U.S. Department of Labor

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

BRB No. 19-0098 BLA

THEODORE FLOYD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 03/26/2020
PEABODY ENERGY	)	
	)	
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 Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Fazal A. Shere (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05519) of Administrative Law Judge Natalie A. Appetta on a request for modification of a denied subsequent claim[1] filed on July 21, 2010 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

In his June 30, 2014 Decision and Order, Administrative Law Judge Drew A. Swank found employer is the responsible operator and claimant established pneumoconiosis and a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 725.309; Director's Exhibit 88. He denied benefits, however, because he found claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 88. On claimant's appeal, the Board vacated the denial of benefits because Judge Swank erred in finding claimant not totally disabled. *Floyd v. E. Assoc. Coal Co.*, BRB No. 14-0365 BLA (June. 22, 2015) (unpub.). In his December 3, 2015 Decision and Order on remand, Judge Swank again found claimant failed to establish total disability and denied benefits. Director's Exhibit 101.

Claimant requested modification of that denial. Director's Exhibit 102. In her October 19, 2018 Decision and Order that is the subject of this appeal, Judge Appetta (the administrative law judge) found employer, self-insured through its parent company Peabody Energy Corporation, is the responsible operator/carrier. She credited claimant with 40.3 years of underground coal mine employment[2] and found he is totally disabled. 20 C.F.R. §718.204(b)(2). She thus found claimant established a change in conditions, 20 C.F.R. §725.310, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012).[3] She further found employer

[1] This is claimant's ninth claim for benefits. His most recent prior claim, filed on August 14, 2001, was denied by the district director on June 27, 2003, because he did not establish any element of entitlement. Director's Exhibit 8.

[2] The record reflects that claimant's last coal mine employment occurred in West Virginia. Director's Exhibits 11, 34. Accordingly, 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).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

did not rebut the presumption. As she found granting modification would render justice under the Act, she awarded benefits.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because she had not been appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] It also argues liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund because the administrative law judge erred in finding Peabody Energy Corporation is the responsible carrier. Alternatively, it asserts the carrier's due process rights were violated because it did not receive adequate notice of the claim. Employer also contends the administrative law judge erred in finding the Section 411(c)(4) presumption invoked and unrebutted.[5]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting employer did not timely raise its Appointments Clause challenge. The Director also argues employer waived the responsible carrier issue, or alternatively, that the Board should affirm the finding that Peabody Energy Corporation is the responsible carrier.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

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[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] We affirm, as unchallenged on appeal, the finding of 40.3 years of underground coal mine employment. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

Appointments Clause Challenge

Employer urges the Board to vacate the administrative law judge's Decision and Order Awarding Benefits and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044 (2018).[6] Employer contends that the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017, does not satisfy the Appointments Clause.[7] Employer's Brief at 25-26. In response, the Director asserts employer forfeited its Appointments Clause challenge by failing to timely raise the issue before the administrative law judge and exceptional circumstances do not exist to excuse its failure. Director's Response Brief at 9. We agree with the Director's assertion.

Appointments Clause issues are "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). *Lucia* was decided on June 21, 2018, giving employer four months to raise the issue to the administrative law judge prior to her October 19, 2018 Decision and Order Awarding Benefits. Had employer timely raised its Appointments Clause challenge to the administrative law judge, she could have, if appropriate, referred the case for assignment to a different, properly appointed administrative law judge to hold a new hearing and issue a decision. *Powell v. Service Employees Intnl, Inc.*, __ BRBS __, BRB No. 18-0557, slip op. at 4 (Aug. 8, 2019); *Kiyuna v. Matson Terminal Inc.*, __ BRBS __, BRB No. 19-0103, slip op. at 4-5 (June 25, 2019). Based on these facts, we conclude that employer forfeited its Appointments Clause challenge by not timely raising it before the administrative law judge.[8] *See Powell*, BRB

[6] *Lucia* involved an Appointments Clause challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). In *Lucia*, the United States Supreme Court held that, similar to Special Trial Judges at the Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. Sec. & Exch. Comm'n*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[7] On July 20, 2018, the Department of Labor (DOL) expressly conceded that the Supreme Court's holding in *Lucia* applies to the DOL's administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] Employer also forfeited its right to challenge whether the Secretary of Labor's ratification of the administrative law judge's appointment on December 21, 2017 was valid,

No. 18-0557 BLA, slip op. at 4*; Kiyuna*, BRB No. 19-0103 BLA, slip op. at 4. Furthermore, employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962). Thus, we hold that employer forfeited its Appointments Clause challenge and deny the relief requested.

Responsible Insurance Carrier

The procedural history of the responsible carrier issue is as follows. The district director issued a Notice of Claim to employer as a self-insured operator. Director's Exhibit 23. Employer responded to the Notice of Claim by clarifying it was self-insured through its parent company Peabody Investments. Director's Exhibits 24-26. Employer conceded the identified operator and its insurer are "financially capable of assuming liability for the payment of benefits," but challenged its status as responsible operator on other grounds. Director's Exhibit 25. The district director subsequently issued a Schedule for the Submission of Additional Evidence (SSAE) identifying employer as the responsible operator and Peabody Energy Corporation[9] (Peabody), the owner of Peabody Investments, as the responsible insurance carrier. Director's Exhibit 29. In its response to the SSAE, employer disputed it is the responsible operator, but did not challenge Peabody's designation as responsible carrier. Director's Exhibit 31. Thereafter the district director issued a Proposed Decision and Order awarding benefits identifying employer, self-insured through Peabody, as the responsible operator/carrier. Director's Exhibit 41.

After employer requested a hearing, the district director forwarded the case to the Office of Administrative Law Judges (OALJ) and listed on Form CM-1025 that employer contested the responsible operator issue, but the issue of insurance was not contested. Director's Exhibit 46. During the hearing before Judge Swank, employer withdrew its controversion to the responsible operator issue. Director's Exhibit 85. Although he ultimately denied benefits as discussed above, he found employer is the responsible operator in his June 30, 2014 Decision and Order. Director's Exhibit 88.

Claimant thereafter requested modification of Judge Swank's December 3, 2015 denial of benefits, and the district director allowed the parties sixty days to submit evidence on modification. Director's Exhibit 102. No party submitted any evidence before the district director. Because the pertinent issue was whether Judge Swank's denial of benefits contained a mistake in fact, the matter was referred to the OALJ. Director's Exhibit 104.

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since it had the opportunity to also raise this issue before the administrative law judge subsequent to *Lucia* but it failed to do so.

[9] The administrative law judge noted Peabody Investments is a wholly-owned subsidiary of Peabody Energy Corporation. *See* March 9, 2018 Order Denying Motion to Dismiss Responsible Operator at 9 n.8.

On Form CM-1025, the district director did not list insurance as a disputed issue. Director's Exhibit 105.

The case was then forwarded to the administrative law judge where employer argued for the first time[10] that Patriot Coal had purchased the assets and liabilities of employer from Peabody in 2007 and the Department of Labor authorized Patriot to self-insure those liabilities. February 22, 2018 Motion to Continue Hearing; April 27, 2018 Motion to Dismiss Peabody. Thus it asserted Patriot rather than Peabody is the responsible carrier for this claim. *Id*.

In light of Patriot's subsequent bankruptcy, employer argued the Trust Fund is liable for any benefits. *Id*. It also maintained the district director did not provide Peabody adequate notice of this claim when processing the modification request such that it could challenge its designation as responsible carrier. *Id*. The administrative law judge found no merit to these arguments and concluded employer is the responsible operator and Peabody is the responsible carrier. March 9, 2018 Order Denying Motion to Dismiss Responsible Operator; August 21, 2018 Order Denying Motion to Dismiss Peabody; Decision and Order at 5.[11]

Employer contends the administrative law judge erred in finding Peabody the responsible carrier.[12] It first argues claimant's request for modification constitutes a novel claim such that the district director must issue a new Notice of Claim, conduct another investigation into the responsible carrier issue, and issue new findings. Employer's Brief

[10] After the Board vacated Administrative Law Judge Swank's denial of benefits in *Floyd v. E. Assoc. Coal Co.*, BRB No. 14-0365 BLA (June. 22, 2015) (unpub.), and remanded the case to him for further consideration of the issue of total disability, employer's counsel Paul E. Frampton filed a notice of withdrawal of counsel before Judge Swank. Director's Exhibit 99. He attached a copy of an October 28, 2015 Order from the United States Bankruptcy Court for the Eastern District of Virginia setting forth the effective date of the bankruptcy of Patriot Coal. *Id*. He indicated Patriot Coal no longer has the "assets to assume liability for the payment of benefits in this federal black lung claim and therefore no longer [met] the criteria for being the responsible operator in this matter as set forth in 20 C.F.R. §725.494(e)." *Id*. He made no argument with respect to Peabody.

[11] The administrative law judge fully addressed employer's arguments in her March 9, 2018 and August 21, 2018 Orders, and incorporated her findings in her Decision and Order Awarding Benefits. Decision and Order at 5.

[12] Employer does not challenge its designation as the responsible operator. Thus this finding is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5.

at 5-7. Because the district director did not conduct a new investigation after claimant filed the request for modification, employer contends Peabody did not receive adequate notice and liability should transfer to the Trust Fund. *Id*. We disagree.

When claimant files a claim, the district director "shall investigate whether any operator may be held liable for the payment of benefits" as a responsible operator. 20 C.F.R. §725.407. The regulations specifically include the insurance carrier as a party that must be given adequate notice of the claim and an opportunity to defend its direct liability to the claimant. 20 C.F.R. §§725.360(a)(4), 725.407(b); *see Tazco, Inc. v. Director, OWCP* [*Osborne*], 895 F.2d 949, 952 (4th Cir. 1990). The administrative law judge correctly found that a request for modification does not constitute a new claim but rather a continuation of the underlying claim. *See Garcia v. Director, OWCP*, 12 BLR 1-24, 1-26 (1988); 20 C.F.R. §725.310(a) (the district director may, at any time before one year . . . after the *denial of a claim*, reconsider the terms of [a] . . . *denial of benefits*); 64 Fed. Reg. 54,965, 54,990 (Oct. 8, 1999) (explaining a request for modification has the effect of extending the processing and adjudication of the original claim); March 9, 2018 Order Denying Motion to Dismiss Responsible Operator at 6-7. Contrary to employer's contention, the district director followed the regulations after claimant filed the underlying claim on July 21, 2010 as he provided both employer and Peabody notice of the claim and allowed them to submit evidence challenging Peabody's designation as responsible carrier.[13] 20 C.F.R. §§725.360(a)(4), 725.407(b); Director's Exhibits 24-26, 29-30, 41-42.

We also agree with the Director's argument that employer waived the right to contest Peabody's designation as the responsible carrier as it conceded this issue before the district director. Director's Brief at 12-13. In the Notice of Claim, the district director provided that "within 30 days of receipt of this [Notice], you (or your insurer) must file a response . . . indicating your intent to accept or contest your identification" as a potentially liable operator/carrier. Director's Exhibit 24. The Notice emphasized to employer that if it did "not respond within 30 days of [its] receipt of the Notice of Claim," it would "not be allowed to contest [its] liability for payment of benefits on any of the grounds set forth in

[13] As the administrative law judge noted, "Peabody had sufficient notice of both the claim and the resultant requested modification." August 21, 2018 Order Denying Motion to Dismiss Peabody at 7. Employer informed the district director that it was self-insured through Peabody. Director's Exhibit 25. Representatives for employer and Peabody actively participated in the underlying claim. Director's Exhibits 24-42. The SSAE and Proposed Decision and Order designating Peabody as the responsible carrier were sent to it by certified mail. Director's Exhibit 31, 42. After the district director received claimant's request for modification, he forwarded a copy to employer and Peabody and provided them sixty days to submit evidence. Director's Exhibit 103. Neither party submitted liability evidence relevant to Patriot at this stage.

20 C.F.R. 725.408(a)(2)," including whether employer or its insurer are financially capable of assuming liability. *Id*.

As discussed above, employer responded to the Notice of Claim by informing the district director that it was self-insured through Peabody. Director's Exhibits 24-26. Employer explicitly acknowledged both are "financially capable of assuming liability for the payment of benefits." Director's Exhibit 25. In an attached response and controversion, employer did not challenge Peabody's designation as responsible carrier. Director's Exhibit 27. The SSAE designating Peabody as responsible carrier was sent to both employer and Peabody by certified mail. Director's Exhibit 31. Neither party challenged the findings in the SSAE.[14]

In addition, in any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The regulations further provide that "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. §725.463(b).

As discussed above, the district director did not identify insurance as a contested issued when this case was forwarded to OALJ in either the underlying claim or the request for modification. Director's Exhibits 46, 103. Employer does not allege that this issue was not reasonably ascertainable while the claim was before the district director. Thus the administrative law judge correctly found the responsible carrier issue was foreclosed from consideration before her, notwithstanding her alternative finding that there is no merit to employer's argument that Peabody transferred liability to Patriot. August 21, 2018 Order Denying Motion to Dismiss Peabody at 7-9.

Finally, we note Patriot acquired Eastern in 2007, *see* April 27, 2018 Motion to Dismiss Peabody at 2, and claimant filed this claim in 2010. Employer did not raise the

[14] The district director also stated employer must submit liability evidence within ninety days and, "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability . . . may be admitted into the record once a case is referred to the Office of Administrative Law Judges." Director's Exhibit 24, *citing* 20 C.F.R. §725.456(b)(1). Because employer submitted no liability evidence within ninety days of the Notice of Claim, the administrative law judge was precluded from considering any evidence relevant to Patriot's acquisition of employer absent a showing of extraordinary circumstances. 20 C.F.R. §725.456(b)(1).

responsible carrier argument at any time before the district director or Judge Swank. Nor did it raise this argument in the prior appellate proceedings before the Board. It raised this argument for the first time eight years after the claim was filed.[15] Accordingly, employer has waived this responsible carrier argument. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220.15, 226 (1981), *aff'd on other grounds*, 772 F.2d 775 (11th Cir. 1985); *Burbank v. K.G.S., Inc.*, 13 BRBS 467, 468 (1981).

Invocation Section 411(c)(4) – Total Disability

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge weighed the medical opinions submitted before Judge Swank.[16] 20 C.F.R. §718.204(b)(2)(iv). Drs. Splan, Ammisetty and Zaldivar opined claimant is totally disabled while Dr. Rosenberg opined he is not. Director's Exhibits 19, 40, 83-85. Judge Appetta agreed with Judge Swank's finding that none of these opinions are reasoned and documented, and thus found no mistake in a determination of fact that these opinions do not establish total disability. Decision and Order at 18-19. She then weighed deposition testimony from Drs. Rosenberg, Zaldivar, and Tuteur, submitted by the parties on modification. She found Drs. Zaldivar and Tuteur testified claimant is totally disabled while Dr. Rosenberg testified claimant is not. Decision and Order at 18-19; Employer's Exhibits 1-3. She found the opinions of all three doctors, as set forth in their testimony, credible because they are reasoned and documented. Decision and Order at 18-

[15] Employer and Peabody have been represented by the same counsel, Paul E. Frampton, at nearly all stages of this claim.

[16] The administrative law judge found there was no mistake in a determination of fact with respect to Judge Swank's findings that the pulmonary function and arterial blood gas studies do not establish total disability, and there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10 n. 8, 11-13. The parties did not submit any additional pulmonary function or arterial blood gas studies as part of the request for modification.

19. Moreover, she found the opinions of Drs. Zaldivar and Tuteur outweighed that of Dr. Rosenberg and thus found the medical opinions establish total disability. *Id*.

Employer argues the administrative law judge erred in finding Drs. Zaldivar and Tuteur opined claimant is totally disabled from a respiratory standpoint.[17] Employer's Brief at 30- 36. We disagree. Dr. Zaldivar was specifically asked if claimant was able to return to his usual coal mine employment from a respiratory standpoint. Employer's Exhibit 2 at 13. He opined claimant was disabled from a respiratory standpoint because "age alone would impair his ventilatory capacity sufficiently to prevent him from going back and doing any rigorous work regardless of anything else." *Id*. Although Dr. Tuteur testified claimant does not have "abnormal pulmonary function values" for an individual his age, Employer's Exhibit 3 at 19-20, he conceded the "absolute" FEV1 values evidenced by Dr. Zaldivar's pulmonary function testing indicate claimant cannot perform the exertional requirements of coal mine work. *Id*. at 24-25. Later in his deposition, he again testified the results of the pulmonary function testing in "absolute terms" meet the Department of Labor disability standards. *Id*. at 31. Thus, while Drs. Zaldivar and Tuteur attributed claimant's respiratory impairment to his age, the administrative law judge acted within her discretion in finding that they nevertheless considered his respiratory impairment to be totally disabling.[18] *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997). As employer does not specifically challenge the administrative law judge's finding that the opinions of Drs. Zaldivar and Tuteur outweigh that of Dr. Rosenberg, we further affirm her finding that the medical opinions establish total disability. *W.Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 698 (4th Cir. 2018); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2)(iv).

[17] Employer argues the administrative law judge erred in weighing Dr. Ammisetty's opinion. Employer's Brief at 28. The administrative law judge did not credit this opinion, however.

[18] We reject employer's assertion that the opinions of Drs. Zaldivar and Tuteur do not support total respiratory disability because they attributed claimant's disabling respiratory condition to his old age. Employer's Brief at 30-36. Contrary to employer's argument, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether claimant's respiratory or pulmonary condition precludes the performance of his usual coal mine work. The etiology of claimant's pulmonary condition concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

We also affirm her findings that all of the relevant evidence weighed together established total disability, claimant established a change in conditions, and he invoked the Section 411(c)(4) presumption. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198; 20 C.F.R. §§725.310, 718.204(b)(2); Decision and Order at 19.

Rebuttal of Section 411(c)(4)

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish he has neither clinical nor legal pneumoconiosis[19] or "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). The administrative law judge found employer disproved legal pneumoconiosis but not clinical pneumoconiosis, and did not establish that claimant's respiratory disability was unrelated to clinical pneumoconiosis. Decision and Order at 19-29. Thus she found employer did not rebut the presumption by either method.

Employer does not challenge the finding that it failed to rebut the presumption of clinical pneumoconiosis. Thus it is affirmed. *See Skrack*, 6 BLR at 1-711; Decision and Order at 19-28. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Employer contends the administrative law judge did not adequately explain her basis for resolving the conflict in the evidence with respect to the cause of claimant's disability. 20 C.F.R. §718.305(d)(1)(ii); Employer's Brief at 40. Employer's argument has merit. The administrative law judge noted the opinions of Drs. Ammisetty, Splan, and Rosenberg do not aid employer in rebutting the presumption because they opined claimant's disability was due in part to pneumoconiosis. Decision and Order at 28-29. She then noted Drs. Tuteur and Zaldivar opined no part of claimant's disability was caused by

[19] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

pneumoconiosis[20] as they concluded "[c]laimant's pulmonary impairment is due mainly to old age. Dr. Zaldivar also attributed [c]laimant's impairment to asthma and aspiration. Dr. Tuteur also considered aspiration to be a contributing factor." *Id.* Finding the "majority of [reasoned opinions] attribute [c]laimant's disability, in part, to pneumoconiosis," she concluded employer failed to establish no part of claimant's disability was caused by pneumoconiosis.

The administrative law judge erred in relying on the numerical superiority of experts when resolving a medical question. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256 (4th Cir. 2016); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992). Because she did not provide a valid reason for resolving the conflict in the evidence, we must vacate her finding that employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(ii); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Akers*, 131 F.3d at 440-41. We remand this case for the administrative law judge to reconsider whether employer rebutted the presumption by establishing "no part of [claimant'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 should address the explanations the physicians provided for their diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Hicks*, 138 F.3d at 528; *Akers*, 131 F.3d at 441. She must set forth her findings in detail, including the underlying rationale for her decision as the Administrative Procedure Act requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[20] Drs. Zaldivar and Tuteur opined claimant has clinical pneumoconiosis. Employer's Exhibits 2, 3.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge