U.S. Department of Labor

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

BRB No. 20-0143 BLA

GARY P. SAWYERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL LLC	)	DATE ISSUED: 11/15/2022
	)	
and	)	
	)	
PEABODY ENERGY CORPORATION	)	
	)	
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 in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher and Tighe A. Estes (Reminger Co., L.P.A.), Lexington, Kentucky, for Employer and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2017-BLA-06269) filed on September 21, 2015,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Eastern Associated Coal Company (Eastern), self-insured through its parent company, Peabody Energy Corporation (Peabody Energy), is the responsible operator liable for the payment of benefits. On the merits of the claim, she found Claimant established at least twenty-six years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She thus determined Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c), and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the district director, the Department of Labor (DOL) official who initially processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It

[1] This is Claimant's third claim for benefits. Director's Exhibits 1, 2, 4. On July 12, 2011, the district director denied his most recent prior claim, filed on July 20, 2010, because he did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 2. Claimant took no further action until he filed the current subsequent claim. Director's Exhibit 4.

[2] 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.

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

also argues the ALJ erred in finding Peabody Energy is the liable carrier. On the merits of the claim, it asserts the ALJ erred in finding the Section 411(c)(4) presumption unrebutted.[4]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response urging the Benefits Review Board to reject Employer's constitutional arguments and to affirm her finding that Peabody Energy 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 if it is rational, supported by substantial evidence, and in accordance 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).

Responsible Insurance Carrier

Employer does not challenge the ALJ's findings that Eastern is the correct responsible operator and it was self-insured by Peabody Energy on the last day Eastern employed Claimant; thus we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983); 20 C.F.R. §§725.494(e), 725.495, 726.203(a); Decision and Order at 40. Patriot Coal Corporation ("Patriot") was initially another Peabody Energy

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> [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.

[4] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25.

[5] Because Claimant's last coal mine employment occurred in West Virginia, we 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); Hearing transcript at 9.

subsidiary. Decision and Order at 40-41; Employer's Brief at 2-3, 28; Director's Brief at 2.[6] In 2007, after the Miner ceased his coal mine employment with Eastern, Peabody Energy transferred a number of its other subsidiaries, including Eastern, to Patriot. Director's Exhibit 42 at 1, 8. That same year, Patriot was spun off as an independent company. *Id*. at 4-58. On March 4, 2011, Patriot was authorized to insure itself and its subsidiaries, retroactive to 1973. *Id*. at 59-60. Although Patriot's self-insurance authorization made it retroactively liable for the claims of miners who worked for Eastern, Patriot later went bankrupt and can no longer provide for those benefits. Employer's Brief at 31; Director's Brief at 18. Neither Patriot's self-insurance authorization nor any other arrangement, however, relieved Peabody Energy of liability for paying benefits to miners last employed by Eastern when Peabody Energy owned and provided self-insurance to that company, as the ALJ held. Decision and Order at 47.

Employer raises several arguments to support its contention that Peabody Energy was improperly designated the self-insured carrier in this claim and thus the Black Lung Disability Trust Fund (the Trust Fund), not Peabody Energy, is responsible for the payment of benefits following Patriot's bankruptcy. Employer's Brief at 11-42. It argues the ALJ erred in finding Peabody Energy liable for benefits because: (1) claims examiners and the district director are inferior officers not properly appointed under the Appointments Clause;[7] (2) 20 C.F.R. §725.495(a)(4) precludes Peabody Energy's liability; (3) before transferring liability to Peabody Energy, the DOL must establish it exhausted any available funds from the security bond Patriot gave to secure its self-insurance status; (4) the DOL released Peabody Energy from liability; (5) the Director is equitably estopped from imposing liability on the company; and (6) the DOL violated its due process rights by not maintaining adequate records with respect to Patriot's bond and failing to comply with its duty to monitor Patriot's financial health. *Id*. It maintains that a separation agreement – a private contract between Peabody Energy and Patriot – released it from liability and the DOL endorsed this shift of complete liability when it authorized Patriot to self-insure. *Id*.

The Board has previously addressed these arguments in *Bailey v. E. Assoc. Coal Co.*, BLR , BRB No. 20-0094 BLA, slip op. at 3-19 (October 25, 2022), *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 5-17 (Oct. 18, 2022), and

[6] The ALJ noted: "Much of the context and background information related to the business relationships between [Eastern, Peabody Energy and Patriot], has been gleaned from various submissions relating to pleadings and evidentiary motions in this case along with the parties' closing briefs." Decision and Order at 40 n.17.

[7] Employer raised this argument for the first time in this claim in its brief before the Board. Employer's Brief at 11-18.

Graham v. E. Assoc. Coal Co., BLR , BRB No. 20-0221 BLA, slip op. at 7-8 (June 23, 2022). For the reasons set forth in *Bailey*, *Howard*, and *Graham*, we reject Employer's arguments. We also reject Employer's arguments with respect to the exclusion of evidence for the reasons set forth below.

Employer asserts the ALJ erred in excluding Employer's liability evidence – Employer's Exhibits 1 through 4[8] and the depositions of David Benedict and Steven Breeskin, two former Department of Labor (DOL) Division of Coal Mine Workers' Compensation officials. Employer's Brief at 18-25. In an April 13, 2017 letter, submitted well after the September 4, 2016 deadline in the Schedule for the Submission of Additional Evidence (SSAE) to submit documentary evidence relevant to liability and identify any liability witnesses, and any subsequent extensions,[9] Employer identified potential witnesses including Stephen Breskin and David Benedict. Director's Exhibit 42. In the June 29, 2017 Proposed Decision and Order, the district director did not address Employer's April 13, 2017 letter except to generally state that it "failed to timely submit evidence to support its position or to timely request an extension of the period of time for submission of such evidence." Director's Exhibit 62.

After the case was transferred to the Office of Administrative Law Judges, Employer submitted documentary evidence pertaining to its liability. Employer's January 29, 2018 and March 2, 2018 Letters. The Director objected to the submission of these documents as untimely, Employer responded, and the Director replied. Director's Objection to the Submission of Documentation; Employer's Response to Director's

[8] Employer's Exhibit 1 is Patriot Coal Corporation's (Patriot's) authorization to self-insure; Employer's Exhibit 2 is the March 4, 2011 letter from Mr. Steven Breeskin, former Director of the Division of Coal Mine Workers' Compensation (DCMWC), to Patriot; Employer's Exhibit 3 is a November 23, 2010 letter from Mr. Breeskin returning to Patriot two unsigned copies of an indemnity bond; Employer's Exhibit 4 is an undated letter from Mr. Michael Chance, the Director of the DCMWC, regarding Patriot's self-insurance reauthorization audit requiring retroactive coverage for all claims through July 1, 1973; Employer does not specifically challenge the ALJ's finding that extraordinary circumstances do not exist to admit Employer's Exhibits 5 through 7. We therefore affirm the ALJ's exclusion of these exhibits as unchallenged. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[9] After granting both parties multiple extensions of time to submit evidence, the district director extended the deadline for the submission of additional evidence to March 22, 2017. ALJ's Order Denying Employer's Request to Submit Documentary Evidence at 4; Director's Exhibits 50-61.

Objection; Director's Reply to Employer's Response. The ALJ excluded Employer's Exhibits 1 through 7 because Employer did not timely submit this evidence to the district director or establish extraordinary circumstances for failing to do so.[10] September 13, 2018 Order Denying Request to Submit Documentary Evidence.[11]

Employer also requested to subpoena David Benedict, Steven Breeskin, Michael Chance, and an unidentified DOL employee or former employee to solicit testimony concerning liability issues and any documentation from the DOL concerning Patriot's liability for claims. Employer's June 14, 2018 Letter. Employer further requested that the evidentiary record be kept open "though the final hearing to accommodate the submission of the deposition transcripts of Mr. Chance, Mr. Benedict, Mr. Breeskin, and the unknown DOL employe[e] as they relate to the liability issue in this matter."[12] Employer's August 16, 2018 Motion for Extension to Submit Liability Evidence. The Director objected to Employer's requests and motions, and Employer responded. Director's Objection to Employer's Request for Subpoenas and Employer's Motion and Motion to Exclude Evidence; Employer's Response to Director's Objection. The ALJ denied Employer's

[10] The documents marked for identification as Employer's Exhibits 1-2 are also contained in Director's Exhibit 42 as attachments to Employer's April 13, 2017 letter. Director's Exhibit 42 at 59-60. They were submitted after September 4, 2016, the initial deadline provided in the SSAE to submit liability evidence or identify liability witnesses, and after March 22, 2017, the extended deadline for the submission of additional evidence. *See* Order Denying Employer's Request to Submit Documentary Evidence at 4. Although the ALJ admitted Director's Exhibit 42 at the hearing, she reiterated her prior ruling excluding the proposed Exhibits 1-7. Hearing Transcript at 27. The Director correctly notes the ALJ ruled that Director's Exhibit 1-71 were forwarded to the OALJ "for inclusion in the record, absent any sustained objection." Order Denying Employer's Request to Submit Documentary Evidence at 3 n.2., *citing* 20 C.F.R. §725.456(a); Director's Brief at 8 n. 4.

[11] The ALJ's reference to Director's Exhibit 61 is a typographical error, as the letter is part of Director's Exhibit 42.

[12] In its brief before the Board, Employer notes that is has not been able to take Mr. Chance's deposition. Employer's Brief at 19. However, similar to the current situation, the Board held in *Howard* that the ALJ permissibly quashed subpoenas for testimony and documents from Mr. Chance because it constitutes liability evidence which was not timely submitted before the district director and for which Employer did not establish extraordinary circumstances for its untimely submission. *Howard*, BLR , BRB No. 20-0229 BLA, slip op. at 10-12.

subpoena and documentation requests and its motion for an extension of time to submit liability evidence because Employer did not timely identify or establish extraordinary circumstances to excuse its failure to timely submit this evidence to the district director. September 13, 2018 Order Denying Subpoena Requests; September 13, 2018 Order Denying Motion for Extension to Submit Liability Evidence. Employer filed a request for reconsideration of the ALJ's denial of its subpoena requests on October 9, 2018, which the ALJ denied. November 13, 2018 Order Denying Employer Request for Reconsideration.

After the hearing was held on December 19, 2018, Employer submitted a Motion to Admit the Depositions of David Benedict and Steven Breeskin. Employer's February 22, 2019 Motion. The Director objected to the motion and Employer replied. Director's Objection to Employer's Motion to Admit; Employer's Reply to Director's Objection. The ALJ denied Employer's motion and excluded the depositions, again finding Employer did not timely identify potential liability witnesses at the district director level. August 29, 2019 Order Denying Motion to Admit Deposition.

On appeal, Employer contends the ALJ erroneously found Employer's submission untimely and that extraordinary circumstances did not exist to admit its liability evidence. In *Graham* and *Bailey*, Employer moved to submit the same evidence for the purposes of establishing Peabody Energy was improperly designated as the responsible carrier for claims that Patriot had been authorized to self-insure and relied on similar arguments to those raised here. The Board held that the ALJ properly excluded the liability evidence under similar circumstances. *See Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 11-13; *Graham*, BLR , BRB No. 20-0221 BLA, slip op. at 6-7. In addition, the Board held in *Bailey* that the depositions of Mr. Benedict and Mr. Breeskin do not support the argument that the DOL released Peabody Energy from liability when it authorized Patriot to self-insure and released a letter of credit Patriot financed under Peabody Energy's self-insurance program. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17.[13] Thus we reject Employer's argument that the ALJ abused her discretion in excluding this evidence.[14] *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc); Employer's Brief at 18-25.

[13] This determination was necessary to reach the conclusion that Peabody was liable for benefits. *Bailey*, BLR , BRB No. 20-0094 BLA, slip op. at 15 n. 17.

[14] Employer states it wants to "preserve" its argument that its due process rights were violated because the ALJ "cut off" discovery "prematurely." Employer's Brief at 39-41. Employer neither asks the Board to address this issue nor sets forth any argument that would permit our review. *See Cox v. Director*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); 20 C.F.R. §802.211(b).

Thus we affirm the ALJ's determination that Eastern and Peabody Energy are the responsible operator and carrier, respectively, and are liable for this claim.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[15] 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 ALJ found Employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish 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). Employer relies on the opinions of Drs. Rosenberg and Zaldivar, who opined Claimant has chronic obstructive pulmonary disease (COPD) unrelated to coal mine dust exposure. Director's Exhibit 19; Employer's Exhibits 9-11. The ALJ found their opinions insufficiently reasoned and unpersuasive, and thus did not carry Employer's burden to prove Claimant does not have legal pneumoconiosis. Decision and Order at 34-38.

Employer argues the ALJ erred in finding Dr. Rosenberg's opinion not well reasoned because he relied on an inaccurate smoking history of twenty pack years, which is greater than the fifteen pack years the ALJ found. Employer's Brief at 52; *see* Decision and Order at 36; Employer's Exhibit 12 at 11. Contrary to Employer's contention, an ALJ may give less weight to a physician's opinion that is based on an inaccurate smoking history in comparison to his determination. *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); *Addison v.*

[15] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Director, OWCP, 11 BLR 1-68, 1-70 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Furthermore, the ALJ accurately noted Dr. Rosenberg excluded coal mine dust exposure as a causative factor for Claimant's disabling COPD based, in part, on the markedly reduced FEV1/FVC ratio shown on pulmonary function testing; he opined this phenomenon is consistent with cigarette smoking and not coal mine dust exposure. Employer's Exhibit 11. The ALJ permissibly found Dr Rosenberg's opinion unpersuasive in view of the DOL's recognition in the preamble to the revised 2001 regulations that coal dust exposure may cause clinically significant obstructive lung disease with associated decrements in the FEV1/FVC ratio and thus permissibly rejected his opinion. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15 (4th Cir. 2012); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); Decision and Order at 40.

Moreover, the ALJ permissibly found Dr. Rosenberg failed to adequately explain why coal mine dust exposure was not a significant aggravating factor for Claimant's obstructive impairment even if it was predominantly caused by smoking. *Stallard*, 876 F.3d at 671-72; *Cochran*, 718 F.3d 319 at 324; Decision and Order at 37.

Regarding Dr. Zaldivar's opinion, the ALJ correctly noted he diagnosed asthma-COPD overlap syndrome, or ACOS, based on Claimant's symptoms, his smoking history and exposure to secondhand smoke as a child, his sensitivity to perfumes and chemicals, and his response to bronchodilators during pulmonary function testing. Decision and Order at 35; Director's Exhibit 19; Employer's Exhibits 9, 10. However, as the ALJ permissibly found and Employer does not challenge, Dr. Zaldivar did not adequately explain why the reversibility of Claimant's obstructive impairment with bronchodilation necessarily eliminated coal mine dust exposure as a cause of the irreversible portion of his impairment.[16] *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004) (ALJ permissibly found presence of a disabling residual impairment suggests a combination of factors caused the condition); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Skrack*, at 1-711; Decision and Order at 35-36. The ALJ also permissibly found Dr. Zaldivar failed to adequately explain why coal mine dust exposure did not

[16] Claimant's five pulmonary function studies produced qualifying values supporting a finding of total pulmonary disability both before and after the administration of bronchodilators. Decision and Order at 8-9; Director's Exhibits 16-19; Claimant's Exhibits 1-2; Employer's Exhibit 9.

substantially aggravate Claimant's obstructive impairment caused by asthma. *Stallard*, 876 F.3d at 671-72; *Cochran*, 718 F.3d 319 at 324; Decision and Order at 35-36.

Because the ALJ acted within her discretion in discrediting the opinions of Drs. Zaldivar and Rosenberg, the only opinions supportive of Employer's burden, we affirm her finding that Employer did not disprove legal pneumoconiosis.[17] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); Decision and Order at 35-38. Employer's failure to rebut the presumption of legal pneumoconiosis precludes a rebuttal finding that Claimant did not have pneumoconiosis.[18] Therefore, we affirm the ALJ's finding that Employer did not establish rebuttal at 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). She rationally discounted the disability causation opinions of Drs. Rosenberg and Zaldivar because they did not diagnose legal pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995) (an ALJ who has found the disease and disability elements established may not credit an opinion denying causation without providing "specific and persuasive" reasons for concluding it does not rest upon a disagreement with those elements); *Big Branch Res., Inc. v. Ogle*, 737 F.3d

[17] We reject Employer's assertion that the ALJ improperly required its medical experts to "prove absolutely 100%, that the Claimant[']s asthma coupled with significant smoking history precludes contribution from coal dust exposure." Employer's Brief at 52; *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). The ALJ applied the correct legal standard in requiring Employer to prove by a preponderance of the evidence that Claimant's respiratory impairment was not "significantly related to, or substantially aggravated by" coal dust exposure. Decision and Order at 34, quoting 20 C.F.R. §718.201(b), 35-37. Further, because Employer has the burden of proof on rebuttal and we affirm the ALJ's rejection of its medical experts, we need not address Employer's contentions concerning the ALJ's weighing of Drs. Raj's and Green's opinions diagnosing legal pneumoconiosis. Decision and Order at 35; Employer's Brief at 53-54; Director's Exhibits 16, 22; Claimant's Exhibits 1, 2.

[18] Thus, we need not address Employer's arguments concerning the ALJ's finding that it also did not rebut the presumption of clinical pneumoconiosis. Decision and Order at 26-34; Employer's Brief at 43-47.

1063, 1074 (6th Cir. 2013); Decision and Order at 38-39. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(ii), and the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge