U.S. Department of Labor

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

BRB Nos. 15-0079 BLA
and 15-0079 BLA-A

ARNOLD ALLEN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BIG RIDGE, formerly known as ARCLAR COAL, LLC	)	DATE ISSUED: 02/25/2016
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Arnold Allen, Shawneetown, Illinois, *pro se*.

Scott A. White (White & Risse, LLP), Arnold, Missouri, for employer.

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:

Claimant appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order Denying Benefits (2011-BLA-6003) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on June 14, 2010,[1] 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 initially determined that the claim was timely filed, and considered entitlement under 20 C.F.R. Part 718. The administrative law judge found that, although this claim was filed after January 1, 2005, and claimant established more than fifteen years of underground coal mine employment, he failed to establish total respiratory or pulmonary disability and, therefore, he was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C §921(c)(4) (2012).[2] The administrative law judge further found, therefore, that claimant failed to meet his burden to establish an essential element of entitlement under the Act and denied benefits accordingly.[3]

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. By a letter brief dated February 13, 2015, the Director, Office of

[1] Claimant filed a claim for benefits on February 23, 2007, which he withdrew on March 22, 2007. Director's Exhibits 1-3. Claimant filed his current claim on June 14, 2010. Director's Exhibit 3. Without the assistance of counsel, claimant requested, by a letter dated January 31, 2013, that the administrative law judge decide the case on the record. The administrative law judge granted claimant's request in an Order dated February 21, 2013. Decision and Order at 2.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground coal mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] The administrative law judge did not render any findings on the issues of the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a) and 718.203, and total disability due to pneumoconiosis under 20 C.F.R. §718.204(c).

Workers' Compensation Programs (the Director), has filed a response requesting that the Board vacate the denial of benefits and remand the case for reconsideration of the medical opinions of Drs. Houser and Tuteur on the issue of total respiratory or pulmonary disability. In its Combined Brief in Support of Petition for Review and Response Brief, employer argues that the administrative law judge erred in finding that the 2010 claim was timely filed and urges the Board to affirm the denial of benefits. The Director filed a letter brief dated June 10, 2015, in response, asking the Board to reject employer's argument on the issue of timeliness. Employer filed a reply brief reiterating its allegation that the present claim was not timely filed.[4]

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[5] 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). With respect to employer's cross-appeal, alleging that the administrative law judge erred in finding that claimant's June 14, 2010 claim was timely filed, the Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

The Timeliness of the Claim

The Act requires that a miner's claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 30 U.S.C. §932(f). The implementing regulation, set forth in 20 C.F.R. §725.308, provides in relevant part, "[a] claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4; Director's Exhibit 4.

pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . ." 20 C.F.R. §725.308(a). Additionally, under the terms of 20 C.F.R. §725.308(c), there is a rebuttable presumption that all claims are timely filed.

In this case, employer argues that Dr. Khan's January 25, 2006 medical report, addressed to claimant's former counsel, triggered the running of the three-year statute of limitations for filing a federal black lung claim. Employer additionally alleges that, given the claimant's acceptance of a lump sum settlement of both his state workers' compensation claim and his state black lung claim in 2007, and claimant's withdrawal of his 2007 federal black lung claim, claimant believed at that time that he had pneumoconiosis and that it was totally disabling. The Director responds, urging the Board to affirm the administrative law judge's finding that, because Dr. Khan's medical report did not trigger the running of the three-year limitations period, claimant's June 14, 2010 claim was timely filed.

After reviewing the administrative law judge's finding, and the arguments raised by employer and the Director, we affirm the administrative law judge's finding. Decision and Order at 5. The administrative law judge acted within her discretion in finding that, although Dr. Khan diagnosed simple coal workers' pneumoconiosis, he did not make "a determination or g[i]ve an opinion with regard to disability."[6] *Id.*; *see* Director's Exhibit 11. The administrative law judge further rationally determined that, because Dr. Khan's letter was addressed directly to claimant's former attorney, and there is no evidence that claimant received the letter, or that its contents were discussed with him, Dr. Khan's letter did not constitute "a medical determination of total disability due to pneumoconiosis which has been communicated to the miner." 20 C.F.R. §725.308(a); *see Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); Decision and Order at 5; Director's Exhibit 11. In addition, because the 2007 Illinois Workers' Compensation Commission Decision and Opinion and the 2007 Settlement Contract Lump Sum Petition and Order do not contain determinations that claimant is totally disabled due to pneumoconiosis, they do not contradict the administrative law judge's finding that there is "no "evidence in the record that [claimant] was ever told that he was totally disabled by pneumoconiosis" prior to the filing of the present claim in 2010. Decision and Order at 5; *see* Director's Exhibits 8, 25. In light of the administrative law judge's rational exercise of her discretion, we affirm her conclusion that this claim was timely filed. 20 C.F.R. §725.308; *see Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-39-40 (1993); Decision and Order at 5.

[6] Employer's summary of Dr. Khan's opinion also reflects that he did not express an opinion regarding disability. *See* Employer's Combined Brief in Support of Petition for Review and Response Brief at 7.

Invocation of the Section 411(c)(4) Presumption – Total Disability

The administrative law judge considered whether claimant proved that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge correctly found that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), because none of the arterial blood gas studies, administered on September 27, 2010, January 11, 2011, and February 17, 2012, produced qualifying values,[7] and there is no evidence that the claimant suffers from complicated pneumoconiosis, or has cor pulmonale with right-sided congestive heart failure. Decision and Order at 36-37; Director's Exhibits 13-4, 25-19; Employer's Exhibit 10-7.

Under 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies dated January 24, 2006, September 29, 2008, September 27, 2010, November 22, 2010, January 11, 2011, and February 17, 2012. The pulmonary function studies administered by Drs. Chirag, Houser, and Tazbaz on September 29, 2008, September 27, 2010, and November 22, 2010, respectively, produced non-qualifying values. Decision and Order at 9, 36-37; Director's Exhibit 13; Employer's Exhibits 1, 5. The January 24, 2006[8] pulmonary function study, which was administered by Dr. Khan without the use of bronchodilators, yielded qualifying values. Director's Exhibit 11 at 9. Dr. Repsher reviewed this study and disagreed with Dr. Khan's observation that claimant understood the test procedure and cooperated fully. Employer's Exhibit 44 at 85. The January 11, 2011 pulmonary function study, administered by Dr. Repsher, yielded qualifying values after the use of bronchodilators, while the pulmonary function study that Dr. Repsher performed on February 17, 2012 produced non-qualifying values. Director's Exhibit 25; Employer's Exhibit 9. Drs. Repsher and Tuteur invalidated the results of the January 11, 2011 and February 17, 2012 studies. Director's Exhibit 25; Employer's Exhibits 9, 12, 16, 41, 44. In sum, four of the pulmonary function tests of record were non-qualifying and two, the January 24, 2006 pre-bronchodilator study and the January 11, 2011 post-bronchodilator study, were qualifying. Dr. Repsher challenged the validity of the January 24, 2006 study, while Drs.

[7] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge erroneously listed the January 24, 2006 pulmonary function test as administered on January 25, 2006. Decision and Order at 9, 36; Director's Exhibit 11 at 9.

Repsher and Tuteur invalidated the studies dated January 11, 2011 and February 17, 2012.

The administrative law judge reviewed the pulmonary function study evidence and concluded, "all of the pulmonary function testing since 2008 was non-qualifying, except the post-bronchodilator testing in January 2011, which has been invalidated. I find that the Claimant has failed to establish that he is disabled based on the pulmonary function tests." Decision and Order at 37. We affirm the administrative law judge's finding because it is rational and supported by substantial evidence. The administrative law judge acted within her discretion as fact-finder in focusing on the more recent pulmonary function studies, as the relevant inquiry at 20 C.F.R. §718.204(b)(2) is claimant's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Coal Co.*, 23 BLR 1-29, 1-35 (2004). In addition, the administrative law judge's conclusion is supported by the preponderance of non-qualifying pulmonary function studies, and the uncontradicted invalidation of the January 11, 2011 qualifying study by Dr. Repsher, who administered the study, and Dr. Tuteur. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885, 16 BLR 2-129, 2-135 (7th Cir. 1992).

Regarding total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Drs. Houser, Repsher, and Tuteur were the only physicians who offered opinions as to whether claimant was totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 37.

Dr. Houser examined claimant at the request of the Department of Labor (DOL) on September 27, 2010. Director's Exhibit 13. Dr. Houser indicated in his report, dated November 11, 2010, that claimant's last work for employer occurred after he suffered a traumatic back injury in a rock fall. *Id*. The physician stated claimant "returned to work after the back injury and was physically unable to perform any type of lifting. He helped around the shop and did odd jobs occasionally." *Id*. Based on claimant's pulmonary function study, Dr. Houser diagnosed chronic obstructive pulmonary disease and a moderately severe obstructive respiratory impairment. *Id*. He opined, "solely from a respiratory standpoint [claimant] is unable to perform his prior coal mine employment[.]" *Id*. Employer deposed Dr. Houser on June 28, 2013. Employer's Exhibit 43. When asked whether claimant described the exertional requirements of his coal mine employment, Dr. Houser referred to claimant's Description of Coal Mine Employment Form and replied, "when he worked underground, he did various jobs: shuttle car operator, *miner operator*, loading machine, face boss, ram car operator, and roof bolter." *Id*. at 21 (emphasis added). He further stated, "these jobs – at least a portion of all of those jobs, at times, require[d] heavy manual labor." *Id*. at 22. The administrative law

judge found that Dr. Houser's opinion is not well-documented because he "never specifically addressed the exertional requirements of the Claimant's last position as a continuous miner operator." Decision and Order at 37. She also observed that Dr. Houser "never addressed the fact that the Claimant's diagnostic testing resulted in non-qualifying values, nor was he aware that none of the valid diagnostic testing from other physicians resulted in qualifying values." *Id.*

Dr. Repsher examined claimant on January 1, 2011, and obtained a blood gas study that he described as "normal," and a pulmonary function study that he determined was invalid due to insufficient performance and cooperation. Director's Exhibit 25. Dr. Repsher concluded that claimant is able to perform his usual coal mine work or "any work of a similarly arduous nature." *Id.* The administrative law judge gave little weight to Dr. Repsher's opinion because it was contrary to the findings of the other physicians who determined that claimant has some degree of lung impairment. Decision and Order at 38.

Dr. Tuteur reviewed claimant's medical records, including the medical reports of Drs. Khan, Houser, and Repsher, and submitted a report dated July 5, 2011. Employer's Exhibit 2. Dr. Tuteur indicated that claimant worked as a continuous miner operator, timberman and roof bolter. *Id.* Based on the "best" pulmonary function study obtained by Dr. Chirag on September 29, 2008, Dr. Tuteur diagnosed a mild obstructive impairment, without restriction. *Id.* He concluded that this impairment did not prevent claimant from performing the work of a coal miner or work requiring similar effort. *Id.* In Dr. Tuteur's deposition testimony, obtained by employer on March 13, 2012, he reiterated his conclusions. Employer's Exhibit 12 at 29, 31-36.

The administrative law judge found that Dr. Tuteur's opinion outweighed Dr. Houser's opinion, because he "had access to virtually all of the available medical evidence, so his opinion was better documented."[9] Decision and Order at 38. Based on this consideration of the medical opinion evidence, the administrative law judge determined that claimant failed to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *Id.* She further found, after weighing the evidence relevant to total disability together, that claimant did not satisfy his burden to prove that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id.*

[9] Dr. Tuteur opined that claimant is totally disabled by a traumatic spinal injury that he suffered in a rock fall incident, and that this disability is not in any way related to the inhalation of coal dust. Employer's Exhibit 2 at 7.

The Director argues that, contrary to the administrative law judge's determination, Dr. Houser was aware of the nature of claimant's last coal mine job as a continuous miner operator and that his assessment of the physical requirements of that job is supported by claimant's deposition testimony. The Director also asserts that the administrative law judge should have first determined the exertional requirements of claimant's job and then weighed the physicians' opinions in light of her finding. The Director further contends that Dr. Houser explained why he diagnosed a moderately severe obstructive impairment, based on the pulmonary function test he administered, and why claimant's non-qualifying blood gas study did not preclude the diagnosis of a totally disabling respiratory impairment. In addition, the Director maintains that the administrative law judge erred by failing to recognize that the qualifying January 24, 2006 pulmonary function test administered by Dr. Khan supports Dr. Houser's total respiratory disability diagnosis. The Director also alleges that the administrative law judge did not apply the same level of scrutiny to Dr. Tuteur's opinion, that claimant does not have a totally disabling respiratory impairment, despite his failure to demonstrate a more in–depth knowledge of claimant's coal mine employment duties. The Director further contends that the administrative law judge erred in according greatest weight to Dr. Tuteur's opinion because he reviewed virtually all of the medical evidence, when his opinion was based primarily on Dr. Chirag's September 29, 2008 non-qualifying pulmonary function test, and that Dr. Tuteur did not explain why he apparently discounted the lower results obtained two years later by Dr. Houser.

After reviewing the administrative law judge's consideration of the medical opinions of Drs. Houser and Tuteur under 20 C.F.R. §718.204(b)(2), we conclude that her analysis contains errors that require remand. As the Director contends, to properly determine whether a medical opinion is documented and reasoned on the issue of total disability, the administrative law judge must make a finding as to the exertional requirements of the miner's usual coal mine work, and compare each physician's understanding of these requirements to his or her finding. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc). In this case, the administrative law judge did not render such a finding and, therefore, we cannot discern whether she acted rationally in discrediting Dr. Houser's opinion that claimant is unable to perform a job that requires heavy manual labor. The administrative law judge also did not make this determination with respect to Dr. Tuteur's opinion that claimant is capable of performing the work of a miner or any job requiring similar effort. In addition, although the administrative law judge's summary of Dr. Tuteur's opinion accurately reflects his understanding that claimant was last employed as a continuous miner operator, she did not consider his omission of a description of the exertional requirements of that work when weighing his opinion. Decision and Order at 20, 38; Employer's Exhibits 2 at 2, 41 at 34-36, 84.

Furthermore, the administrative law judge did not properly consider the significance of Dr. Houser's reliance on a non-qualifying pulmonary function study to diagnose a totally disabling respiratory impairment. Contrary to the administrative law judge's finding, Dr. Houser discussed the non-qualifying pulmonary function study he administered on September 27, 2010, and explained that, based on the disability guidelines developed by the American Medical Association, claimant suffers from a moderately severe obstructive respiratory impairment that would prevent him from performing jobs requiring arduous manual labor. Employer's Exhibit 43 at 21-22, 38-42. Furthermore, discrediting a medical opinion diagnosing a totally disabling respiratory impairment because the objective studies are non-qualifying conflicts with 20 C.F.R. §718.204(b)(2)(iv), which provides, in relevant part:

> [W]here total disability cannot be established under paragraphs (b)(2)(i) [and] (ii) of this section, . . . total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine employment or comparable gainful employment].

20 C.F.R. §718.204(b)(2)(iv); *see Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985).

The administrative law judge also did not address Dr. Houser's accurate statement that the normal results of claimant's blood gas study did not conflict with the diagnosis of a moderately severe respiratory impairment on claimant's pulmonary function study because these tests measure different types of impairment. *See Sheranko v. Jones and Laughlin Steel Corp*., 6 BLR 1-797, 1-798 (1984); Employer's Exhibit 43 at 35. Because the administrative law judge did not properly consider the medical opinion evidence on the issue of total disability, we vacate her discrediting of Dr. Houser's opinion, and her crediting of Dr. Tuteur's opinion, and remand the case to the administrative law judge for reconsideration.

On remand, the administrative law judge must first make a finding as to the exertional requirements of claimant's usual coal mine employment. She must consider all relevant evidence, including claimant's deposition testimony that his work as a "one guy" continuous mine operator was "hard," required lifting "[q]uite a bit at times . . . [e]verything you could, miner cable, rock, bits, curtain, just different odds and ends, sledge hammers." *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Director's Exhibit 28 at 29-30, 33-34, 36, 40, 45. She must then reassess the opinions of Drs. Houser and Tuteur and determine whether Dr. Houser adequately explained his

diagnosis of a totally disabling respiratory impairment,[10] and whether the mild respiratory impairment diagnosed by Dr. Tuteur precludes claimant from performing his duties as a continuous miner operator. 20 C.F.R. §718.204(b)(2)(iv); *see Killman v. Director, OWCP*, 415 F.3d 716, 722, 23 BLR 2-250, 2-260 (7th Cir. 2005); *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985); *see also Cornett v. Benham Coal Co.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). The administrative law judge is further required by the Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), to set forth her findings in detail, including the underlying rationale. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 162, 1-165 (1989).

If the administrative law judge finds that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), she must weigh all the relevant evidence together, both like and unlike, including claimant's pulmonary function studies, blood gas studies, and medical opinions, to determine whether claimant has established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing invocation of the Section 411(c)(4) presumption. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 732, 25 BLR 2-405, 2-423 (7th Cir. 2013); *Collins v. J & L Steel*, 21 BLR 1-181 (1999). If the administrative law judge determines that claimant has failed to establish total disability under 20 C.F.R. §718.204(b)(2), an award of benefits is precluded, and she may reinstate her denial of benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[10] The administrative law judge's reconsideration of Dr. Houser's opinion on the issue of total disability must be based on an accurate understanding of his testimony regarding the September 27, 2010 pulmonary function study that he obtained, and must resolve the conflict in the evidence regarding the validity of this study. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). The administrative law judge stated that the physician testified that the non-qualifying pulmonary function study that he obtained on September 27, 2010, exhibited a "'lack of reproducibility,' but the results were reproducible enough to be consistent." Decision and Order at 37, *quoting* Employer's Exhibit 43 at 40. This is not a completely accurate characterization of Dr. Houser's testimony. Although he made the comment quoted by the administrative law judge, it was only with respect to one of six test attempts, and he reported that he relied solely on the tests that produced reproducible results to diagnose a moderately severe obstructive impairment. Employer's Exhibit 43 at 38-40. In addition, the administrative law judge did not render a finding as to whether Dr. Houser's September 27, 2010 pulmonary function study was valid, despite observing that Dr. Tuteur validated the study, while Dr. Fino opined that it was not valid. Decision and Order at 9; Employer's Exhibit 41; Director's Exhibit 24.

If the administrative law judge determines that claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2), and is entitled to invocation of the Section 411(c)(4) presumption, she must determine whether employer has met its burden of rebutting the presumption with affirmative proof that claimant does not have legal and clinical pneumoconiosis, or that no part of his respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.[11] 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich v. Keystone Coal Mining Corp*., BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[11] The Director, Office of Workers' Compensation Programs (the Director), has asked the Board to instruct the administrative law judge that she may take official notice on remand of items pertaining to the credibility of Dr. Wheeler's x-ray interpretations. Employer objects to the Director's request. We decline to address this issue, as it should be initially raised before the administrative law judge, as the finder of fact.