U.S. Department of Labor

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

BRB No. 14-0408 BLA

WILSON CANTRELL (Deceased)[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIZWIL, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/17/2015
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

[1] The caption in the administrative law judge's Decision and Order reflects claimant's last name followed by his first name, i.e., "Cantrell Wilson." Claimant passed away on March 17, 2014, while the instant claim was still pending before the administrative law judge. By Order dated December 22, 2014, the Board denied claimant's widow's motion to be substituted as the claimant, but has updated its records to reflect that claimant is deceased.

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

Kathleen H. Kim (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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2010-BLA-05743) of Administrative Law Judge Joseph E. Kane 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). This case involves a subsequent claim filed on August 18, 2009.[2]

The administrative law judge found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308, and that the evidence established that claimant had a 10.44 year coal mine employment history, and a thirty-five pack-year smoking history.[3] The administrative law judge further found that the evidence submitted since the prior denial of benefits established the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and, thus, demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits of the subsequent claim, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

[2] Claimant's first claim, filed on August 6, 1993, was denied on May 23, 1996, because the existence of pneumoconiosis was not established. *Cantrell v. Bizwell, Inc.*, BRB No. 96-0323 BLA (May 23, 1996) (unpub.); Director's Exhibit 1 at 8, 274. Claimant's second claim, filed on November 20, 1998, was denied on March 5, 1999, because no element of entitlement was established. Director's Exhibit 2 at 8, 61. Claimant's second claim was administratively closed and deemed abandoned on May 19, 1999, because no further action was taken on that claim. *Id*. at 3.

[3] Claimant's last coal mine employment was in Kentucky. Director's Exhibit 12; Hearing Tr. at 12. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

On appeal, employer contends that the administrative law judge erred in finding that this subsequent claim was timely filed. Employer also contends that the administrative law judge erred in finding 10.44 years of coal mine employment. Employer further contends that the administrative law judge erred in finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief urging the Board to affirm the administrative law judge's timeliness finding, and affirm the award of benefits. Employer filed a reply brief, reiterating its contentions on appeal.[4]

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

20 C.F.R. §725.308-Timeliness

Employer initially contends that the administrative law judge erred in finding that the August 18, 2009 claim was timely filed. Section 422(f), 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis that has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The "burden falls on employer to prove that the claim was filed outside the limitations period." *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). The question of whether the evidence is sufficient to establish rebuttal of the presumption of the timely filing of a claim pursuant to Section 725.308(a) involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23.

In finding that the Section 725.308 presumption of timeliness was not rebutted, the administrative law judge stated:

> Employer has not advanced any argument, either by motion, at the hearing, or in its post-hearing brief, as to why this claim is untimely. Therefore, I find that Employer has failed to rebut the presumption of timeliness, and conclude this claim is timely.

Decision and Order at 5.

Employer asserts that, in connection with his claim for state black lung benefits, claimant testified that his doctor, E.E. Musgrave, told him in 1980 that he had black lung disease, or pneumoconiosis. Employer's Brief at 14, *citing* Director's Exhibit 14 at 2. Employer further asserts that Dr. Musgrave testified that he believed claimant's pneumoconiosis became disabling by March 29, 1988.[5] Employer's Brief at 14, *citing* Director's Exhibit 14 at 4. Employer contends that "these facts are uncontradicted" and establish that claimant's initial, 1993, claim, and all subsequent claims, are time barred. Employer's Brief at 15-16, *citing Stolitza v. Barnes & Tucker Co.*, 23 BLR 1-94 (2005) (holding that where a previous claim was finally denied as untimely, that decision is res judicata, and bars the filing of a subsequent claim). Employer asserts that the fact that it did not advance this argument with more specificity before the administrative law judge is of no consequence, as there is no dispute that it contested the issue of timeliness, and "the record contains proof for the [administrative law judge] to have considered." Employer's Brief at 16. Employer contends, therefore, that the administrative law judge's finding is erroneous and requires reversal of the award of benefits. We disagree.

First, in a subsequent claim, the prior denial must be accepted as both final and correct. *Arch of Ky. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483**,** 24 BLR 2-135, 2-

[5] Employer relies on deposition testimony taken in connection with claimant's Kentucky workers' compensation claim for occupational pneumoconiosis, as summarized in the April 26, 1991 decision of the Kentucky Workers' Compensation Board. Specifically, that decision references claimant's testimony that Dr. Musgrave told him that he had pneumoconiosis in 1980. Director's Exhibit 14 at 2. That decision also recounts that, with respect to that same claim, Dr. Musgrave testified by deposition that he did not remember telling claimant that he had pneumoconiosis in 1980, but may have told claimant that he had pneumoconiosis but that it was not disabling. *Id*. at 3. When asked when claimant's pneumoconiosis became totally disabling, Dr. Musgrave replied, "From 5-11-85, he showed advancing chronic obstructive pulmonary disease, but not until 3-29-88, was the diagnosis established as anthracosilicosis, [s]tage 2." *Id*. at 3-4.

153 (6th Cir. 2009); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 616, 23 BLR 2-345, 2-361 (4th Cir. 2006); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-89 (3d Cir. 1995) (holding that a claimant filing a subsequent claim is "precluded from collaterally attacking the prior denial of benefits"); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-222 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Thus, a medical determination of total disability due to pneumoconiosis predating a denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *See Brigance*, 718 F.3d at 594, 25 BLR at 2-279-80; *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54. Therefore, as the Director correctly asserts, "[i]t is now too late" for employer to rely on Dr. Musgrave's opinion. Director's Brief at 3. The intervening final denials of claimant's 1993 and 1998 claims, on the grounds that claimant was not totally disabled due to pneumoconiosis, must be considered final and correct, and necessarily repudiate the opinion of Dr. Musgrave upon which employer relies. *Id.* Consequently, the opinion of Dr. Musgrave cannot trigger the running of the three-year time limit for filing claimant's 1993, 1998, or 2009 claims.[6] *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54.

Second, neither claimant's testimony, that Dr. Musgrave told him he had pneumoconiosis, nor Dr. Musgrave's testimony, that claimant's diagnosis had progressed to "anthracosilicosis, [s]tage 2" as of March 29, 1988, establishes that a diagnosis of total disability due to pneumoconiosis was ever communicated to claimant. 20 C.F.R. §725.308(a). Thus, there is no merit to employer's contention that "there can be no dispute that [this evidence] demonstrates that [claimant's] claims" were time barred.[7] Employer's Brief at 15-16. Finally, as the Director asserts, employer has not alleged that there is any other medical evidence that could trigger the three-year statute of limitations. Director's Brief at 3.

We, therefore, affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness, and further affirm his determination that the claim was timely filed.

[6] Moreover, employer's reliance on *Stolitza v. Barnes & Tucker Co.*, 23 BLR 1-94 (2005), is misplaced, as none of claimant's prior claims was denied as untimely.

[7] We, therefore, need not address employer's contention, advanced in its reply brief, that Dr. Musgrave's opinion cannot be deemed a misdiagnosis because it was "withheld from disclosure" in both claimant's prior and current claims. Employer's Reply Brief at 2.

Length of Coal Mine Employment

Employer next challenges the administrative law judge's determination that claimant established 10.44 years of coal mine employment. Employer asserts that the administrative law judge calculated the years of coal mine employment without reference to the evidence in the record. Specifically, employer argues that, for the years 1972 through 1977, the administrative law judge erred in crediting claimant with each quarter in which he earned $50.00 or more in coal mine employment, as reflected in his Social Security Administration (SSA) earnings records. Employer's Brief at 16-17. Employer asserts that use of this method does not adequately account for the variation in claimant's earnings, or for claimant's testimony regarding his length of his employment, and his hourly wages, at certain companies.[8] For the years from 1978 to 1985, for which the SSA did not report quarterly earnings, employer asserts that if the administrative law judge had divided claimant's reported annual earnings by his stated hourly wages, claimant would have been credited with less than the 6.44 years of coal mine employment the administrative law judge found for this period.[9] Employer contends that,

[8] Specifically, employer notes that claimant's Social Security Administration (SSA) earning records reflect that for the first quarter of 1973, claimant earned $1,068.75 for Williams Grocery Company, in non-coal mine work, but earned only $143.00 for Evans & Dixon, a coal mine employer. Employer's Brief at 16; Director's Exhibit 12 at 5. Employer also notes that in 1974, claimant's quarterly earnings from coal mine employment ranged from $105.00 to $1,612.75, in the same year. Employer's Brief at 16. Further, employer asserts that crediting claimant with a full quarter of employment when he earned only $105.00 fails to account for claimant's testimony that, during that time, he "[thought he] might have been making . . . $6.00 an hour." Hearing Tr. at 29; Employer's Brief at 16. Employer also asserts that the administrative law judge erred in crediting claimant with six months of employment in 1973 when he testified that he only worked for the first few months of that year. Employer's Brief at 16. Employer asserts that, if the time is calculated properly, claimant worked only 3.5 years in coal mine employment between 1972 and 1977, not 4.00 years. Employer's Brief at 16.

[9] Employer only identifies error with respect to two years during this period. Specifically, employer asserts that, "[b]ased on [claimant's] testimony that he earned $13.00 per hour when he worked at Diamond P. [Coal Company]," claimant's annual earnings for 1978 would reflect 82 days of employment, not .48 years, and claimant's annual earnings for 1979 would reflect 106 days of employment, not one year. Employer's Brief at 17. Contrary to employer's contention, however, claimant testified that for the years 1978 and 1979, he earned "around $7.00" per hour at Diamond P. Coal Company, and his hourly rate was increased to only $9.00 for his last two years of employment. Hearing Tr. at 34. Thus, even employer's suggested method of computation would yield more coal mine employment than employer assumes.

taking these factors into account, the combined total for claimant's two periods of employment is "less than ten years," not 10.44 years, as found by the administrative law judge. Employer's Brief at 16-17; Reply Brief at 3-4. Employer's arguments are not persuasive.

A review of the Decision and Order reveals that the administrative law judge set forth his findings of fact and conclusions of law, based on his assessment of the relevant evidence of record. Decision and Order at 5-8. In determining the total length of claimant's coal mine employment, the administrative law judge noted that, in addition to the district director's determination that claimant had eleven years of coal mine employment, the record also contained claimant's hearing testimony, the work histories he submitted to the Department of Labor, his coal mine employment records, and his SSA earnings records. Decision and Order at 5, 8. For the years 1972 through 1977, relying on claimant's SSA earnings records, the administrative law judge identified the number of quarters in each year in which claimant's SSA earnings statement indicated that he earned at least $50.00 from coal mine employment, and credited claimant with a total of sixteen quarters, or four years of employment, for this period. Decision and Order at 6. The Board has held that this is a reasonable method of calculation.[10] *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Thus, the administrative law judge acted within his discretion in relying on the SSA earnings record to credit claimant with two quarters of coal mine employment in 1972, two quarters in 1973, four quarters in 1974, three quarters in 1975, two quarters in 1976, and three quarters in 1977, for a total of four years, irrespective of the amount of claimant's earnings from quarter to quarter, or year to year. *See Tackett*, 6 BLR at 1-841; Decision and Order at 7.

The administrative law judge next considered claimant's employment from 1978 through 1985, when claimant's SSA earnings record ends, correctly noting that, after 1977, the SSA records do not break down claimant's yearly earnings into quarters, but reflect only an annual sum for each employer.

The administrative law judge determined that, while the record reflected that claimant worked for Diamond P. Coal Company (Diamond P.) from 1978 to 1983, the

[10] Although employer has pointed to earnings from non-coal mine work during the first quarter of 1973, in urging that the earnings from coal mine employment in that quarter not be credited under the SSA formula, the amount for non-coal mine work in this case does not itself demonstrate that claimant did not engage in coal mine employment which would count as full-time. Nor is there unequivocal, credible evidence of claimant having been paid an hourly wage in coal mine employment that would demonstrate that claimant did not engage in coal mine employment for the full quarter. Consequently, the administrative law judge's use of the SSA formula was not clearly unreasonable.

evidence was insufficient to establish the beginning and ending dates of claimant's employment. Thus, for the years 1978 and 1983, the administrative law judge compared claimant's yearly earnings with the yearly wage base set forth in Exhibit 609 of the Department of Labor's "Wage Base History" (Exhibit 609), to determine whether claimant's wages met or exceeded the yearly wage base.[11] Because claimant's yearly earnings were less than the yearly wage base for both 1978 and 1983, the administrative law judge divided claimant's earnings by the wage base to credit claimant with a portion of a year. Applying this method, the administrative law judge credited claimant with a total of 1.09 years of coal mine employment for these years.[12] For the intervening years, 1979-1982, based on the SSA earnings record that reflected that claimant was continuously employed with Diamond P., the administrative law judge credited claimant with a total of four years. Decision and Order at 7. Finally, for the years 1984-1985, the administrative law judge relied on a letter from employer's representative, stating that claimant was employed from June 11, 1984 to September 20, 1985, to credit claimant with a total of 1.35 years.[13] Combining all calculations, the administrative law judge credited claimant with a total of 10.44 years of coal mine employment. Decision and Order at 8.

The Board will uphold the administrative law judge's computation of time spent in coal mine employment if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole. *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co*., 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Smith v. Nat'l Mines Corp*., 7 BLR 1-803, 1-805 (1985). We find no merit to employer's contention that the administrative law judge calculated claimant's years of coal mine employment without adequate reference to the evidence in the record, as the administrative law judge permissibly relied primarily on claimant's SSA earnings records, together with his employment records. *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett*, 6 BLR at 1-841; Decision and Order at 8. Contrary to employer's argument, the administrative law judge was not

[11] Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*, *Wage Based History*, contains the Social Security Administration's wage base table, which reflects the maximum amount of yearly earnings by employees on which employers and employees are required to pay social security tax. *See* http://www.dol.gov/owcp/dcmwc/exh609.htm.

[12] The administrative law judge credited claimant with .48 years of coal mine employment for 1978 and .61 years for 1983. Decision and Order at 7.

[13] The administrative law judge credited claimant with .55 years in 1984 and .80 years in 1985. Decision and Order at 7-8.

required to divide claimant's reported annual earnings by his stated hourly wage, to determine the number of days claimant worked.[14] As the administrative law judge employed reasonable methods of computation and sufficiently explained their use, *see Muncy*, 25 BLR at 1-27; *Preston*, 6 BLR at 1-1232; *Tackett*, 6 BLR at 1-841, and substantial evidence supports his findings, we affirm his determination of 10.44 years of coal mine employment.

Merits of Entitlement

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Legal Pneumoconiosis

Employer asserts that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge considered the opinions of Drs. Rasmussen, Sikder, Dahhan, and Tuteur. Drs. Rasmussen and Sikder opined that claimant had legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure. Director's Exhibit 20; Claimant's Exhibits 1, 2. Drs. Dahhan and Tuteur opined that claimant did not have legal pneumoconiosis, and that his totally disabling COPD was due entirely to cigarette smoking. Director's Exhibit 23; Employer's Exhibits 2, 4, 5.

The administrative law judge discredited the opinions of Drs. Dahhan and Tuteur because he found that each was inadequately reasoned or explained, and inconsistent with the scientific evidence credited by the Department of Labor (DOL) in the preamble to the 2001 regulatory revisions.[15] Decision and Order at 28-30. Conversely, the administrative law judge found that Dr. Rasmussen's diagnosis of legal pneumoconiosis

[14] We note that claimant's testimony, on which employer urges reliance, is somewhat equivocal as to the wages he received. Moreover, claimant's testimony was given in 2012, more than twenty years after he was last employed, and more than thirty years after the period of coal mine employment earnings questioned by employer.

[15] The administrative law judge also accorded less weight to the diagnosis of legal pneumoconiosis by Dr. Sikder because she relied on a significantly overstated coal mine employment history. Decision and Order at 28.

was well-reasoned and well-documented, and supported by the medical science underlying the revised regulations. Decision and Order at 27-28. According "full probative weight" to Dr. Rasmussen's opinion, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer initially asserts that the administrative law judge erred by referring to the preamble to the 2001 regulatory revisions when evaluating the credibility of the medical opinions. Employer's Brief at 17-23. Employer's assertion lacks merit. The preamble sets forth scientific evidence which the DOL found reliable when drafting the regulations. *See Arch On The Green, Inc. v. Groves*, 761 F.3d 594, 601, 25 BLR 2-615, 2-627 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Director's Brief at 4. Contrary to employer's contention, the preamble is not a legislative ruling requiring notice and comment, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990), and does not constitute evidence outside the record, requiring the administrative law judge to give notice and an opportunity to respond. *Adams*, 694 F.3d at 801-03, 25 BLR at 2-211-12. Further, multiple circuit courts, and the Board, have held that an administrative law judge, as part of the deliberative process, may rely on the preamble as a guide in assessing the credibility of the medical evidence. *See Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Obush*, 650 F.3d at 257, 24 BLR at 2-383; *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Employer's Brief at 18-19; Director's Brief at 4. Accordingly, we reject employer's argument that the administrative law judge erred in utilizing the preamble in his evaluation of the medical opinion evidence.

Employer also contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find legal pneumoconiosis established. Employer asserts that Dr. Rasmussen's opinion cannot satisfy claimant's burden of proof. Employer's Brief at 23-24. Employer's argument lacks merit.

The administrative law judge initially noted that Dr. Rasmussen's conclusions were based on his physical examination of claimant, claimant's exposure histories, and the results of objective testing. The administrative law judge further correctly noted that, in concluding that coal mine dust was a "significant co-contributor," along with cigarette smoking, to claimant's COPD/emphysema, Dr. Rasmussen initially considered an inflated coal mine employment history of fifteen years, but a correct smoking history of

thirty-five pack-years.[16] Decision and Order at 5, 27; Director's Exhibit 20. The administrative law judge further noted, however, that Dr. Rasmussen testified at his deposition that he would not change his opinion regarding the etiology of claimant's respiratory impairment even if he assumed approximately eleven years of coal mine employment, stating:

> . . . I would still think both [coal mine dust and smoking] were contributing factors, although certainly having only 11 years compared to 15 would tend to reduce the significance of his coal mine dust exposure, but still would represent a significant co[-]contributor.

Claimant's Exhibit 1 at 29. On cross-examination, Dr. Rasmussen reiterated that he "would still believe the 11 years would rise to a level of significance, certainly not as much as the 15 years, but I believe it would rise to a minimal degree of significance." *Id.* at 32-33.

Contrary to employer's contention, it was within the administrative law judge's discretion to credit Dr. Rasmussen's opinion despite his reliance on a longer coal mine employment history than that found established by the administrative law judge. *See Clark*, 12 BLR at 1-155; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The administrative law judge specifically addressed this discrepancy and permissibly concluded that Dr. Rasmussen had ultimately relied on an eleven year coal mine employment history, which the administrative law judge observed was "very close to [his own] finding of 10.44 years." *See Clark*, 12 BLR at 1-155; *McMath*, 12 BLR at 1-9; *Lucostic*, 8 BLR at 1-47; Decision and Order at 27-28. Additionally, the administrative law judge noted that Dr. Rasmussen had considered whether claimant's COPD/emphysema could have been caused by his

[16] Dr. Rasmussen explained that smoking-induced chronic obstructive pulmonary disease (COPD)/emphysema is indistinguishable from that caused by coal dust, and that the effects of the two are additive. Claimant's Exhibit 1 at 27-30. Dr. Rasmussen concluded that because there was no way by physical, physiologic, or radiographic means to distinguish the effects of cigarette smoke and coal mine dust exposure, it was impossible to exclude either cause as a potential contributing factor to claimant's COPD/emphysema. Decision and Order at 27; Director's Exhibit 20. Dr. Rasmussen stated that, while his examination also revealed a positive x-ray for clinical pneumoconiosis, his opinion as to the cause of claimant's COPD/emphysema would not change even if the x-ray evidence was negative. Decision and Order at 27; Director's Exhibit 20. Dr. Rasmussen further stated that, although smoking was probably a greater contributor to claimant's impairment, claimant would not have been as impaired had he not also been exposed to coal mine dust. Claimant's Exhibit 1 at 38.

five years of employment as a driller at a limestone quarry, and explained that while claimant's rock dust exposure could have been a significant causative factor, claimant's coal mine dust exposure would still have been an additive factor. Decision and Order at 27; Claimant's Exhibit 1 at 33-34.

Because the administrative law judge appropriately found that Dr. Rasmussen based his opinion on claimant's physical examination, objective testing, symptoms, and work histories, and explained why he concluded that claimant's disabling COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's permissible determination that Dr. Rasmussen's diagnosis of legal pneumoconiosis is well-reasoned and documented and entitled to "full probative weight." *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); Decision and Order at 28. Moreover, because Dr. Rasmussen specifically opined that, even if claimant only had eleven years of coal mine dust exposure, "it would still represent a significant co[-]contributor" to his disabling COPD/emphysema, rising to a "minimal degree of significance," we affirm the administrative law judge's conclusion that Dr. Rasmussen's opinion is sufficient to satisfy claimant's burden of proof to establish the existence of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); *Groves*, 761 F.3d at 596-99, 25 BLR at 2-620-24 (holding that a physician's opinion that "most of [claimant's] impairment is secondary to cigarette smoking and that coal mine dust contributes to a minor degree" was sufficient to establish legal pneumoconiosis)*; Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); Director's Brief at 5-6.

We further reject employer's contention that the administrative law judge misapplied the preamble in discrediting the opinions of Drs. Dahhan and Tuteur as to the cause of claimant's disabling COPD. Employer's Brief at 20-21. Contrary to employer's assertion, the administrative law judge did not utilize the preamble as a presumption that all obstructive lung disease is pneumoconiosis, but instead consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 314-15, 25 BLR at 2-129-32; Director's Brief at 4. Specifically, the administrative law judge found that Dr. Dahhan excluded coal mine dust exposure as a cause of claimant's COPD, in part, because claimant's coal mine dust exposure ceased in 1992.[17] Contrary to employer's argument on this issue, as the Director asserts, the administrative law judge

[17] The administrative law judge correctly noted that claimant's last coal mine employment ended in 1985, not in 1992. Decision and Order at 29.

rationally discounted Dr. Dahhan's explanation because he found that it was inconsistent with the DOL's recognition of pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738-39 (6th Cir. 2014); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); Decision and Order at 29; Employer's Brief at 29; Director's Brief at 4; Employer's Exhibit 4 at 3. The administrative law judge further discounted Dr. Dahhan's opinion as his view, that claimant's 1700 cc loss in FEV1 "cannot be accounted for by the obstructive impact of coal dust," did not address partial contribution and implies that coal mine dust never, or rarely, causes disabling lung disease, contrary to the DOL's recognition that coal mine dust-induced COPD can be clinically significant. *See* 65 Fed. Reg. at 79,938 (Dec. 20. 2000)*; Sterling*, 762 F.3d at 491, 25 BLR at 2-645; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; Decision and Order at 28-29; Employer's Brief at 20; Employer's Exhibit 4 at 3.

The administrative law judge also correctly noted that, in excluding coal mine dust exposure as a cause of claimant's COPD, Dr. Dahhan stated that claimant's history of treatment with bronchodilators reflected that his treating physician "believe[d]" that claimant's COPD was "amenable by such measures, which is another finding inconsistent with the permanent adverse affect [sic] of coal dust on the respiratory system." Decision and Order at 29; Director's Exhibit 23 at 4. The administrative law judge permissibly discounted Dr. Dahhan's opinion, that claimant did not have an irreversible disease such as legal pneumoconiosis because he was being treated with bronchodilators, because it was both speculative, and failed to address the etiology of the fixed, irreversible portion of claimant's impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 29; Director's Exhibit 23 at 2-3.

Additionally, we affirm the administrative law judge's decision to accord Dr. Tuteur's opinion little weight. In excluding coal mine dust as a contributing factor to claimant's disabling COPD, Dr. Tuteur cited to medical studies and statistics indicating that claimant had a twenty percent chance of developing COPD from smoking, as opposed to a "1% or less" chance of developing it from coal mine dust exposure. Employer's Exhibit 2 at 9. The administrative law judge permissibly determined that Dr. Tuteur's opinion was entitled to "little probative weight" because he relied, at least in part, on generalities and statistics, rather than claimant's specific condition, and because his opinion reflected a belief that legal pneumoconiosis is a "rarity," contrary to the results of studies found credible by the DOL. *See* 65 Fed. Reg. 79,920, 79,938, 79,940 (Dec. 20, 2000); *Adams*, 694 F.3d at 801-03, 25 BLR at 2-210-12; *Knizner v. Bethlehem*

Mines Corp., 8 BLR 1-5, 1-7 (1985); Decision and Order at 30; Employer's Exhibit 2 at 9-10.

As the administrative law judge provided valid reasons for discounting the opinions of Drs. Dahhan and Tuteur, it is not necessary for the Board to address employer's remaining arguments concerning the administrative law judge's consideration of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Therefore, we affirm the administrative law judge's permissible determination to accord the greatest weight to Dr. Rasmussen's opinion, as well-reasoned, well-documented, and supported by the medical science accepted by the DOL, as set forth in the preamble, and we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Groves*, 761 F.3d at 601, 25 BLR at 2-627; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 31.

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218 (6th Cir. 2012); Decision and Order at 30-31. Because it is supported by substantial evidence, this finding is affirmed.[18] Consequently, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis.

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 24-25. We disagree. The administrative law judge rationally discounted the opinions of Drs. Dahhan and Tuteur because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that the evidence established the presence of the disease. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*,

[18] Having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge properly found that he was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203(b), as his finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 31.

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); Decision and Order at 32.

Moreover, there is no merit to employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion sufficient to meet claimant's burden of proof. As the Director asserts, in beginning his analysis of the medical opinions, the administrative law judge properly applied the "substantially contributing cause" standard, set forth in the regulations, and correctly stated that a "substantially contributing cause is one that has a material adverse effect on claimant's respiratory or pulmonary condition, or one that materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment." Decision and Order at 31, *citing* 20 C.F.R. §718.204(c); Director's Brief at 24. In evaluating Dr. Rasmussen's opinion, attributing claimant's disabling COPD/emphysema to coal mine dust exposure and smoking, the administrative law judge noted Dr. Rasmussen's explanation that the effects of both exposures are indistinguishable. Decision and Order at 31; Director's Exhibit 20. Additionally, the administrative law judge noted that, while Dr. Rasmussen stated that claimant's smoking history was sufficient to cause his disability, he clarified that claimant "would not be as disabled . . . had he not had his occupational exposure" to coal mine dust. Decision and Order at 31; Claimant's Exhibit 1 at 38. Further, the administrative law judge acknowledged Dr. Rasmussen's statement that while eleven years of coal mine dust exposure, as opposed to fifteen, would reduce the significance of his coal mine dust exposure, it would still be "a significant co-contributor" to claimant's total disability. Decision and Order at 31; Claimant's Exhibit 1 at 29, 32-33. Thus, having considered Dr. Rasmussen's opinion as a whole, the administrative law judge permissibly concluded that Dr. Rasmussen's opinion supported a finding that coal mine dust exposure "materially worsened" claimant's totally disabling COPD/emphysema. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; Decision and Order at 31. Therefore, contrary to employer's contention, and as the Director asserts, the administrative law judge rationally found that the opinion of Dr. Rasmussen established that legal pneumoconiosis was a "substantially contributing cause" of claimant's total disability, pursuant to 20 C.F.R. §718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004); Decision and Order at 32. Consequently, we affirm the administrative law judge's finding that claimant was totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge