U.S. Department of Labor

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

BRB No. 21-0282 BLA

HENRY W. PETERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ASARCO, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 11/14/2022
	)	
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 Carrie Bland, District Chief Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for Claimant.

Michael A. Pusateri and Brian D. Straw (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Jeffrey S. Goldberg (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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2017-BLA-05920) rendered on a claim filed on January 21, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. She accepted the parties' stipulation that Claimant had twenty-nine years of coal mine employment and determined it occurred in conditions substantially similar to underground coal mine employment. She found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and therefore invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). The ALJ further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2,[2] and the removal provisions applicable to the ALJ rendered her appointment unconstitutional. It also challenges its designation as the responsible

[1] Section 411(c)(4) provides a rebuttable presumption 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] 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.

operator. On the merits, Employer argues the ALJ erred in finding Claimant is totally disabled and invoked the Section 411(c)(4) presumption, and in finding Employer did not rebut it.[3]

Claimant responds in support of the award of benefits.[4] The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, urging rejection of Employer's arguments regarding the ALJ's appointment and removal protections, and its designation as the responsible operator. Employer filed separate reply briefs to Claimant's and the Director's responses, reiterating its arguments.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ'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 Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the Decision and Order and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 12-18; Employer's Reply to the

[3] We affirm, as unchallenged on appeal, the ALJ's finding Claimant established twenty-nine years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 6-7.

[4] On June 28, 2021, Claimant filed his Brief in Response to Petition for Review along with a Motion for Leave to File Instanter requesting the Board accept the filing of his response brief out of time. Claimant's counsel represented the late filing was due to the mistaken belief she had been granted an extension of time along with the Director. By Order, the Board accepted Claimant's late-filed brief as part of the record. *Peters v. ASARCO, Inc.*, BRB No. 21-0282 BLA (July 8, 2021) (Order) (unpub.).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit because Claimant performed his coal mine employment in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18, 20, 30, 34.

[6] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the

Director at 1-5 (unpaginated). Although the Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] Employer maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment.[8] *Id.* The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance with the Appointments Clause. Director's Brief at 8-11. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* We agree with the Director's arguments.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Id.* at 9 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Ratification is permissible so long as the agency head: 1) had the authority to take the action to be ratified at the time of ratification; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603 (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)).

[7] The Secretary of Labor issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Bland.

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

Congress authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified ALJ Bland and indicated he gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Bland. The Secretary further stated he was acting in his "capacity as head of the Department of Labor" when ratifying the appointment of ALJ Bland "as an [ALJ]." *Id.*

Employer does not assert the Secretary had no knowledge of all the material facts but generally speculates the Secretary's "signing" individual letters "does not reflect genuine, let alone thoughtful, consideration of potential candidates for these positions."[9] Employer's Brief at 16. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (National Labor Relations Board's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 18-23; Employer's Reply Brief at 5-8 (unpaginated). Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. *Id.* It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). *Id.* For the reasons set forth

[9] While Employer notes the Secretary's ratification letter was signed by a "robo-pen," Employer's Reply Brief at 3 (unpaginated), this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 3-5 (Oct. 18, 2022), we hold Employer's arguments unpersuasive.

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner.[10] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either it is financially incapable of assuming liability for benefits or another potentially liable operator that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2); *see RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

Although Employer argues the ALJ erred in finding Asarco, Inc. (Asarco) is the responsible operator, we agree with the Director's position that Employer stipulated Asarco is the responsible operator before the ALJ. Employer's Brief at 23-29; Director's Brief at 15-16. Stipulations of fact that are fairly entered into are binding on the parties. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *see also Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1068 (7th Cir. 2000) (voluntary stipulations bind the parties); *Soo Line R. Co. v. St. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997) ("judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court" through stipulation).

In the Joint Pre-Hearing Statement to the ALJ, Employer stipulated "ASARCO is the correctly named Responsible Operator." Joint Pre-Hearing Statement at 1 (unpaginated). At the hearing, the Director argued Employer should be bound by its stipulation. Hearing Transcript at 14. Employer stated it contested the issue before making the stipulation but offered no reason why it should not be bound by it. *Id.* at 14-15. The ALJ held "[b]ased on the stipulations, I do find that the parties have stipulated that

[10] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[Employer] is the responsible operator in this case," and gave Employer the opportunity to file a motion for reconsideration of her ruling after the hearing. *Id.* at 15.

In a motion for reconsideration and in its post-hearing brief, Employer argued only that Asarco is not the potentially liable operator that most recently employed Claimant, but it did not address its stipulation. Employer's Post Hearing Brief at 1; Mot. for Recon. at 4-6. The ALJ addressed Employer's arguments in her Decision and Order. Noting Employer did not contest Asarco satisfied the requirements for a potentially liable operator, she found it was properly named the responsible operator pursuant to 20 C.F.R. §725.495(a)(3).[11] Decision and Order at 5.

Before the Board, Employer asserts it preserved its objection to Asarco's "legal status as the responsible operator" because it disputed Asarco's designation before and after the stipulation. Employer's Reply to the Director at 11 (unpaginated). Thus, in all its pleadings, Employer has failed to offer any argument or reason for making an exception to the well-established rule that stipulations are binding on those who make them. *See Burris*, 732 F.3d at 730; *Puig*, 200 F.3d at 1068; *Soo Line R. Co.*, 125 F.3d at 483. We therefore decline to disturb the ALJ's permissible finding that Employer is bound by its stipulation that Asarco is the responsible operator and decline to further address Employer's liability arguments.[12] *Id.*; Hearing Transcript at 15.

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

[11] The regulation states, in relevant part, "If the miner's most recent employer does not qualify as a potentially liable operator pursuant to 20 C.F.R. §725.494, then the responsible operator will be the potentially liable operator that next most recently employed the miner." 20 C.F.R. §725.495(a)(3).

[12] Employer argues the ALJ erred in finding Asarco, Inc. is the responsible operator because Mid State Coal Company (Mid State Coal) more recently employed Claimant for at least one year. Employer further asserts that, to the extent Mid State Coal is not capable of assuming liability, the DOL is at fault by not enforcing the applicable regulations and requiring this operator to carry insurance when it employed Claimant. It also argues the district director was required to either pursue the officers of Mid State Coal for payment of benefits or assign liability to the Trust Fund. Employer's Brief at 23-29.

opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ 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 ALJ found the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv).[13]

Employer argues the ALJ erred in finding the medical opinions establish total disability. Employer's Brief at 29-31. We disagree.

Before weighing the medical opinions, the ALJ found Claimant's usual coal mine work was as both an end loader operator and a laborer, and that this work required heavy manual labor. Decision and Order at 14. The ALJ then considered the opinions of Drs. Cohen, Sood, and Rosenberg. Decision and Order at 10-13. Drs. Cohen and Sood opined Claimant is totally disabled from a pulmonary perspective based on the results of his objective testing and the exertional requirements of his usual coal mine employment.[14] Director's Exhibits 15, 65; Claimant's Exhibits 3, 4, 6. Dr. Rosenberg opined Claimant's objective testing is non-qualifying when adjusted for his age and that he is able to perform the light manual labor required of an end loader operator. Employer's Exhibits 1, 2. The ALJ credited the opinions of Drs. Cohen and Sood over the opinion of Dr. Rosenberg based on their superior understanding of the exertional requirements of Claimant's usual coal mine work. Decision and Order at 14. Therefore she found the medical opinion evidence establishes total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14-15.

Employer argues the ALJ erred in finding Claimant's usual coal mine work required heavy manual labor because she took into account his work as a laborer on Sundays, which it argues was voluntary overtime work and should not have been considered. Employer's Brief at 29-31; Employer's Reply to Claimant at 1-3 (unpaginated). As Employer maintains Claimant's non-overtime work required only light manual labor, it contends the ALJ erred in crediting the opinions of Drs. Cohen and Sood over the opinion of Dr.

[13] The ALJ found Claimant did not establish total disability based on the pulmonary function or arterial blood gas testing, and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 7-9.

[14] Drs. Cohen and Sood listed Claimant's last coal mining employment as an end loader operator. Director's Exhibit 15, Claimant's Exhibit 6. They described the exertional requirements of Claimant's last job as involving "lots of manual work" including climbing steps to get into machinery, walking, and intermittent lifting of up to 75 pounds. *Id.*

Rosenberg based on the physicians' understandings of Claimant's exertional requirements. *Id*. This argument has no merit.

A miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The ALJ found Claimant's duties as an end loader operator required light manual labor, and his job as a laborer required heavy manual labor. Decision and Order at 14. Employer identifies no errors in these findings; thus we affirm them. *See Skrack*, 6 BLR at 1-711; *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010).

Contrary to Employer's argument, Claimant did not testify that he worked as a laborer only during voluntary overtime. He testified he usually worked Monday through Saturday, but if his employer "need[ed] extra help or somebody [did not] show up or turned down time," he would "go in on [Sunday]." Director's Exhibit 57 at 32-33. He stated he did not work overtime and "always had a second shift." Hearing Transcript at 31. When asked how many Sundays he worked, he answered "probably worked half of them. People would turn it down and if nobody wanted it, you could work it, and I worked a lot of them." *Id*. at 23-24. He indicated he "spent about half the time operating the end loader and the other half cleaning up coal," and "[o]n Saturdays and some Sundays, [he] was a general laborer in the tipple." Claimant's Exhibit 7; Hearing Transcript at 22-24, 31-33; Director's Exhibit 57 at 27-32. Contrary to Employer's argument, in light of the frequency with which Claimant performed various tasks, the ALJ permissibly found his work as an end loader operator and as a laborer at the tipple to be his usual coal mine work, as he "regularly worked [those jobs] for a substantial period of time."[15] *See Pifer*, 8 BLR at 1-155; *Shortridge*, 4 BLR at 1-539; Decision and Order at 14. Thus, we discern no error in the ALJ's consideration of Claimant's work as a laborer in determining the exertional requirements of his usual coal mine employment.[16]

[15] Claimant's uncontradicted testimony that he usually worked Saturdays coupled with his description of his Saturday work is substantial evidence supporting the ALJ's finding that heavy labor constituted a portion of his usual employment, apart from his testimony concerning Sunday work.

[16] Employer's argument the ALJ erred in "focusing on the hardest parts of [Claimant's] work rather than his usual coal mine employment in its entirety" is without merit. *See Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). If Claimant cannot perform the hardest parts of his usual coal mine work, he cannot perform his usual coal mine work. *See id.*; 20 C.F.R. §718.204(b)(1).

Because we affirm the ALJ's finding Claimant's work required heavy manual labor, we further affirm her crediting the opinions of Drs. Cohen and Sood, because they considered the correct exertional requirements, over the opinion of Dr. Rosenberg, who did not. *See Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 15.

Because it is supported by substantial evidence, we affirm the ALJ's determination the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), and the evidence as whole establishes total disability.[17] 20 C.F.R. §718.204(b)(2). We therefore affirm her determination Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[18] 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. Decision and Order at 16-23.

Employer does not specifically challenge the ALJ's finding it failed to rebut the presumption by disproving clinical pneumoconiosis[19] or establishing no part of Claimant's

[17] We reject Employer's general contention that the ALJ failed to consider Claimant's non-pulmonary or non-respiratory condition in evaluating the evidence regarding total disability for the reasons set forth in *Howard v. Apogee Coal Co.*, BLR , BRB No. 20-0229 BLA, slip op. at 16-17 (Oct. 18, 2022).

[18] "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).

[19] Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). We need not address Employer's arguments relevant to legal pneumoconiosis, as we have

total disability was caused by clinical pneumoconiosis; thus, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983), Decision and Order at 16-18, 22-23. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §718.305(d)(1)(i),(ii); Decision and Order at 23-24.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

affirmed the ALJ's finding that Employer is unable to rebut the Section 411(c)(4) presumption by establishing Claimant does not have pneumoconiosis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).