

BRB No. 13-0168 BLA

VIKI WHITT )  
(On Behalf of RALPH T. NULL, deceased) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CONSOLIDATION COAL COMPANY ) DATE ISSUED: 01/30/2014  
 )  
 and )  
 )  
 CONSOL ENERGY, INCORPORATED )  
 )  
 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 Granting Benefits of Pamela J. Lakes,  
Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Tiffany B. Davis (Jackson Kelly PLLC),  
Morgantown, West Virginia, for employer.

Richard A. Seid (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: DOLDER, Chief Administrative Appeals Judge, SMITH and  
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-05275) of Administrative Law Judge Pamela J. Lakes, rendered on a subsequent claim filed on February 22, 2008,<sup>1</sup> pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that the miner had twenty-six years of coal mine employment. The administrative law judge determined that newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Based on her determinations that the miner worked at least fifteen years in underground coal mine employment and also suffered from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.<sup>3</sup>

On appeal, employer challenges the application of amended Section 411(c)(4) to this claim. Employer contends that the administrative law judge erred in finding that the miner was totally disabled and, therefore, erred in finding invocation of the amended Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in weighing the evidence relevant to rebuttal of the amended Section 411(c)(4)

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<sup>1</sup> Claimant is the daughter of the miner, who died on March 21, 2010. Director's Exhibits 50, 51. Claimant is pursuing the claim on behalf of the miner's estate. *Id.* The record shows that the miner filed three prior claims for benefits, each of which was denied. Director's Exhibits 1, 2, 3.

<sup>2</sup> Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

<sup>3</sup> The administrative law judge issued an Erratum to Decision and Order Granting Benefits on January 22, 2013, amending language to reflect her finding that the medical opinion evidence fails to preponderate against a finding of clinical pneumoconiosis.

presumption. Claimant has not filed a brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments with regard to the application of amended Section 411(c)(4) to this case. The Director takes no position on the weight accorded the evidence.<sup>4</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's assertion that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, in the absence of implementing regulations. Employer's Brief in Support of Petition for Review at 39-40. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010); *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2010). Moreover, the Department of Labor (DOL) recently promulgated regulations that are consistent with the provisions applied by the administrative law judge. Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

## **I. INVOCATION OF THE PRESUMPTION – TOTAL DISABILITY**

Employer contends that the administrative law judge erred in finding that the miner was totally disabled. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the two newly submitted pulmonary function tests, dated March 25, 2008 and August 20, 2008, were non-qualifying for total disability.<sup>6</sup> Decision and Order

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<sup>4</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner worked at least twenty-six years in coal mine employment, with more than fifteen years in underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7.

<sup>5</sup> As the miner's coal mine employment was in Virginia and West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

<sup>6</sup> 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).

at 8. Relevant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge noted that there were two newly submitted arterial blood gas studies. She found that a blood gas study conducted by Dr. Forehand on March 25, 2008, produced non-qualifying values at rest, but the “PO2 levels dropped after exercising” and were qualifying for total disability. Decision and Order at 9; *see* Director’s Exhibit 14. The administrative law judge also found an arterial blood gas study conducted by Dr. Hippensteel, on August 20, 2008, had non-qualifying values at rest, but that no exercise test was performed. Decision and Order at 9; Director’s Exhibit 32. The administrative law judge observed that “the blood gas studies, standing alone, neither support nor undermine a finding of total disability.” Decision and Order at 9. However, she indicated that the “significance” of the blood gas study findings would be addressed in relation to the medical opinions.<sup>7</sup> *Id.*

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the opinions of Drs. Forehand, Hippensteel and Rosenberg. The administrative law judge considered the qualifications of the physicians and stated:

Dr. Forehand is board-certified in allergy and immunology and board-eligible in pediatric pulmonary medicine, whereas Drs. Hippensteel and Rosenberg are board-certified in internal medicine with a subspecialty in pulmonary diseases. Although Dr. Forehand is not board-certified in pulmonary diseases, he is Director of the Southern Appalachian Center for Pulmonary Studies and has given numerous lectures on pulmonary diseases. Dr. Forehand has treated miners for pulmonary problems and performed black lung evaluations for decades, and I find that his opinion is not entitled to less weight on the basis that he lacked board certification in pulmonary diseases. *Instead, I will look at the reasoning supporting the doctors’ opinions as a basis for selecting among them.*

Decision and Order at 9 (internal citations omitted) (emphasis added).

The administrative law judge found that Dr. Forehand provided a well-reasoned opinion that the miner was totally disabled from performing his usual coal mine employment, based on the results of the exercise blood gas study he obtained. Decision and Order at 9-10. The administrative law judge further found that, “[a]lthough Dr.

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<sup>7</sup> The administrative law judge found that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure. Decision and Order at 9.

Hippensteel disputes that [the miner's] coal mine employment contributed to his impairment," his opinion "supports a finding of total disability" since he "agreed that [the miner] was totally disabled on a pulmonary or respiratory basis." *Id.* at 10. In contrast, the administrative law judge rejected Dr. Rosenberg's opinion, that the miner was not totally disabled from a respiratory or pulmonary standpoint, because Dr. Rosenberg "did not explain how [the miner] could perform his previous coal mine work from a pulmonary perspective given that, during the most recent testing, his oxygen levels decreased with exercise, particularly as [Dr. Rosenberg] noted that [the miner's] work involved medium to heavy manual labor." *Id.* at 10. The administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), and based on a weighing of all the relevant evidence together. *Id.* at 10-11. Because the miner had at least fifteen years of underground coal mine employment and was totally disabled, the administrative law judge found that claimant invoked the amended Section 411(c)(4) presumption. *Id.* at 11.

Employer argues that the administrative law judge erred by not considering all of the relevant qualifications of Drs. Hippensteel and Rosenberg.<sup>8</sup> Employer's Brief in Support of Petition for Review at 8-9. To the extent that employer maintains that the administrative law judge was required to credit its medical experts based on their alleged "superior" qualifications, that argument is rejected. *Id.* Although an administrative law judge may accord greater weight to a physician's opinion based on his or her expertise, the administrative law judge is not required to do so. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Furthermore, the administrative law judge rationally determined to resolve the conflict in the medical opinion evidence, based on the credibility of the reasoning provided by the physicians, as discussed *infra*. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Kiser v. L & J Equipment Company*, 23 BLR 1-246 (2006), slip op. at 5, n. 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

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<sup>8</sup> Specifically, employer argues that Dr. Hippensteel is more qualified than Dr. Forehand because he is Board-certified in critical care medicine, is a B reader and has held various positions and professorships, and that Dr. Rosenberg is more qualified than Dr. Forehand because he is Board-certified in occupational medicine, is a B reader, is well-published and has also held various positions and professorships. Employer's Brief in Support of Petition for Review at 8-9.

Relevant to the issue of total disability, the administrative law judge determined that the miner last worked as a foreman, and that his usual coal mine duties were “strenuous and involved crawling through mines and occasionally lifting heavy rails and rocks.” Decision and Order at 10, *citing* Director’s Exhibits 2, 32. She noted correctly that Dr. Forehand examined the miner on March 25, 2008, at the request of the Department of Labor, and opined, based on the results of the *qualifying* exercise arterial blood gas study, that the miner had “insufficient residual gas exchange capacity to return to his previous coal employment.” Decision and Order at 9-10; *see* Director’s Exhibit 14. The administrative law judge credited Dr. Forehand’s opinion because she determined that “Dr. Forehand reasonably opined that [the miner] was incapable of performing his last coal mine employment given his decrease in oxygenation with exercise.” Decision and Order at 10.

With regard to Dr. Rosenberg’s opinion, the administrative law judge noted that he acknowledged that the miner’s coal mine employment required “[a]nywhere from medium physical demands up to heavy or very heavy [demands], depending on the situation.” Employer’s Exhibit 2 at 6. The administrative law judge also observed that Dr. Rosenberg was aware that arterial blood gas testing, obtained by Dr. Forehand, revealed that the miner’s PO2 levels fell with exercise. *Id.* at 8-9. The administrative law judge found that Dr. Rosenberg’s opinion was not well-reasoned because “he does not explain how [the miner] could perform his previous coal mine work from a pulmonary perspective given that, during the most recent testing, his oxygen levels decreased with exercise, particularly as he noted that [the miner’s] work involved medium to very heavy physical demand.” Decision and Order at 10.

Employer asserts that Dr. Forehand’s opinion is entitled to little weight because he “neglected to discuss what, if any, impact [the miner’s] known significant cardiac disease had on the gas exchange impairment[.]” *Id.* at 19. Contrary to employer’s contention, the proper inquiry at 20 C.F.R. §718.204(b) is whether claimant has a totally disabling respiratory or pulmonary impairment. The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or, if claimant has successfully invoked the Section 411(c)(4) presumption, when evaluating the evidence on rebuttal. *See* 20 C.F.R. §718.204(b)(2); 30 U.S.C. §921(c)(4).

We reject employer’s arguments as they pertain to the opinions of Drs. Forehand and Rosenberg. The administrative law judge permissibly found that Dr. Forehand’s opinion is reasoned and well-documented, as it was based “on his own comprehensive examination of [the miner], which included clinical testing, a physical examination, a review of [the miner’s] medical, employment, and smoking history.” Decision and Order at 13; *see Clark*, 12 BLR at 1-155. In contrast, the administrative law judge rationally found that Dr. Rosenberg’s opinion was not sufficiently explained in light of the

objective evidence.<sup>9</sup> See *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Because the administrative law judge has broad discretion in rendering her credibility determinations, we affirm the administrative law judge's decision to credit Dr. Forehand's opinion and give "little weight" to Dr. Rosenberg's opinion. Decision and Order at 9-10; see *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

However, we agree with employer that the administrative law judge mischaracterized Dr. Hippensteel's opinion, in part. Dr. Hippensteel examined claimant and reviewed the objective evidence from Dr. Forehand's examination. Director's Exhibit 32. Dr. Hippensteel described the miner's gas exchange impairment as "variable" and specifically stated that this "is not associated with enough ventilatory impairment from any cause to keep [the miner] from returning to his job in the mines from a pulmonary standpoint." *Id.* Dr. Hippensteel also testified that the pulmonary function studies and the arterial blood gas studies "considered together" do not "document any impairment in [the miner] which would have prevented him from performing his most recent coal mine work[.]" Employer's Exhibit 3 at 20-21. Dr. Hippensteel concluded that the miner was "unable to go back to his job in the mines because of *multiple* medical factors unrelated to his prior coal mine dust exposure[,] which include severe coronary artery disease, his age, diabetes with neuropathy and obesity, which are diseases of the general public." *Id.* We agree with employer that the administrative law judge incorrectly stated that Dr. Hippensteel's opinion "supports a finding of total disability" at 20 C.F.R. §718.204(b)(2). Decision and Order at 10.

To the extent that the administrative law judge mischaracterized Dr. Hippensteel's opinion and did not address his specific statements on the issue of total disability, we must vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(iv), along with her determination that claimant is entitled to the presumption at amended Section 411(c)(4). Thus, we vacate the award of benefits and remand for the administrative law judge to reweigh the conflicting medical opinions of Drs. Forehand and Hippensteel and determine whether the miner was totally disabled by a respiratory or

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<sup>9</sup> Employer contends that Dr. Rosenberg has explained, based on the normal diffusion capacity test, why the miner's gas exchange abnormality with exercise is not due to a respiratory or pulmonary condition. Employer's Brief in Support of Petition for Review at 20. Employer's contention constitutes a request that we reweigh the evidence, which we are not empowered to do. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

pulmonary impairment. In considering whether the miner was totally disabled, the administrative law judge must address all of the relevant evidence, and explain the bases for her credibility determinations in accordance with the Administrative Procedure Act.<sup>10</sup> *Id.*

## II. REBUTTAL OF AMENDED SECTION 411(c)(4)

In the interest of judicial economy, we will address employer's arguments relevant to rebuttal of the amended Section 411(c)(4) presumption. In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant has neither clinical nor legal pneumoconiosis, or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief in Support of Petition for Review at 32-39, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976). We reject this argument for the reasons set forth in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring).<sup>11</sup> Moreover, as discussed *supra* n.2, the DOL recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1); *see also* 78 Fed. Reg. 59,101, 59,109 (Sept. 25, 2013); *Usery*, 428 U.S. at 37-38, 3 BLR at 2-58-59.

In considering whether employer rebutted the presumed fact of clinical pneumoconiosis,<sup>12</sup> the administrative law judge weighed five ILO-classified readings of

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<sup>10</sup> The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

<sup>11</sup> Employer's request that this case be held in abeyance pending a decision on appeal from *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4-5 (2011), is moot. *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J., concurring).

<sup>12</sup> The regulations provide:

one analog x-ray dated March 25, 2008. Decision and Order at 12. This x-ray was read as positive for pneumoconiosis by Drs. Miller and Alexander, both dually qualified as Board-certified radiologists and B readers, and as positive by Dr. Forehand, a B reader. Director's Exhibit 14; Claimant's Exhibits 1, 4. The same x-ray was read as negative for pneumoconiosis by Dr. Meyer, a dually qualified radiologist, and as negative by Dr. Tarver, a B reader. Director's Exhibit 14; Employer's Exhibit 4. Because two dually qualified radiologists read this x-ray as positive for pneumoconiosis, while one dually qualified radiologist read it as negative, the administrative law judge concluded that the March 25, 2008 x-ray "suggests the presence of clinical pneumoconiosis, or, at best, is in equipoise." Decision and Order at 12. In addition, the administrative law judge summarized the x-ray readings from the miner's previous claims, and found that this evidence "tends to establish the existence of pneumoconiosis."<sup>13</sup> *Id.* at 13. Therefore, the

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"Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

<sup>13</sup> The administrative law judge summarized this evidence as follows:

As Judge Rippey found in connection with the first claim, the x-ray evidence before him, consisting of readings of three x-rays (three relating to a 1976 x-ray, one relating to a 1980 x-ray, and two relating to a 1982 x-ray), was uniformly positive for pneumoconiosis. The x-ray evidence for the second claim (consisting of three readings of a 1988 x-ray, two of which were positive [by dually-qualified readers] and one of which was "0/1", which does not constitute evidence of pneumoconiosis [by a B-reader]) preponderated in favor of a finding of pneumoconiosis. However, the x-ray evidence from the third claim (consisting of two interpretations of 1999 x-ray) did not support a finding of pneumoconiosis. That x-ray was interpreted as negative by a B-reader and as "0/1", which does not constitute evidence of pneumoconiosis, by a dually qualified reader.

administrative law judge found that all of the analog x-ray readings taken together “preponderate in favor of a finding of pneumoconiosis.” *Id.*

The administrative law judge noted that the record contained a digital x-ray dated August 20, 2008, which had one positive reading for pneumoconiosis by Dr. Alexander, and two negative readings by Dr. Wiot, also a dually qualified radiologist, and Dr. Hippensteel, a B reader. The administrative law judge considered the readings by the dually qualified radiologists to be “at best in equipoise.” *Id.* at 15. However, the administrative law judge assigned “little if any probative value” to the digital x-ray evidence because “[n]either party submitted evidence that digital x-rays are medically acceptable and relevant for diagnosing clinical pneumoconiosis[.]” *Id.* at 15.

The administrative law judge also rejected the opinions of Drs. Rosenberg and Hippensteel, that the miner did not have clinical pneumoconiosis, because she found that their conclusions were “dependent upon the accuracy of the negative x-ray readings.” Decision and Order at 15. Thus, the administrative law judge concluded that employer failed to rebut the presumption that the miner suffered from clinical pneumoconiosis.

We affirm, as unchallenged by employer on appeal, the administrative law judge’s finding that the x-ray evidence “preponderate[s] in favor of a finding of pneumoconiosis.” Decision and Order at 13; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because Drs. Rosenberg and Hippensteel opined that claimant did not have clinical pneumoconiosis based, in part, on their belief that claimant did not have radiological evidence for clinical pneumoconiosis, contrary to the administrative law judge’s findings, we see no error in her assignment of less weight to their opinions.<sup>14</sup> *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

We reject employer’s contention that the administrative law judge failed to consider all of the explanations provided by Dr. Rosenberg for why he opined that the miner did not have clinical pneumoconiosis. The administrative law judge noted that Dr.

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Decision and Order at 13 (internal citations omitted).

<sup>14</sup> Dr. Hippensteel read an x-ray as negative for pneumoconiosis and Dr. Rosenberg relied, in part, on the negative x-ray readings of Drs. Wiot and Meyer. Director’s Exhibits 32, 33; Employer’s Exhibits 6, 7.

Rosenberg relied on the fact that the miner had a normal diffusion capacity study, but found that he “has not explained why the diffusion capacity findings are of such significance in the diagnosis of pneumoconiosis.” Decision and Order at 14; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-155. In addition, the administrative law judge rationally concluded that Dr. Rosenberg’s “statement that it cannot be ‘definitely stated’ that the x-ray changes are due to coal mine dust exposure is insufficient” to establish rebuttal. Decision and Order at 14, quoting Director’s Exhibit 33; see *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; see also *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-9 (6th Cir. 2011). Thus, we affirm the administrative law judge’s finding that employer failed to disprove the existence of clinical pneumoconiosis, based on the opinions of Drs. Hippensteel and Rosenberg.<sup>15</sup> See *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As substantial evidence supports the administrative law judge’s credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that claimant does not have clinical pneumoconiosis.<sup>16</sup>

As to the second method of rebuttal, the administrative law judge determined that the opinions of Drs. Hippensteel and Rosenberg were insufficient to rule out a causal connection between the miner’s respiratory disability, as shown by the exercise arterial blood gas study, and his “long history of coal mine employment.” Decision and Order at

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<sup>15</sup> We find no merit to employer’s argument that the administrative law judge’s analysis of the evidence was inconsistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). The administrative law judge weighed all of the relevant evidence on the issue of whether the miner had clinical pneumoconiosis, as required by *Compton*. Decision and Order at 15.

<sup>16</sup> Contrary to employer’s argument, the administrative law judge correctly determined that employer’s failure to rebut the presumption of clinical pneumoconiosis made it “unnecessary to discuss whether the evidence rebuts a finding of legal pneumoconiosis.” Decision and Order at 15; see Employer’s Brief in Support of Petition for Review at 29. In order to establish the first method of rebuttal by proving that the miner did not suffer from pneumoconiosis, employer must establish that the miner did not have clinical *or* legal pneumoconiosis. 30 U.S.C. §921(c)(4), see 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

13. We reject employer's assertion that the administrative law judge applied an improper rebuttal standard, to the extent he required employer to "rule out" coal dust exposure as a causative factor for claimant's disabling respiratory impairment. Employer's Brief in Support of Petition for Review at 19-22; Employer's Reply Brief in Support of Petition for Review at 12-14. Contrary to employer's contention, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held 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. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). In addition, the DOL has expressed its acceptance of the "rule out" standard on rebuttal. 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013).

To the extent we have vacated the administrative law judge's finding that claimant is totally disabled, we consider employer's specific arguments with regard to the weight accorded its medical experts on the issue of disability causation under the second rebuttal method to be premature.

### **III. REMAND INSTRUCTIONS**

In summary, on remand the administrative law judge must reconsider whether claimant has established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). If the evidence is sufficient to establish total disability, the administrative law judge may reinstate her determination that claimant invoked the rebuttable presumption at amended Section 411(c)(4) and that employer failed to rebut that presumption by disproving the existence of pneumoconiosis. The administrative law judge should then address whether employer has established rebuttal by proving that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge