the existence of pneumoconiosis, or establish that the miner's death did not arise out of coal mine employment, I would affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Therefore, I would affirm the award of benefits.

BETTY JEAN HALL
Administrative Appeals Judge