



BRB No. 15-0069 BLA

KENNETH E. LAYNE)

Claimant-Respondent)

v.)

CONSOLIDATION COAL COMPANY)

and)

DATE ISSUED: 10/22/2015

WELLS FARGO DISABILITY)

MANAGEMENT/SELF-INSURED)

THROUGH 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 of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey Swanson and Allman), Indianapolis, Indiana, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Sarah M. Hurley (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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (12-BLA-6103) of Administrative Law Judge Stephen R. Henley awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). On April 11, 2011, claimant filed a written notice of intent to file a claim for benefits, and thereafter filed a claim form on July 26, 2011. Director's Exhibit 2.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),¹ the administrative law judge credited claimant with 16.5 years of underground coal mine employment,² as stipulated by the parties. Decision and Order at 3, 5. Further, the administrative law judge found that the evidence established, and employer conceded, that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).³ The administrative law judge, therefore, found that claimant invoked

¹ As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725.

² The record indicates that claimant's coal mine employment was in Illinois. Hearing Transcript at 31. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ Specifically, the administrative law judge found that the pulmonary function study evidence supported total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), that all of the physicians of record opined that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that employer conceded total disability. Decision and Order at 7-9.

the Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits. Finding that the evidence did not establish when claimant became totally disabled due to pneumoconiosis, the administrative law judge awarded benefits as of July 2011, the month in which claimant filed his claim form.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits. Employer filed separate reply briefs to the response briefs filed by claimant and the Director, reiterating its contentions on appeal.

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

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

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer's Brief at 4-7. We decline to address employer's challenge. Employer conceded total disability in its post-hearing brief before the administrative law judge:

Weighing all the evidence together, the [administrative law judge] should find the evidence supports a finding [of] total disability and, considering [e]mployer's stipulation to 16.5 years of underground coal mine employment, invoke the 15-year presumption found at 30 U.S.C. §921(c)(4).

Employer's Post-Hearing Brief at 20. The administrative law judge acknowledged and quoted employer's concession in finding total disability established. Decision and Order at 9. As the United States Court of Appeals for the Seventh Circuit has held,

“concessions bind those who make them”⁴ *Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 730, 25 BLR 2-405, 2-418 (7th Cir. 2013). Because employer is bound by its concession below that claimant is totally disabled, we decline to address its arguments that the administrative law judge erred in finding that the pulmonary function study evidence supported a finding of total disability.

Moreover, even if employer’s arguments were properly before the Board, they lack merit. Contrary to employer’s contention, the administrative law judge permissibly averaged the differing heights recorded on the two pulmonary function studies of record to determine claimant’s height. *K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); see *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Further, as claimant was in his eighties when both pulmonary function studies were administered,⁵ the administrative law judge properly used the table values for a seventy-one-year-old miner, the maximum age for which values are set forth in the table, in determining that the studies were qualifying.⁶ *Meade*, 24 BLR at 1-47. Employer submitted no medical evidence to prove that the pulmonary function studies were actually normal, or did not demonstrate total disability. *Id.* Finally, even accepting employer’s argument that the March 8, 2012 pulmonary function study should have been found invalid would not alter the administrative law judge’s finding that the August 22, 2011 study was qualifying, valid, and supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). For all the foregoing reasons, we affirm the administrative law judge’s findings of total disability and that claimant invoked the Section 411(c)(4) presumption.

⁴ Employer’s only argument for making an exception to the rule is that it believes the administrative law judge’s analysis of the two pulmonary function studies of record “effected [sic] the rebuttal evidence analysis.” Employer’s Brief at 7. However, a review of the administrative law judge’s Decision and Order does not reveal that he relied on the pulmonary function study evidence in weighing employer’s rebuttal evidence. Decision and Order at 15-18, 20.

⁵ Claimant was eighty-one years old when the August 22, 2011 pulmonary function study was administered, and eighty-two years old when the March 8, 2012 pulmonary function study was administered. Director’s Exhibit 11; Employer’s Exhibit 4.

⁶ A “qualifying” pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A “non-qualifying” study exceeds those values. See 20 C.F.R. §718.204(b)(2)(i). The table values are set forth according to gender, height, and age, but the table ends at age seventy-one. *K.J.M. [Meade] v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-45 (2008).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,⁷ 20 C.F.R. §718.305(d)(1)(i), or by establishing that “no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.⁸ Decision and Order at 10-21.

Initially, we reject employer’s contention that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). In support of its argument, employer relies upon the statutory language of 30 U.S.C. §921(c)(4), and the United States Supreme Court’s holding in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), that the rebuttal limitations are inapplicable to coal mine operators. Employer’s Brief at 25-26. Employer’s contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff’d on other grounds*, 724 F.3d 550, 25 BLR 2-339 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision. *See also W.Va. CWP Fund v. Bender*, 782 F.3d 129, 137-43, BLR (4th Cir. 2015) (rejecting the *Usery* argument, and holding that, because the statute is silent as to how coal mine operators may rebut the Section 411(c)(4) presumption, the Department of Labor promulgated reasonable regulations setting forth rebuttal standards applicable to both the Secretary and coal mine operators).

⁷ “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b). “Clinical pneumoconiosis” consists of “those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment.” 20 C.F.R. §718.201(a)(1).

⁸ The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis, but failed to establish that he does not have legal pneumoconiosis, or that his total disability is unrelated to legal pneumoconiosis. Decision and Order at 10-20.

Employer argues that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Tuteur and Zaldivar, and considered claimant's medical treatment records.⁹ Dr. Tuteur opined that claimant does not have a coal mine dust-related disease, but suffers from a "multifactorial" obstructive and restrictive pulmonary impairment due to smoking, heart disease, and ventilatory muscle weakness. Employer's Exhibit 4, 7. Dr. Zaldivar opined that claimant has an obstructive and restrictive pulmonary impairment that is due to smoking, asthma, and the effects of arthritis. Employer's Exhibits 4, 5, 7, 8. Claimant's medical treatment records, dating from 1982 to 2013, contained diagnoses of multiple conditions, including chronic obstructive pulmonary disease (COPD), asthmatic bronchitis, heart disease, and hypertension. Employer's Exhibits 9-15, 18. The entries in the treatment records did not address the etiology of the respiratory impairments that were diagnosed.

The administrative law judge discounted the opinions of Drs. Tuteur and Zaldivar, because he found that they did not adequately explain why coal mine dust exposure did not contribute to, or aggravate, claimant's pulmonary impairments. Decision and Order at 16-18. Specifically, the administrative law judge found that, although Dr. Tuteur opined that smoking complicated claimant's pulmonary problems, Dr. Tuteur did not explain why claimant's 16.5 years of coal mine dust exposure did not contribute to, or aggravate, those pulmonary problems. With respect to Dr. Zaldivar, the administrative law judge noted his opinion that "eighty to ninety percent" of claimant's pulmonary impairment is due to smoking, but found that he did not identify the cause of the remaining ten to twenty percent of claimant's pulmonary impairment, or explain why claimant's 16.5 years of coal mine dust exposure could not have contributed to the impairment. Additionally, the administrative law judge found that claimant's treatment records did not assist employer in rebutting the presumption of legal pneumoconiosis because they did not "exclude coal mine dust as a potential cause or aggravating factor of claimant's COPD." Decision and Order at 19.

Employer argues that the administrative law judge erred in his analysis of the opinions of Drs. Tuteur and Zaldivar. Employer's Brief at 14-22. We disagree. Legal pneumoconiosis includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment," 20 C.F.R. §718.201(a)(2), and a pulmonary disease arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R.

⁹ The administrative law judge also summarized the opinion of Dr. Tazbaz diagnosing claimant with chronic obstructive pulmonary disease and coal worker's pneumoconiosis. Director's Exhibit 11.

§718.201(b). Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Tuteur and Zaldivar because he found that they failed to adequately explain why coal mine dust exposure did not contribute to, or aggravate, claimant's pulmonary impairment, along with smoking and the other causes that the physicians identified. *See Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 668, BLR (6th Cir. 2015); *Owens*, 25 BLR at 1-9; *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103-04 (7th Cir. 2008); 20 C.F.R. §718.201(b). Substantial evidence supports the administrative law judge's credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Therefore, the administrative law judge's credibility determination is affirmed.¹⁰

Further, employer argues that the administrative law judge erred in finding that claimant's medical treatment records did not rebut the presumption of legal pneumoconiosis, even though "[n]one of the entries attributed [claimant's] condition to any etiology or exposure." Employer's Brief at 13. Because the treatment records did not address the cause of claimant's COPD or other respiratory impairments that were diagnosed, the administrative law judge correctly found that they do not assist employer in carrying its burden to rebut the presumption of legal pneumoconiosis. *See* 20 C.F.R. §§718.305(d)(1)(i)(A), 718.201(b). We therefore reject employer's allegation of error. The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.¹¹

Employer contends that the administrative law judge erred in his consideration of whether employer rebutted the presumed fact of disability causation. Employer's Brief at 23-27. Initially, we reject employer's assertion that the administrative law judge erred in requiring it to "rule out" pneumoconiosis as a cause of the miner's disability. *Id.* at 23-25. The regulations specifically require the party opposing entitlement to establish that

¹⁰ Because we affirm the administrative law judge's discounting of the opinions of Drs. Tuteur and Zaldivar on the grounds stated above, we need not address employer's remaining challenges to the administrative law judge's weighing of those opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

¹¹ Employer argues that the administrative law judge erred in inferring that Dr. Tazbaz diagnosed claimant with legal pneumoconiosis. Employer's Brief at 7-10, 20-22. Because employer bears the burden to prove that claimant does not have pneumoconiosis, we need not address employer's arguments regarding the analysis of claimant's medical opinion evidence. *See* 20 C.F.R. §718.305(d)(1)(i).

“no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii); *Bender*, 782 F.3d at 137-43; *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 5-8 (Apr. 21, 2015) (Boggs, J., concurring & dissenting).

Contrary to employer’s additional contention, Employer’s Brief at 27, the administrative law judge permissibly discounted the disability causation opinions of Drs. Tuteur and Zaldivar because the physicians did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge’s finding that employer failed to disprove legal pneumoconiosis. *See Burris*, 732 F.3d at 735, 25 BLR at 2-425; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013). Thus, we affirm the administrative law judge’s finding that employer failed to establish that claimant’s respiratory disability is not due to pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits.

Date for the Commencement of Benefits

Although not raised by the parties, an error is evident on the face of the administrative law judge’s decision regarding his determination of the benefits commencement date. Applying the relevant regulations to the facts found by the administrative law judge yields the correct benefits commencement date as a matter of law. Accordingly, we will address the issue and modify the administrative law judge’s decision. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8, 20 BLR 2-1, 2-10 n.8 (4th Cir. 1995)(holding that review of an issue “may proceed (even completely sua sponte) when the equities require”); *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1-446 (1986).

The administrative law judge found that the evidence did not establish the month in which claimant became totally disabled due to pneumoconiosis. Decision and Order at 21. The administrative law judge correctly noted that where the evidence does not establish the month in which the miner became totally disabled due to pneumoconiosis, benefits commence as of the month in which the claim was filed. 20 C.F.R. §725.503(b). The administrative law judge, however, misidentified the month of filing. The administrative law judge found that July 2011, the month in which claimant submitted a claim form, was the month in which the claim was filed. As noted earlier, however, claimant filed with the district director a written, signed notice of intent to file a black

lung claim on April 11, 2011. Director's Exhibit 2 at 2. Pursuant to 20 C.F.R. §725.305, a written statement indicating an intention to claim benefits, signed by claimant, is considered to be the filing of a claim if claimant files the prescribed claim form within six months of being notified by the district director of the need to file the form. 20 C.F.R. §725.305(a)(1), (b). Consistent with 20 C.F.R. §725.305, upon receipt of claimant's notice of intent, the district director mailed claimant a claim form and notified him that if he filed the form within six months of the district director's April 26, 2011 letter, his entitlement to benefits would be protected back to the date the district director received claimant's notice of intent. Director's Exhibit 2 at 1. Since claimant timely filed his claim form on July 26, 2011, his claim is considered to have been filed as of April 11, 2011. 20 C.F.R. §725.305(a)(1), (b); *see Marx v. Director, OWCP*, 870 F.2d 114, 118, 12 BLR 2-199, 2-204-05 (3d Cir. 1989). Consequently, we modify the administrative law judge's decision to reflect that benefits shall commence as of April 2011. 20 C.F.R. §§725.305(b), 725.503(b).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge