BRB No. 11-0579 BLA

BENNY S. ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHLAND ENTERPRISES, INCORPORATED	)	DATE ISSUED: 05/29/2012
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2008-BLA-5146) of Administrative Law Judge Linda S. Chapman rendered on a subsequent claim filed on November 6, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119

(2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1] The administrative law judge found that the record established thirty-three years of coal mine employment and that at least fifteen of those years were in underground coal mine employment. Considering the claim pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis, if claimant establishes at least fifteen years of coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge found the presumption invoked. Turning to rebuttal, the administrative law judge found that the Section 411(c)(4) presumption was not rebutted because employer failed to meet its burden of showing that claimant does not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge, therefore, awarded benefits under Section 411(c)(4).[2]

[1] Claimant filed three previous claims for benefits. Director's Exhibits 1-3. Claimant first filed a claim on November 8, 1982, which was denied by Administrative Law Judge Giles J. McCarthy on November 24, 1987, because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed duplicate claims on January 4, 1991 and April 27, 1999, which were denied by the district director on March 22, 1991 and September 10, 1999, respectively, because the newly submitted evidence did not establish any of the elements of entitlement. Director's Exhibits 2-3. Claimant took no further action with regard to these denials until he filed the current claim. Director's Exhibit 4.

[2] In considering this claim, the administrative law judge initially adjudicated the claim under 20 C.F.R. Part 718, finding that the newly submitted medical evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Turning to the merits, however, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, denied benefits.

Claimant, without the assistance of counsel, appealed, generally challenging the administrative law judge's denial of benefits. Prior to its review of claimant's appeal, the Board, in light of the 2010 amendments to the Act, provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. *Elkins v. Southland Enterprises, Inc.*, BRB No. 09-0787 BLA (May 10, 2010)(unpub. Order). Pursuant to the Board's Order, employer and the Director, Office of Workers' Compensation Programs, agreed that the 2010 amendments might apply in this case, as the present claim was filed after January 1, 2005, was pending on March 23, 2010, and the administrative law judge found that claimant established at least fifteen

On appeal, employer challenges the administrative law judge's finding that the Section 411(c)(4) presumption was invoked, and that employer failed to rebut the presumption. In support of its argument, employer asserts that the administrative law judge mischaracterized the evidence, improperly evaluated the evidence, and misapplied the burden of proof in violation of the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C §919(d) and 30 U.S.C. §932(a).[3] Claimant has not filed a response brief in this appeal. The response brief of the Director, Office of Workers' Compensation Programs (the Director), is limited to urging affirmance of the administrative law judge's finding that the Section 411(c)(4) presumption was invoked. In reply, employer again contends that the administrative law judge erred in finding the presumption invoked.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 411(c)(4) Invocation

Employer challenges the administrative law judge's determination that the medical opinions of Drs. Hippensteel, Fino and Baker establish total respiratory disability

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years of qualifying coal mine employment and that the new evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the Board vacated the administrative law judge's denial of benefits pursuant to 20 C.F.R. Part 718, and remanded the case to the administrative law judge for consideration of whether claimant was entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). In addition, the Board instructed the administrative law judge that, if the Section 411(c)(4) presumption is invoked, she must then determine whether employer has rebutted the presumption. *Elkins v. Southland Enterprises, Inc.*, BRB No. 09-0787 BLA (July 29, 2010).

[3] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge set forth the rationale underlying her findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[4] Because claimant's last coal mine employment was in Virginia, the Board will apply the law 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 Exhibits 1, 2, 3.

pursuant to 20 C.F.R. §718.204(b) and, therefore, establish invocation of the Section 411(c)(4) presumption, as the requisite years of coal mine employment were established.[5] Decision and Order at 2-4 and 3 n. 1. In particular, employer contends that the administrative law judge erred in relying on the opinion of Dr. Hippensteel because Dr. Hippensteel did not attribute claimant's total disability to a respiratory impairment alone, but to the combined effects of age and obstructive respiratory impairment. Likewise, employer contends that the administrative law judge erred in relying on Dr. Fino's opinion because Dr. Fino attributed claimant's total disability to age and smoking. Employer's Brief at 12. Employer also contends that the medical opinion evidence was not considered in relation to the physical demands of claimant's usual coal mine employment and that the administrative law judge did not properly weigh the medical opinion evidence against the non-qualifying pulmonary function and blood gas study evidence.

Contrary to employer's argument, the administrative law judge correctly determined that Dr. Fino opined that, from a respiratory standpoint, claimant is totally disabled from returning to his usual coal mining job or a job requiring similar effort,[6] and that Dr. Hippensteel opined that claimant's respiratory condition precludes him from performing his usual coal mine employment.[7] *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); Decision and Order at 2-3 and n. 3; Employer's Exhibit 2 at 24. Further, contrary to employer's assertion, the administrative law judge properly found that both Drs. Fino and Hippensteel recognized the exertional requirements of claimant's usual coal mine employment and based their findings, that claimant has a totally disabling respiratory impairment, on that information.[8] *See Cornett*

[5] The administrative law judge's finding that fifteen years of underground coal mine employment were established is affirmed, as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Dr. Fino opined that claimant suffers from chronic obstructive pulmonary disease in the form of chronic bronchitis and emphysema, and that the condition is permanent and disabling. Dr. Fino documented claimant's coal mine employment as a "scoop operator" and opined that, from a respiratory standpoint, claimant is unable to perform his last coal mining job or one requiring similar effort. Employer's Exhibit 3 at 7, 14-15; Director's Exhibit 15 at 12, 14.

[7] Dr. Hippensteel testified that claimant is unable to return to his previous coal mine employment due to his obstructive respiratory impairment. Employer's Exhibits 1 at 12, 2 at 24-25.

[8] Dr. Fino noted that claimant's employment, as a scoop operator, involved "heavy labor, as he would have to load timbers and block by hand." Director's Exhibit 15 at 2, 12.

v. Benham Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 3; Director's Exhibit 15 at 2, 13-14. In addition, contrary to employer's contention, the administrative law judge properly considered the non-qualifying pulmonary function and blood gas study evidence with the medical opinion evidence, as well as the fact that the record did not contain evidence of cor pulmonale with right-sided congestive heart failure. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc). The administrative law judge, therefore, properly found that the opinions of Drs. Hippensteel and Fino supported a finding that claimant established a totally disabling respiratory impairment.

Evaluation of the medical evidence is a matter left to the discretion of the fact-finder. *See Mabe v. Bishop Coal Co*., 9 BLR 1-67 (1986). In this case, the administrative law judge accurately summarized the medical opinions, and rationally determined that the opinions of Drs. Fino and Hippensteel, supported by that of Dr. Baker,[9] established total respiratory disability. Decision and Order at 4. Consequently, we agree with the Director that employer's argument, that the physicians did not assess total respiratory disability, or that the administrative law judge mischaracterized the medical opinions of Drs. Hippensteel and Fino, is meritless. The administrative law judge's finding that the Section 411(c)(4) presumption was invoked, is, therefore, affirmed.

Section 411(c)(4) Rebuttal

Turning to the issue of rebuttal under Section 411(c)(4), employer first argues that the x-ray evidence establishes the absence of clinical pneumoconiosis, and that the administrative law judge incorrectly evaluated that evidence. In particular, employer

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Dr. Hippensteel recorded that claimant's job as a scoop operator "required heavy manual labor hauling supplies, timbers, rock dust and roof bolt bundles." Employer's Exhibit 1 at 1, 11-12.

Claimant testified that in his coal mine employment "running the scoop operator…I hauled supplies, I kept the section clean, ribs rock dusted and coal scooped up and stuff." Jan. 15, 2007 Hearing Transcript at 18.

[9] The administrative law judge observed that Dr. Baker's assessment of a moderate impairment, which prevents the performance of claimant's coal mine employment, did not indicate the specific exertional requirements of the job, and was, therefore, less probative. However, she rationally found that Dr. Baker's disability assessment was consistent with the conclusions of Drs. Hippensteel and Fino. Decision and Order at 2, 4; Director's Exhibit 14 at 17-18.

challenges the administrative law judge's finding that some of the x-ray readings were in equipoise. Employer also argues that the administrative law judge should have assigned determinative weight to the negative x-ray interpretations of radiologists who were professors of radiology over those who do not "possess similar prestigious academic appointments." Employer's Brief at 13. Employer's argument is without merit. We discern no error in the administrative law judge's evaluation of this evidence. The administrative law judge reviewed the readings of the four newly submitted x-rays dated November 27, 2006, May 5, 2007, May 5, 2008, and January 20, 2009. Decision and Order at 5. She properly found that the readings of the November 27, 2006 x-ray were in equipoise because Dr. Alexander, a dually-qualified radiologist, interpreted the x-ray film as positive for pneumoconiosis while Dr. Wiot, a dually-qualified radiologist, interpreted it as negative. The administrative law judge properly found the May 5, 2007 x-ray to be positive for pneumoconiosis because Dr. Alexander, who read the x-ray as positive, was dually-qualified, while Dr. Fino, who read the x-ray as negative, was only a B reader. She properly found the May 15, 2008 x-ray to be positive for pneumoconiosis, based on the positive interpretation of Dr. Miller, a dually-qualified radiologist, over the negative reading by Dr. Hippensteel, a B reader. Finally, regarding the January 20, 2009 x-ray, which was interpreted by Dr. Miller as positive, and by Dr. Wheeler as negative, both dually-qualified radiologists, the administrative law judge properly found the x-ray to be neither positive nor negative, because the readings were in equipoise. *Id*.

Because claimant was entitled to the Section 411(c)(4) presumption, x-ray evidence that is found to be equally probative and is, therefore, in equipoise, is insufficient to establish the absence of clinical pneumoconiosis. *See Morrison v. Tennessee Consolidation Coal Co.*, 644 F.3d 473, BLR 2- (6th Cir. 2011). Moreover, the administrative law judge's assignment of determinative weight to the interpretations of dually-qualified radiologists represents a reasonable method of evaluating conflicting x-ray evidence, and the administrative law judge is not required to accord greater weight to the interpretations of radiologists who are professors of radiology or "possess similar prestigious academic appointments." *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1983); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *see also* 20 C.F.R. §718.202(a)(1). Consequently, as the administrative law judge's analysis of the x-ray evidence is rational, and supported by substantial evidence, her determination that employer failed to rebut the Section 411(c)(4) presumption by establishing the absence of clinical pneumoconiosis is affirmed. 30 U.S.C. §921(c)(4).

Next, employer challenges the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis. Specifically, employer challenges the administrative law judge's determination that the opinions of Drs. Hippensteel and Fino[10] do not establish rebuttal of

[10] Dr. Fino diagnosed chronic obstructive pulmonary disease, with chronic obstructive bronchitis and emphysema, and opined that any contribution to his reduction

the presumption pursuant to Section 411(c)(4), based on her finding that the views of Drs. Hippensteel and Fino are in conflict with the definition of legal pneumoconiosis as set forth in 20 C.F.R. §718.201. Decision and Order at 4, 7-8. According to employer, since Drs. Hippensteel and Fino acknowledged that legal pneumoconiosis can develop or progress after coal mine dust exposure ends, the administrative law judge erred in discounting their opinions and, in doing so, improperly presumed that *all* pneumoconiosis is latent and progressive. Additionally, employer argues that the administrative law judge failed to apply a proper standard of proof on rebuttal, and "increase[d] the employer's burden [on rebuttal] by demanding a 'cohesive theory of the etiology of [c]laimant's pulmonary impairment.'" Employer's Brief at 17-18.

The following evidence is relevant. To begin, Dr. Hippensteel stated that the variable results on claimant's pulmonary function studies were not indicative of the fixed or progressive impairment shown in coal workers' pneumoconiosis. Employer's Exhibit 1 at 11. Dr. Hippensteel also stated that, while the development of impairment in pneumoconiosis is latent, claimant's bronchitis, asthma, and bronchial inflammation were not due to his coal mine dust exposure, since claimant did not have recent exposure that could cause industrial bronchitis, and industrial bronchitis would be expected to cease within several months of leaving the mines. *See* Employer's Exhibit 2 at 27, 30.

Similarly, Dr. Fino stated that, because claimant had normal lung function when he left the mines, his significant obstructive ventilatory abnormality is not due to coal mine employment, but to his continued smoking. Employer's Exhibit 3 at 19, 22. Dr. Fino opined that, although obstruction can worsen after the cessation of coal mine employment, if it is due to coal dust inhalation, "the miner must 'start out' with obstruction in order for it to worsen." *Id*. at 20. Further, Dr. Fino opined that, because claimant does not have silicosis, his condition is not a latent coal dust related disease. *Id*. at 18-21. In this connection, Dr. Fino additionally stated that chronic obstructive pulmonary disease (COPD) is not the latent coal dust-related lung disease referred to in the Act, because the Department of Labor (the DOL) studies underlying the concept of latency involved studies of silicosis, and did not include coal miners in the studies. Decision and Order at 6; *see* Employer's Exhibit 3 at 18-21, 22.

The administrative law judge, as the trier-of-fact, has the discretion to determine whether a medical opinion is supported by accepted scientific evidence, as determined by

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in FEV_1 by coal mine dust was of no clinical significance. Dr. Fino attributed all of claimant's detriment in lung function to smoking.

Dr. Hippensteel agreed with Dr. Fino that claimant has a purely obstructive and variable impairment unrelated to his coal mine employment. Employer's Exhibits 1 at 12, 3 at 14-15; Decision and Order at 6.

the DOL when it revised the definition of pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); *see J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); 65 Fed. Reg. 79,940 (Dec. 20, 2000). The comments to the regulation state that "it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period of time." DOL Comments to the Amended Regulations, 65 Fed. Reg. at 79,971; *see also* 20 C.F.R. §718.201(c). Moreover, the DOL revised definition of pneumoconiosis includes obstructive impairments arising out of coal mine employment. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 1-125-26.[11]

The administrative law judge rationally found that Drs. Hippensteel and Fino excluded claimant's coal mine employment as a factor in his respiratory impairment "because this impairment was not manifest when he left the mines." Decision and Order at 7, 8. Consequently, the administrative law judge properly determined that the opinions of Drs Hippensteel and Fino are not consistent with the view underlying the Act, that legal pneumoconiosis can be latent and progressive. *See* 20 C.F.R. §718.201(c). The administrative law judge did not, contrary to employer's assertions, impose an improper burden of proof on employer or improperly rely upon the assumption that any irreversible respiratory or pulmonary impairment must be attributable to coal dust exposure. Rather, she rationally determined that the opinions of Drs. Hippensteel and Fino, that any obstructive respiratory impairment suffered by claimant would have disappeared shortly after he left the mines, are entitled to little weight as they are inconsistent with 20 C.F.R. §718.201(c), which recognizes that pneumoconiosis "is a latent and progressive disease that may first become detectable only *after* the cessation of coal dust exposure." 20 C.F.R. §718.201(c); *see Workman v. Eastern Assoc. Coal Corp.*, 23 BLR 1-22 (2004)(en banc); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(en banc).

In light of the statements made by Drs. Hippensteel and Fino, the administrative law judge permissibly questioned whether their opinions reflect a personal view of pneumoconiosis that is at odds with the position of the DOL, expressed in Section 718.201(c), that pneumoconiosis may be both latent and progressive in nature. *See* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir.

[11] In this connection, we note that Drs. Hippensteel and Fino, contrary to medical literature credited by the Department of Labor, presume that generally a restrictive impairment must be present in order for obstructive disease to be related to coal dust, and that coal dust causes only minimal obstruction. *See* 65 Fed. Reg. 79,942 (Dec. 20, 2000); *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006).

2002)(NMA); *see* 65 Fed. Reg. at 79,937-79,945, 79,968-79; *Workman*, 23 BLR at 1-25; *see also Sewell Coal Co. v. Triplett*, 253 F. App'x. 274, 277, 2007 WL 3302366 **3 (4th Cir. Nov. 7, 2007)(unpub.). Moreover, in attributing claimant's obstructive impairment to smoking and non-industrial causes, Drs. Hippensteel and Fino made statements that, as the administrative law judge found, are at odds with pertinent findings of the DOL regarding the medical science on the types of impairments that can be caused or aggravated by coal mine dust exposure.[12] *See* 65 Fed. Reg. at 79,938-44; Decision and Order at 7, and n. 4, 8. As the administrative law judge provided appropriate reasons for her conclusion that the opinions of Drs. Hippensteel and Fino are not reliable on the issue of legal pneumoconiosis, her Decision and Order comports with the requirements of the APA. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We affirm, therefore, the administrative law judge's determination that the opinions of Drs. Hippensteel and Fino, that claimant's respiratory impairment is not due to coal mine employment, are entitled to little, if any, weight. Decision and Order at 7-8; *see* 20 C.F.R §718.201; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to meet its burden at Section 411(c)(4) to disprove the existence of legal pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Defore v. Alabama By-Products*, 12 BLR 1-27, 1-29 (1988).

We next address employer's argument that the administrative law judge erred in finding that employer failed to establish that claimant's totally disabling pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment, and, thus, failed to rebut the Section 411(c)(4) presumption. Employer argues that "[i]f the claimant has provided little or no substantial affirmative evidence, which is the case here, then, logically, substantial rebuttal evidence will be more persuasive than little or no affirmative evidence." Employer's Brief at 19. Employer is mistaken. Claimant is not required to produce affirmative evidence that his total respiratory disability is due to, or related to, his coal mine employment. Rather, as the administrative law judge properly recognized, to successfully rebut the presumption at Section 411(c)(4), employer has the burden to *affirmatively establish* that claimant's disabling respiratory impairment does not arise out of, or in connection with, his coal mine employment. Decision and Order at 8; *see Morrison*, 644 F.3d at 479, BLR at 2- .

[12] Further, we note that where a miner's disabling lung disease is due to bronchial asthma and tobacco smoke-induced impairments, a medical expert must adequately explain how a miner's years of coal mine dust exposure are eliminated as a contributing or aggravating factor in his lung condition. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998).

As set forth above, the administrative law judge permissibly discounted the opinions of Drs. Hippensteel and Fino, to find that employer did not meet its burden of eliminating coal mine dust exposure as a contributing factor in claimant's disabling obstructive impairment. Consequently, we hold that the administrative law judge's decision fully comports with the requirements of the APA, and we affirm her finding that employer has failed to rebut the presumption of total disability due to pneumoconiosis by showing that claimant's respiratory impairment did not arise out of, or in connection with, employment in a coal mine. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Defore*, 12 BLR at 1-29; Decision and Order at 24.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer has not rebutted the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge