U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 19-0556 BLA
and 19-0556 BLA-A

ROGER L. LESTER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
VACO RESOURCES INCORPORATED	)	DATE ISSUED: 11/05/2020
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Roger L. Lester, Hurley, Virginia.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge Morris D. Davis's Decision and Order Denying Benefits (2016-BLA-05939) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on May 12, 2014.[2]

The administrative law judge noted Claimant was credited with eleven years of coal mine employment in the most recent prior denial of benefits, which is insufficient to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). He further determined even if Claimant could invoke the presumption, Claimant could not establish a change in an applicable condition of entitlement[4] because

[1] Ms. Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on Claimant's behalf that the Board review the administrative law judge's decision, but Ms. Combs is not representing Claimant in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Administrative Law Judge Linda S. Chapman denied Claimant's first claim, filed on July 24, 2006, in a Decision and Order Denying Benefits dated June 2, 2009, based on Claimant's failure to establish pneumoconiosis. Director's Exhibit 1. On March 4, 2010, Claimant filed a request for modification of the denial of benefits, which Administrative Law Judge Christine L. Kirby denied on February 13, 2013, in a Decision and Order Denying Modification Request, again finding Claimant failed to establish the existence of pneumoconiosis. *Id*. Claimant did not take any further action on his July 24, 2006 claim until filing the present subsequent claim. Director's Exhibit 3.

[3] Section 411(c)(4) of the Black Lung Benefits Act applies to claims filed after January 1, 2005, and pending on or after March 23, 2010. 30 U.S.C. §921(c)(4) (2012). It provides a rebuttable presumption that Claimant is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. *Id*.; 20 C.F.R. §718.305.

[4] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the

only his request for modification was pending as of the date the presumption was enacted. After considering whether Claimant could establish entitlement under 20 C.F.R. Part 718 without the presumption, the administrative law judge determined Claimant failed to establish pneumoconiosis or total disability due to pneumoconiosis. He therefore found Claimant failed to demonstrate a change in an applicable condition of entitlement and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. On cross-appeal, Employer challenges the administrative law judge's discrediting of Dr. Rosenberg's opinion that Claimant does not have legal pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in either appeal.

In an appeal a claimant files without the assistance of counsel, the Benefits Review Board considers whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order Denying Benefits if his findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

I. Section 411(c)(4) Presumption

A. Availability

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,[5] has specifically held that invocation of the Section 411(c)(4) presumption establishes an element of entitlement for purposes of demonstrating a change in an applicable condition of entitlement in a subsequent claim. *E. Assoc. Coal Corp. v.*

---

date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant's initial claim was denied for failure to establish the existence of pneumoconiosis, he had to establish this element of entitlement to obtain review of his subsequent claim on the merits. *White*, 23 BLR at 1-3.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); [April 24, 2012] Hearing Transcript at 23.

Director, OWCP [*Toler*], 805 F.3d 502, 511-14, 25 BLR 2-743, 754-58 (4th Cir. 2015); *see also Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-95, 25 BLR 2-285, 2-292-93 (7th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 731, 25 BLR 2-405, 2-420 (7th Cir. 2013). The administrative law judge correctly determined that the Section 411(c)(4) presumption applied to Claimant's first claim as he filed it after January 1, 2005, and it was still pending on March 23, 2010, based on his request for modification of the denial of that claim. 30 U.S.C. §921(c)(4) (2012); Decision and Order at 3. He further determined, however, that invocation of the presumption could not establish a change in an applicable condition of entitlement because Claimant's subsequent claim, filed on May 12, 2014, was not pending on March 23, 2010. He therefore did not consider whether Claimant satisfied the prerequisites for invocation of the Section 411(c)(4) presumption. *Id*. This was error as Section 411(c)(4) applies to all claims filed after January 1, 2005, and pending on *or after* March 23, 2010. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(a); s*ee Toler*, 805 F.3d at 511-14, 25 BLR at 754-58; *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-158 n.11 (2015) (Boggs, J., concurring & dissenting); Director's Exhibit 3. Accordingly, we reverse the administrative law judge's findings that the Section 411(c)(4) presumption does not apply to Claimant's subsequent claim and that invocation cannot establish a change in an applicable condition of entitlement.

B. Invocation of the Presumption – Length of Coal Mine Employment

As previously indicated, to invoke the Section 411(c)(4) presumption, Claimant must initially establish he had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). The administrative law judge noted Claimant's allegation that he had more than fifteen years of underground coal mine employment and surface coal mine employment in substantially similar dust conditions. Decision and Order at 5. He also acknowledged Employer's assertion that the previous administrative law judge's finding of eleven years of qualifying coal mine employment should be binding in Claimant's current claim under the doctrine of collateral estoppel. *Id.* at 5-6. The administrative law judge did not, however, further address the issue, presumably because he believed the Section 411(c)(4) presumption was not applicable to Claimant's subsequent claim. *Id*. at 3.

Contrary to Employer's assertion, collateral estoppel does not preclude the administrative law judge from revisiting the issue of the length of Claimant's coal mine employment. For collateral estoppel to apply, it must be established that: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue's determination was a critical and necessary part of the decision in the prior proceeding; 4) the prior judgment is final and valid; and 5) the party against whom collateral estoppel is asserted had a full and fair

opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc). Judge Kirby denied Claimant's request for modification and benefits because she found Claimant did not establish the existence of pneumoconiosis.[6] Thus, Judge Kirby's finding of eleven years of coal mine employment was not "a critical and necessary part" of the judgment in Claimant's first claim and is not binding in his subsequent claim. *Collins*, 468 F.3d at 217. We must therefore vacate the denial of benefits and remand the case to the administrative law judge to render a finding as to whether Claimant can establish at least fifteen years of qualifying coal mine employment.[7]

II. Entitlement Under 20 C.F.R. Part 718

In the interest of judicial economy, we address the administrative law judge's finding that Claimant failed to meet his burden to establish entitlement under 20 C.F.R. Part 718, in the event that the Section 411(c)(4) presumption is not invoked on remand.

Without the benefit of the presumption, Claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The administrative law judge denied benefits because Claimant did not establish the existence of pneumoconiosis at 20 C.F.R.

[6] In adjudicating Claimant's 2006 claim, Judge Chapman credited Claimant with ten years of coal mine employment in her decision denying benefits. Director's Exhibit 1; June 2, 2009 Decision and Order at 3.

[7] If, on remand, the administrative law judge finds a change in an applicable condition of entitlement is established, no findings made in Claimant's prior claim are binding on any party in this claim, unless the party either failed to contest that issue or stipulated that issue in Claimant's prior claim. 20 C.F.R. §725.309(c)(5). Because Claimant contested the length of his coal mine employment in his initial claim, no prior finding as to the length of Claimant's coal mine employment is binding in his current claim. Director's Exhibit 1.

§718.202(a)[8] and thus did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

In evaluating the presence of clinical pneumoconiosis, the administrative law judge noted the new evidence submitted in Claimant's subsequent claim consists of eleven interpretations of five x-rays dated July 16, 2014,[9] August 28, 2015, November 8, 2016, January 28, 2017, and June 6, 2017, and that all of the interpreting physicians are dually qualified as Board-certified radiologists and B readers.[10] *See* 20 C.F.R. §718.202(a)(1); Decision and Order at 11-15, 42-44; Director's Exhibits 16, 20, 22; Claimant's Exhibits 1-4; Employer's Exhibits 1, 5, 6, 9.

Drs. Crum and Miller interpreted the July 16, 2014 x-ray as positive for pneumoconiosis, whereas Dr. Wolfe interpreted it as negative for pneumoconiosis. Director's Exhibits 16, 20, 22. Dr. Miller interpreted the August 28, 2018 x-ray as positive for pneumoconiosis, while Dr. Tarver interpreted the x-ray as negative. Claimant's Exhibit 2; Employer's Exhibit 1. Dr. Crum interpreted x-rays dated November 8, 2016, and January 28, 2017, as positive for pneumoconiosis, whereas Dr. Meyer interpreted each x-ray as negative. Claimant's Exhibits 1, 3; Employer's Exhibits 5, 6. Dr. Crum interpreted the June 6, 2017 x-ray as positive for pneumoconiosis, while Dr. Tarver interpreted the x-ray as negative. Claimant's Exhibit 4; Employer's Exhibit 9.

The administrative law judge found Dr. Crum, a dually qualified physician, read four x-rays as positive for pneumoconiosis while the "dually qualified physicians who read the same four chest x-rays [as Dr. Crum] reported no parenchymal or pleural abnormalities consistent with pneumoconiosis." Decision and Order at 44. Likewise, he found dually qualified radiologists read the August 28, 2015 x-ray as positive and as negative. *Id.* Based on this characterization of the evidence, he concluded the x-ray evidence is in equipoise

[8] "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). "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).

[9] On September 11, 2014, Dr. Ranavaya interpreted the July 16, 2014 x-ray for film quality only as "Film Quality 1." Director's Exhibit 16.

[10] The treatment records contain two narrative x-ray reports from Drs. DePonte and Patel; however, neither contains a finding of coal workers' pneumoconiosis. Director's Exhibit 19; Claimant's Exhibit 6.

and therefore insufficient to establish clinical pneumoconiosis. *Id*. In rendering this finding, however, the administrative law judge ignored that the record contains a second positive reading of the July 16, 2014 x-ray by Dr. Miller, also a dually-qualified radiologist. Director's Exhibit 16. Because the administrative law judge both misstated and did not consider all the relevant evidence in weighing the x-rays, we must vacate his finding that the July 16, 2014 x-ray, and the x-ray evidence as a whole, is in equipoise. 20 C.F.R. §718.202(a)(1); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 280-81 (1994); Decision and Order at 44. We therefore further vacate his determination that Claimant did not establish clinical pneumoconiosis based on the x-ray evidence under 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.107, the administrative law judge correctly found Claimant's treatment records contain two new computed tomography (CT) scans dated October 16, 2014, and March 30, 2017. *See* 20 C.F.R. §718.107; Decision and Order at 16-17, 43-45. The interpreting radiologist read the October 16, 2014 CT scan, which was done without contrast, as revealing "[c]hanges in the lungs probably due to pneumoconiosis." Claimant's Exhibit 5. The same radiologist interpreted the March 30, 2017 contrast CT scan and observed "a new developing mass since 2014" measuring "2.9 x 3.7 x 3 cm in the left hilum," which was "highly suspicious for malignancy." Claimant's Exhibit 5. He further noted lung scarring was evident on the March 30, 2017 CT scan, but "[n]o other change or abnormality [was] seen." *Id*.

The administrative law judge permissibly found the probative value of the October 16, 2014 CT scan diminished because the interpreting radiologist noted the CT scan was "limited" due to the "non-use of IV contrast," and the administrative law judge concluded his finding of a nodular density "suggestive of possible early pneumoconiosis" was "too equivocal" to definitively document a finding of clinical pneumoconiosis. Decision and Order at 44; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); *Dolzanie v. Director, OWCP*, 6 BLR 1-865, 1-867 (1984); Claimant's Exhibit 5. Given the factors that detracted from the October 16, 2014 CT scan, the administrative law judge rationally accorded greater weight to the March 30, 2017 CT scan that "failed to demonstrate densities suggestive of pneumoconiosis." Decision and Order at 44; Claimant's Exhibit 6. Accordingly, we affirm his finding the CT scan evidence does not establish pneumoconiosis as supported by substantial evidence.[11] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000);

[11] The administrative law judge accurately noted Claimant underwent a positron emission tomography-computed tomography (PET-CT) scan on May 9, 2017, which revealed a hypermetabolic left lower lobe mass consistent with malignancy, but did not

Milburn Colliery Co. v. Hicks, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 44.

Claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), as the record contains no biopsy or autopsy evidence of pneumoconiosis.[12] Further, Claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3) by invoking the Section 411(c)(3) irrebuttable presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), as the record contains no evidence of complicated pneumoconiosis.

The administrative law judge next addressed the medical opinions of Drs. Gallup, Green, Basheda, and Rosenberg. *See* 20 C.F.R. §718.202(a)(4); Decision and Order at 20-33, 45-47. Drs. Gallup and Green diagnosed Claimant with both clinical and legal pneumoconiosis. Director's Exhibits 16, 18; Claimant's Exhibit 1, 4. In contrast, Drs. Basheda and Rosenberg opined that Claimant does not have either form of pneumoconiosis.[13] Director's Exhibit 21; Employer's Exhibits 3, 10, 16.

The administrative law judge accorded little weight to Dr. Gallup's diagnosis of clinical pneumoconiosis, finding it to be inconsistent with his earlier finding that the x-ray evidence is inconclusive on the issue of clinical pneumoconiosis. Decision and Order at 45. Because we have vacated his finding with respect to the x-ray evidence, we must also vacate his discrediting Dr. Gallup's diagnosis of clinical pneumoconiosis on the basis that it conflicted with this finding. In addition, we hold the administrative law judge erred in determining Dr. Gallup's diagnosis of legal pneumoconiosis, contained in his May 18, 2016 supplemental report, is entitled to diminished weight because Dr. Gallup failed to adequately explain why he disagreed with Dr. Basheda's opinion that Claimant does not suffer from legal pneumoconiosis. Implicit in the administrative law judge's weighing of

---

identify abnormalities consistent with pneumoconiosis. Employer's Exhibit 8; Decision and Order at 17.

[12] The administrative law judge did not specifically address Dr. Hoskere's report of a bronchoscopy performed on April 20, 2017. Employer's Exhibit 8. However, even assuming the product of bronchoscopy washings constitutes biopsy evidence, remand is not necessary as Dr. Hoskere made no mention of pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[13] Diagnoses of coal workers' pneumoconiosis appear in Claimant's treatment records, but do not include a discussion or explanation of the basis for the diagnoses. Director's Exhibit 19.

Dr. Gallup's diagnosis of legal pneumoconiosis is an assumption that Dr. Basheda's contrary opinion is correct. The administrative law judge's omission of an explicit finding as to whether Dr. Basheda's opinion is reasoned and documented, however, violates the Administrative Procedure Act (APA),[14] which requires the administrative law judge to resolve conflicts in the medical opinion evidence and set forth his findings in detail, including the underlying rationale. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012). We therefore vacate the administrative law judge's discrediting of Dr. Gallup's diagnosis of legal pneumoconiosis.

In light of the foregoing, we must also vacate the administrative law judge's determination that Dr. Green's opinion cannot establish clinical pneumoconiosis because Dr. Green relied, in part, on a positive x-ray interpretation, contrary to the administrative law judge's determination that the x-ray evidence is inconclusive on the presence of the disease. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; Decision and Order at 45. We affirm, however, the administrative law judge's rational finding that Dr. Green's diagnosis of legal pneumoconiosis is entitled to less weight because the physician relied on an inaccurate smoking history ending in 1995, contrary to the administrative judge's finding Claimant "continued to smoke cigarettes on a regular basis into 2017."[15] *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); Decision and Order at 46.

Because we have vacated the administrative law judge's discrediting of Dr. Gallup's diagnoses of clinical and legal pneumoconiosis, and Dr. Green's diagnosis of clinical pneumoconiosis, we further vacate his determination that Claimant failed to establish the

[14] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).

[15] The administrative law judge acknowledged that Dr. Green reported that Claimant had a smoking history of one pack per day for thirty-three years and stopped smoking in 1995. Claimant's Exhibits 1, 4. However, after reviewing Claimant's testimony and his statements to the physicians including his treating oncologists, the administrative law judge concluded Claimant stopped smoking a few months before his cancer diagnosis in April 2017, or twenty-two years after Dr. Green understood his smoking to have ceased. Decision and Order at 45.

existence of pneumoconiosis based on the medical opinion evidence at 20 C.F.R. §718.202(a)(4) or by a preponderance of all relevant evidence when weighed together.

III. Remand Instructions

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

On remand, the administrative law judge must first determine whether Claimant can establish at least fifteen years of qualifying coal mine employment based on a consideration of all relevant evidence.[16] In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). He may determine the dates and length of coal mine employment "by any credible evidence," 20 C.F.R. §725.101(a)(32)(ii), but where the beginning and ending dates of the miner's employment cannot be determined or it lasted less than a calendar year, the administrative law judge may use the formula set forth in 20 C.F.R. §725.101(a)(32)(iii). *Id*.

If the administrative law judge finds at least fifteen years of coal mine employment established on remand, he must also determine whether Claimant's coal mine employment occurred in underground mines or in surface mines in conditions substantially similar to those in an underground mine. If Claimant worked on the surface at the site of an underground mine, however, he need not establish "substantial similarity." *Muncy*, 25 BLR at 1-29; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013). If the administrative law judge determines on remand that Claimant has established at least fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption.[17] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i).

[16] The record contains documentary evidence in the form of Claimant's applications for benefits alleging thirty-three years of coal mine employment in his prior claim and thirty-two years in his subsequent claim, Social Security Administration earnings records for the period between 1959 and 1992, and employment history forms reflecting coal mine employment from 1959 to 1992. Director's Exhibits 1, 3, 4, 7-9. Claimant also submitted a handwritten list showing employment that is not included on his Social Security Administration earnings records between 1959 and 1977. Director's Exhibit 6. The record also contains additional statements and testimony indicating Claimant started his coal mine employment working for his father at age fifteen in 1959 and stopped sometime in 1991, when he was injured. November 29, 2017 Hearing Transcript at 18-26; April 24, 2012 Hearing Tr. at 12-20; January 14, 2009 Hearing Tr. at 16-18.

[17] Claimant is also required to establish he has a totally disabling respiratory or pulmonary impairment to invoke the presumption. 30 U.S.C. §921(c)(4); 20 C.F.R.

If the administrative law judge finds Claimant has invoked the Section 411(c)(4) presumption, the burden of proof shifts to Employer to rebut the presumption by establishing Claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] 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)(i), (ii). To disprove legal pneumoconiosis, Employer must establish that Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

If the presumption applies, in determining whether Employer has satisfied its burden, the administrative law judge must resolve all conflicts in the evidence and set forth his findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge should address the physicians' explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). In light of the rebuttal standard for legal pneumoconiosis requiring Employer to establish Claimant's impairments are not "significantly related to, or substantially aggravated by," coal mine dust exposure, the administrative law judge should also consider the extent to which the physicians explain why dust exposure in coal mine employment was not an additive factor, with smoking, in causing Claimant's impairments. 20 C.F.R. §718.201(b); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013).

Regarding the administrative law judge's weighing of the medical opinion evidence on remand, we agree with Employer that the administrative law judge must reconsider Dr. Rosenberg's opinion excluding the presence of legal pneumoconiosis if he reaches rebuttal of the presumed existence of legal pneumoconiosis. Employer's Consolidated Response

---

§718.305(b)(1)(iii). The administrative law judge determined correctly that Employer indicated "the medical experts agree that Claimant has a totally disabling respiratory impairment." Decision and Order at 5, *quoting* Employer's Closing Argument at 4. Moreover, in its cross-appeal, Employer argues only that Claimant cannot invoke the Section 411(c)(4) presumption because he did not establish fifteen years of qualifying coal mine employment in his initial claim. Employer's Consolidated Response Brief and Cross-Petition for Review at 4-5. Claimant has therefore established total disability based on Employer's concession before the administrative law judge and its choice not to raise the issue on appeal.

Brief and Cross-Petition for Review (Employer's Consolidated Brief) at 16-18. The administrative law judge found Dr. Rosenberg's opinion that Claimant's lung cancer was unrelated to coal dust conflicted with the Department of Labor's position that silica, which is frequently a component of coal mine dust, can be carcinogenic. Decision and Order at 32 n.39, 47. He also determined Dr. Rosenberg's "flat rejection" of the view that it is impossible to distinguish between the effects of smoking and coal dust exposure "lacked sufficient explanation in light of regulations and prior decisions under the Act." *Id*. at 47.

We agree with Employer's position that the administrative law judge did not explain his rejection of Dr. Rosenberg's opinion that Claimant's lung cancer is not due to coal dust exposure in light of the administrative law judge's own finding that "there is no pathological evidence in this case of respirable crystalline silica in the Claimant's lung tissues." Decision and Order at 32 n.39; Employer's Consolidated Brief at 15. The second reason the administrative law judge provided is also inadequate. Although he summarized Dr. Rosenberg's opinion in detail, he did not explain why he found Dr. Rosenberg's explanation insufficient or explicitly address the factors Dr. Rosenberg cited in support of excluding coal dust exposure as a causal or aggravating agent in Claimant's respiratory impairment.[18] His decision therefore did not comply with the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165. We therefore vacate the administrative law judge's discrediting of Dr. Rosenberg's opinion and instruct him to reconsider it if he reaches rebuttal of legal pneumoconiosis on remand.

If the administrative law judge finds Employer has rebutted the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis or disability causation, he

[18] Dr. Rosenberg cited the variability of Claimant's obstructive impairment and hypoxia, the reduction in his FEV1/FVC ratio on his pulmonary function study, his bronchodilator response, a reduced diffusing capacity, and marked air trapping as variables supporting the conclusion that smoking is the sole cause of Claimant's impairment. Employer's Exhibits 3, 16 at 27-28. He also asserted the medical literature the Department of Labor (DOL) cites in the preamble to the 2001 regulatory revisions has been misinterpreted or superseded by subsequent publications based on more recent studies. Employer's Exhibits 3, 16 at 23-26. We note, however, that the latter issue requires courts "to engage the substance of that scientific dispute," thus requiring Employer to submit "'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute." *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014), *quoting Midland Coal Co. v. Dir. of Office of Workers' Comp. Programs*, 358 F.3d 486, 490 (7th Cir. 2004).

must deny benefits. If, however, he concludes Employer has failed to meet its burden on rebuttal, he must award benefits.

B. Establishing Entitlement Without Section 411(c)(4) Presumption

If the administrative law judge determines on remand that Claimant has not invoked the Section 411(c)(4) presumption, he must reconsider his finding that Claimant did not establish the existence of pneumoconiosis by a preponderance of the evidence. He must first reweigh the x-ray evidence at 20 C.F.R. §718.202(a)(1), including Dr. Miller's positive reading of the July 16, 2014 x-ray. He must then reconsider the diagnoses of clinical pneumoconiosis Drs. Gallup and Green made, based on his reweighing of the x-ray evidence, and whether Claimant established the existence of legal pneumoconiosis based on a reconsideration of Dr. Gallup's opinion and Dr. Basheda's opinion. 20 C.F.R. §718.202(a)(4). Both physicians diagnosed asthma with bronchodilator response, with Dr. Gallup attributing the impairment, in part, to coal mine dust exposure, and Dr. Basheda attributing it to tobacco smoke. Director's Exhibits 15, 16, 18; 21; Employer's Exhibit 10. The administrative law judge must weigh these opinions on remand and determine whether either is credible and whose is better-reasoned by addressing the physicians' explanations of their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

If the administrative law judge determines Claimant would establish pneumoconiosis under 20 C.F.R. §718.202(a)(1) or (4), or both, considered in isolation, he must then determine whether Claimant has established pneumoconiosis based on a weighing of all evidence together. *See Compton*, 211 F.3d at 207-208. Finally, the administrative law judge must resolve all conflicts in the evidence relevant to the existence of pneumoconiosis and render his findings in detail, including his rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. A finding that Claimant has failed to prove he has pneumoconiosis precludes an award of benefits. *See Trent*, 11 BLR at 1-27. Conversely, a determination that Claimant has met his burden on this element of entitlement would require the administrative law judge to consider whether Claimant has proven he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). If he establishes he has pneumoconiosis and is totally disabled by it, he is entitled to benefits. *See Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge