U.S. Department of Labor

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

BRB No. 13-0544 BLA

JAMES A. MINICH Claimant-Respondent v. KEYSTONE COAL MINING CORPORATION and ROCHESTER & PITTSBURGH COAL COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/21/2015 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.[1]

Margaret M. Scully (Thompson Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

[1] On November 12, 2014, the Board accepted Mr. MacDonnell's appearance as counsel to represent claimant in this case, with the assistance of student caseworker Paul M. Wiley. Previously, claimant had been represented by lay representative Lynda D. Glagola from Lungs at Work in McMurray, Pennsylvania.

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5373) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered on a subsequent claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge credited claimant with twenty-nine years of underground coal mine employment, and adjudicated this claim, filed on August 20, 2010, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge initially found that the newly submitted x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge then found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and was entitled to invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[2] Claimant's initial claim for benefits, filed on March 5, 2004, was denied on August 4, 2006 by Administrative Law Judge Daniel L. Leland, who determined that the evidence did not establish either the existence of pneumoconiosis or that claimant's total disability was due to pneumoconiosis. Director's Exhibit 1.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[4] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments reinstated the presumption at Section 411(c)(4) of the Act, which provides, in pertinent part:

On appeal, employer contends that the administrative law judge did not apply the appropriate legal standard on rebuttal, and that he erred in weighing the evidence relevant to the issues of pneumoconiosis and disability causation. Claimant responds in support of the award of benefits, asserting that the administrative law judge applied the correct rebuttal standard. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge applied an incorrect rebuttal standard on the issue of disability causation, which affected his analysis of the medical opinion evidence on that issue. Employer has filed reply briefs in support of its position.[5]

Upon consideration of employer's appeal and the pleadings filed by the parties, the Board decided to hold oral argument in this case to determine the correct interpretation and application of the recently enacted statutory amendment at 30 U.S.C. §921(c)(4) and its implementing regulation at 20 C.F.R. §718.305, particularly subsection 718.305(d)(ii), which sets forth the disability causation standard on rebuttal.[6] *Minich v.*

> [I]f a miner was employed for fifteen years or more in one or more underground coal mines . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis . . . . The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

30 U.S.C. §921(c)(4).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established more than fifteen years of underground coal mine employment, a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] Section 718.305 provides in pertinent part:

Keystone Coal Mining Corp., BRB No. 13-0544 BLA (Sept. 25, 2014)(unpub. Order). On November 14, 2014, the Board granted claimant an extension of time to submit a supplemental brief, and rescheduled the oral argument, which was held in Pittsburgh, Pennsylvania on December 9, 2014. *Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA (Nov. 14, 2014)(unpub. Order). All of the parties submitted supplemental briefs in response to the questions posed by the Board for oral argument.

(a) *Applicability*. This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

(b) *Invocation*. (1) The claimant may invoke the presumption by establishing that—

(i) The miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; . . .

. . . .

(c) *Facts presumed*. Once invoked, there will be rebuttable presumption—

(1) In a miner's claim, that the miner is totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; . . .

. . . .

(d) *Rebuttal*— (1) *Miner's claim*. In a claim filed by a miner, the party opposing entitlement may rebut the presumption by—

(i) Establishing both that the miner does not, or did not, have:

(A) Legal pneumoconiosis as defined in §718.201(a)(2); and

(B) Clinical pneumoconiosis as defined in §718.201(a)(1), arising out of coal mine employment (*see* §718.203); or

(ii) Establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201 . . . .

20 C.F.R. §718.305.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

Employer initially contends that the administrative law judge applied the wrong legal standard in finding that employer failed to rebut the presumed fact of disability causation under amended Section 411(c)(4), which provides, in pertinent part, that "[t]he Secretary may rebut [the] presumption only by establishing that . . . [the miner's] respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). Employer asserts that the statutory language, as discussed in the preamble to the implementing regulations, should be interpreted as requiring proof that pneumoconiosis is not a "substantially contributing cause" of the miner's disabling impairment, arguing that employer's burden on rebuttal can be no higher than claimant's burden to prove disability causation at 20 C.F.R. §718.204(c)(1). Employer maintains, therefore, that medical opinions supportive of rebuttal need not rule out any minimal contribution from either coal dust exposure or pneumoconiosis to the miner's disability. Employer's Brief at 19-22; Employer's Supplemental Brief at 1-6; Oral Argument Transcript (OA Tr.) at 5-13, 42-46.

Claimant contends that the statute mandates that coal dust exposure be ruled out as a contributing cause of the miner's respiratory disability. Claimant argues that the "arising out of" language in the statute requires that employer show that coal dust played absolutely no part in causing the miner's disability at 20 C.F.R. §718.305(d)(1)(ii). Claimant further asserts that if coal dust exposure contributed to a miner's disease or impairment at least in part, including a "clinically insignificant part," the miner has legal pneumoconiosis. Claimant's Supplemental Brief at 3-12; OA Tr. at 13-24.

The Director maintains that the statute does not address the disability causation rebuttal standard for employers, and that it is the responsibility of the Secretary of Labor to fill this legislative gap, which he has done by promulgating the regulation at 20 C.F.R. §718.305(d). *See* 30 U.S.C. §921(a), (b). The Director argues that this regulation is a rational means of assigning rebuttal burdens and that it is not inconsistent with the statutory language or the Act. The Director disagrees with employer's argument that a

[7] The Board will apply the law of the United States Court of Appeals for the Third Circuit, as claimant was last employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 10.

"substantially contributing cause" rebuttal standard applies at Section 718.305(d)(1)(ii). While the Director agrees with employer that a medical opinion need not rule out *coal dust exposure* as a contributing cause of the miner's disability in order to establish rebuttal, the Director maintains that employer's burden is to "rule out" or show that "no part" of the miner's disability was caused by the compensable disease of *pneumoconiosis*, as defined in 20 C.F.R. §718.201. Director's Brief at 2-4; Director's Supplemental Brief at 2-12; OA Tr. at 27-36.

We agree with the position taken by the Director. Since the Director is charged with the administration of the Act, deference is generally granted to his position on issues involving the interpretation or application of the Act. *Webber v. Peabody Coal Co*., 23 BLR 1-123, 1-132 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007)(en banc); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). As noted by the Director, amended Section 411(c)(4), 30 U.S.C. §921(c)(4), is silent as to the rebuttal methods available to an employer. Further, the statutory method by which the Secretary can rebut the presumption of disability causation, i.e., establishing that "[the miner's] respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine," is susceptible to interpretation. 30 U.S.C. §921(c)(4); *see Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). As the Director explained, the Department of Labor promulgated the current regulations in order to fill the statutory gap, to clarify ambiguous phraseology, and to effectuate the purpose of the Act, i.e., to compensate miners with fifteen or more years of coal mine employment who are disabled by pneumoconiosis.

The implementing regulation at 20 C.F.R. §718.305 mirrors the elements of entitlement at 20 C.F.R. §§718.202, 718.203 and 718.204, and allows employer to establish rebuttal of the presumption by either disproving the elements of disease and disease causation at Section 718.305(d)(1)(i),[8] or disproving disability causation at

[8] To rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), employer must affirmatively disprove the existence of pneumoconiosis as defined in 20 C.F.R. §718.201. Employer must show that the miner does not have legal pneumoconiosis, i.e., a chronic lung disease or impairment and its sequelae that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment, and does not have clinical pneumoconiosis arising out of coal mine employment. These showings would rebut either the disease element of entitlement, by demonstrating the absence of legal and clinical pneumoconiosis, or the disease causation element, by demonstrating the absence of legal pneumoconiosis and that the miner's clinical pneumoconiosis was not caused by coal mine employment. *See* 20 C.F.R. §§718.201, 718.202, 718.203.

Section 718.305(d)(1)(ii). Because the Act requires miners to prove that their disability is caused by pneumoconiosis, Section 718.305(d)(1)(ii) appropriately provides that employers may rebut the element of disability causation by proving that the miner's respiratory disability is not due to pneumoconiosis. However, Section 718.305(d)(1)(ii) provides a different disability causation rebuttal standard than the disability causation standard for claims governed by the general Part 718 criteria. Although under 20 C.F.R. §718.204(c)(1) a miner must establish that pneumoconiosis is a "substantially contributing cause" of his disability, under Section 718.305(d)(1)(ii), an employer must establish that no part of the miner's respiratory or pulmonary disability is due to pneumoconiosis. This difference is warranted because Congress determined that miners with fifteen or more years of qualifying coal mine employment should bear a lesser burden to obtain benefits. *See* 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). The regulation effectuates the statutory language providing for rebuttal by establishing that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). By requiring proof that the miner's totally disabling impairment did not arise out of, *or in connection with*, employment in a coal mine, Congress imposed a very high burden which the Secretary reasonably interpreted as requiring proof that "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).

Employer and our dissenting colleague maintain that this standard is not consistent with the Act because it would permit an award of benefits to a miner whose pneumoconiosis was an insignificant contributor to his totally disabling respiratory impairment. Accordingly, they contend that it should be sufficient to rebut the presumption by showing that any contribution by pneumoconiosis to the miner's total respiratory disability was insignificant or *de minimis*. A similar proposal to reduce employer's rebuttal burden was rejected by the United States Court of Appeals for the Fourth Circuit in *W. Va. CWP Fund v. Bender*, F.3d , No. 12-2034, 2015 WL 1475069 (4th Cir. Apr. 2, 2015).[9] The court analyzed the proposal that rebuttal of the presumption could be established by showing that pneumoconiosis was not a substantially contributing cause of the miner's disability and explained its fundamental flaw:

[9] The United States Court of Appeals for the Fourth Circuit further held that the disability causation rebuttal standard set forth at 20 C.F.R. §718.305(d)(1)(ii) is a reasonable exercise of agency authority applicable to any party opposing entitlement, including coal mine operators. *W. Va. CWP Fund v. Bender*, F.3d , No. 12-2034, slip op. at 29, 2015 WL 1475069 at *10 (4th Cir. Apr. 2, 2015).

> Thus, to counter an operator's evidence that pneumoconiosis was not "a substantially contributing cause" of the miner's disability, a miner entitled to the statutory presumption nevertheless would be placed back at "square one," forced to prove the "substantial" impact of pneumoconiosis on his disability, which is the very situation that Congress intended to eliminate in enacting the presumption.

Bender, slip op. at 25, 2015 WL 1475069 at *9 (*citing Pauley v. BethEnergy Mines, Inc.*, 601 U.S. 680, 15 BLR 2-155 (1991)).

The court's analysis and criticism are applicable to the standard advanced by employer and our dissenting colleague. To counter an employer's medical opinions, that pneumoconiosis was a *de minimis* factor, or did not materially worsen the miner's disability, a miner entitled to the statutory presumption nevertheless would be forced to obtain medical opinions at least as persuasive as those paid for by employer, to prove that his pneumoconiosis made a greater contribution to his disability. The burden thereby imposed on disabled, long-term miners to obtain black lung benefits is, in significant respects, the same as that which Congress sought to eliminate when it enacted the presumption to benefit those miners. The conclusion is inescapable: application of the rebuttal standard advocated here by employer and our dissenting colleague would defeat the purpose of the presumption Congress enacted. In contrast, application of the regulatory rebuttal standard removes those obstacles which Congress perceived prevented long-term, disabled coal miners from receiving the black lung disability compensation owed them. We agree with the Fourth Circuit that the Director's position is consistent with the statute, standing alone and when viewed as part of the complete statutory and regulatory framework of the Act, and we will defer to his reasonable construction and interpretation of the implementing regulation at Section 718.305. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Bethlehem Mines Corp. v. Simila*, 766 F.2d 128 (3d Cir. 1985).

With respect to the merits of the claim, employer contends that the administrative law judge erred in summarily rejecting the medical opinions of Drs. Fino[10] and Basheda as insufficient to establish disability causation rebuttal at Section 718.305(d)(1)(ii). Employer argues that the administrative law judge erred in requiring the opinions supportive of rebuttal to completely rule out any contribution from coal dust exposure to the miner's disability. Employer further asserts that the administrative law judge should

[10] Additionally, employer correctly asserts that the administrative law judge failed to acknowledge that Dr. Fino is Board-certified in pulmonary medicine, as well as in internal medicine. Decision and Order at 15; *see* Employer's Exhibit 7 at 4.

have considered the medical opinions of Drs. Paul, Pickerill, and Fino from the prior claim, which attributed claimant's respiratory impairment to his cigarette smoking. Employer's Brief at 17-25. Employer's arguments have merit.

Having invoked the presumption at amended Section 411(c)(4), and having found the existence of clinical pneumoconiosis established,[11] the administrative law judge determined that rebuttal could not be established at Section 718.305(d)(1)(i) and, therefore, did not address the issue of legal pneumoconiosis. The administrative law judge then considered whether employer was able to establish rebuttal at Section 718.305(d)(1)(ii), noting that the single issue to be determined was whether claimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment. Decision and Order at 15. In adjudicating the issue, the administrative law judge reviewed the medical opinions of Drs. Fino[12] and Basheda.[13] Decision and Order at 16-17. Dr. Fino opined that claimant does not have clinical or legal pneumoconiosis, and that his disability is due to emphysema from cigarette smoking. Director's Exhibit 1;

[11] We agree with employer that, in finding the existence of clinical pneumoconiosis and a change in an applicable condition of entitlement established, based solely on the newly submitted analog x-ray evidence, the administrative law judge erred in failing to consider all of the evidence relevant to the issue of clinical pneumoconiosis, including digital x-ray evidence and medical opinion evidence. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997); Employer's Brief at 5-17; Employer's Reply Brief at 1-2. Moreover, the administrative law judge erred in placing the burden of proof on claimant to establish the existence of pneumoconiosis before determining whether claimant was entitled to the presumption of pneumoconiosis at amended Section 411(c)(4). As invocation of the Section 411(c)(4) presumption, based on a finding that the newly submitted evidence is sufficient to establish total respiratory disability, would also establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c), the burden would shift to employer to disprove the existence of pneumoconiosis on rebuttal at 20 C.F.R. §718.305(d)(1)(i). *See* 20 C.F.R. §725.309(c); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 25 BLR 2-285, 2-293 (7th Cir. 2013). The administrative law judge would then be required to address all the evidence of record relevant to the issues of legal and clinical pneumoconiosis, including evidence submitted in the earlier claim.

[12] Dr. Fino examined claimant on June 30, 2005 and June 23, 2011, and was deposed on May 7, 2013. Director's Exhibit 1; Employer's Exhibits 1, 7.

[13] Dr. Basheda examined claimant on January 16, 2013, and was deposed on May 15, 2013. Employer's Exhibits 2, 8.

Employer's Exhibits 1, 7. While Dr. Fino conceded that claimant's emphysema may be due in part to coal mining, he stated that the degree of emphysema due to coal dust is not clinically significant. Employer's Exhibits 1 at 12, 7 at 31-32. Dr. Basheda opined that claimant does not have clinical or legal pneumoconiosis, but diagnosed severe tobacco-induced chronic obstructive pulmonary disease with an asthmatic component. Employer's Exhibits 2, 8 at 17. He could not state that claimant did not lose any lung function from coal dust exposure, but indicated that any such loss is "insignificant compared to his loss of lung function from his continued smoking." Employer's Exhibit 8 at 22-23. The administrative law judge determined that "for the [amended Section 411(c)(4)] presumption to be rebutted, the cause of total pulmonary/respiratory disability cannot be due, in whole or in part, to coal dust exposure from the miner's coal mine employment." Decision and Order at 17. He concluded that, "as neither physician [could] state that coal dust exposure is not responsible for at least a part of claimant's pulmonary/respiratory disability," the presumption had not been rebutted. *Id.*

We agree with the Director that the administrative law judge applied an incorrect rebuttal standard, as he required employer to rule out *coal dust exposure*, rather than *pneumoconiosis*, as a contributing cause of claimant's disabling respiratory impairment at Section 718.305(d)(1)(ii). As Drs. Fino and Basheda opined that claimant did not have clinical pneumoconiosis and that the minimal contribution from coal dust exposure to claimant's disabling respiratory impairment was insufficient to constitute legal pneumoconiosis, their opinions, if found to be credible by the administrative law judge, would meet employer's burden under both methods of rebuttal at Section 718.305(d)(1). Accordingly, we must vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption, and remand this case for further consideration.

On remand, the administrative law judge must consider and weigh all relevant evidence, including evidence from claimant's prior claim, to determine whether it is sufficient for employer to establish rebuttal of the presumption by disproving the existence of both legal and clinical pneumoconiosis, or by establishing that no part of the miner's pulmonary or respiratory disability was caused by pneumoconiosis, as outlined in Section 718.305(d).[14] The administrative law judge should begin his analysis at Section

[14] In this case, no party disputes that claimant is entitled to invocation of the presumption at amended Section 411(c)(4). In each case, however, before reaching the issue of pneumoconiosis, the administrative law judge must initially determine whether the presumption at amended Section 411(c)(4) is applicable, i.e., whether the claim was filed and/or pending during the requisite time periods; whether the miner had at least fifteen years of underground coal mine employment or comparable surface mine employment; and whether the evidence established total respiratory disability. If invocation is established, the burden would then shift to employer either to disprove the

718.305(d)(1)(i)(A) by considering all relevant and credible evidence to determine whether employer has proved that claimant does not have legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Even if legal pneumoconiosis is found to be present, the administrative law judge must determine whether employer has disproved the existence of clinical pneumoconiosis arising out of coal mine employment at Section 718.305(d)(1)(i)(B), as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the credibility of the medical opinions at Section 718.305(d)(1)(ii), the second rebuttal prong. As the administrative law judge previously weighed only the new x-ray evidence and placed the burden on claimant to establish the existence of clinical pneumoconiosis, on remand, the administrative law judge must address and weigh all evidence relevant to the issue, including the medical opinion evidence, with the burden on employer. If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the amended Section 411(c)(4) presumption at Section 718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption at Section 718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at Section 718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis.

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 consideration consistent with this opinion.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

---

existence of both legal and clinical pneumoconiosis or to prove that no part of the miner's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305.

BOGGS, Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues' decision in all other respects, I respectfully dissent from their conclusion that employer must establish rebuttal of the presumption of disability causation created by Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by showing that not even a *de minimis* or insignificant part of a miner's disability was caused by pneumoconiosis. To the contrary, the statutory language, in conjunction with the statutory structure and the purpose of the Act, and the regulation of the Department of Labor (the Department) defining disability causation, requires that pneumoconiosis materially contribute to a miner's disability before benefits can be awarded. Consequently, rebuttal can be established by showing that pneumoconiosis has no material adverse effect on the miner's respiratory or pulmonary condition or does not materially worsen the miner's totally disabling respiratory or pulmonary impairment.

The Director, Office of Workers' Compensation Programs (the Director), concedes that the rebuttal standards under the statute do not apply to operators.[15] The Director submits that, in promulgating the regulation at 20 C.F.R. §718.305, the Department sought to fill a statutory gap, clarify ambiguous phraseology in the statute and the prior implementing regulation, and effectuate the purpose of the Act, i.e., "to provide benefits . . . to coal miners who are totally disabled *due to* pneumoconiosis and to the surviving dependents of miners whose death was *due to* such disease . . . ." 30 U.S.C. §901(a) (emphasis added); *see* Director's Supplemental Brief at 8-9; Oral Argument Transcript (OA Tr.) at 31-33; *see also* 78 Fed. Reg. 59,102, 59,106-07 (Sept. 25, 2013).

Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in coal mine employment, either underground or in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is "totally disabled *due to* pneumoconiosis." 30 U.S.C. §921(c)(4) (emphasis added). The question before us is how an employer may rebut the presumption. As the Director suggested, "[t]he proper way to rebut the presumption is to disprove the presumed fact, not to disprove something else." OA Tr. at 31-32. Upon invocation of the presumption, the presumed facts that the party opposing entitlement must disprove are: (1) the existence of both legal and clinical pneumoconiosis; (2) disease causation; and (3) disability causation. *See* 78 Fed. Reg. at 59,106; Director's Supplemental Brief at 5.

[15] Consequently, as the Director, Office of Workers' Compensation Programs, also concedes, the statutory language pertinent to rebuttal by the Secretary of Labor is not applicable to this case. Oral Argument Transcript (OA Tr.) at 31.

With respect to disability causation, the regulation relating to presumption rebuttal, 20 C.F.R. §718.305(d), provides that the party opposing entitlement may rebut the presumption of total disability due to pneumoconiosis by establishing that 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).[16] This regulation does not define the terms "due to" or "caused by"; there is no evident discernible difference between the two terms.

However, as employer points out, the Department has a regulation that specifically defines total disability *due to* pneumoconiosis (i.e., the required degree of relationship

---

[16] As noted by employer, the United States Court of Appeals for the Third Circuit, in *Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984), upheld the validity of a similar disability causation rebuttal provision at 20 C.F.R. §727.203(b)(3), and clarified that the regulation does not permit the award of benefits for partial disability, only total disability, of which pneumoconiosis is a contributing cause. OA Tr. at 9-10; *Carozza*, 727 F.2d at 78, 6 BLR at 2-21. In determining that Congress did not intend to exclude benefits for total disability resulting from multiple causes, one of which is pneumoconiosis, the court noted that it was useful to examine the legal background against which the statute in question should be viewed. It observed that:

> [u]nder traditional workmen's compensation law, compensation is proper where a work-related injury *aggravates* a pre-existing or non-work-related condition *to the point of compensable disability*, even if the work-related condition in and of itself is not compensable. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(en banc); 1 A. Larson, *The Law of Workmen's Compensation* §12.20 (1982). The Senate Report accompanying the bill that formed the basis for the Black Lung Benefits Act of 1977 was cognizant of this background and indicated no dissatisfaction.
>
> "It is also intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was significantly related to or aggravated by the occupational exposure be included in the regulations." S. Rep. No. 95-209, 95th Cong. 1st Sess. 13-14 (1977). While this statement in a Senate Report cannot be treated as determinative, it nonetheless constitutes some incremental authority for the Secretary's implementation of the statute.

Carozza, 727 F.2d at 78 n.1, 6 BLR at 2-22 n.1 (emphasis added).

between pneumoconiosis and disability) for purposes of entitlement to benefits, 20 C.F.R. §718.204(c). That regulation[17] states:

> A miner shall be considered totally disabled *due to* pneumoconiosis if pneumoconiosis, as defined in [20 C.F.R.] §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause' of the miner's disability if it:
>
> (i) [h]as a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) [m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1) (emphasis added). In promulgating the regulation at 20 C.F.R. §718.204(c), which interprets the statutory phrase "due to" and sets forth the degree to which pneumoconiosis must contribute to a miner's disability, the Department originally selected language ensuring "a tangible and actual contribution by the pneumoconiosis," *see* 62 Fed. Reg. 3337, 3345 (Jan. 22, 1997), and subsequently added the words "material" and "materially" in order to clarify its intent. *See* 65 Fed. Reg. 79,920, 79,923, 79,946 (Dec. 20, 2000). The Department asserted that the regulatory language "makes explicit the Department's position with regard to establishing total disability due to pneumoconiosis," 62 Fed. Reg. at 3340, and manifested the Department's intent to "codify the numerous decisions of the courts of appeals which, in the process of deciding when a miner is totally disabled due to pneumoconiosis, have also ruled on what evidence is legally sufficient to establish [the disability causation] element of entitlement." 75 Fed. Reg. at 79,946; *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38, 14 BLR 2-68, 2-72-76 (4th Cir. 1990)(pneumoconiosis must be ''at least a contributing cause'' of the disabling respiratory impairment and must be a "necessary condition" of the disability); *Shelton v. Director, OWCP*, 899 F.2d 690, 693, 13 BLR 2-444, 2-448 (7th Cir. 1990)("due to" requires that pneumoconiosis be a necessary, though not sufficient, cause of disability); *see also Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Lollar v. Ala. By-Products Corp.*, 893 F.2d 1258, 1265, 13

[17] The regulatory section is titled "**Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis**," and the regulatory subsection is titled, "(c)(1) *Total disability due to pneumoconiosis defined*." 20 C.F.R. §718.204(c) (emphasis added).

BLR 2-277, 2-283 (11th Cir. 1990)(must establish that pneumoconiosis is a ‘‘substantial contributing factor" in the causation of the miner's total pulmonary disability); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 734, 13 BLR 2-23, 2-37 (3d Cir. 1989)(construing the words "due to" to mean that a substantial nexus exists between pneumoconiosis and the disability).[18] The Deparment concluded that "[e]vidence that pneumoconiosis made only a negligible, inconsequential or insignificant contribution to the miner's disability is insufficient to establish total disability due to pneumoconiosis." 65 Fed. Reg. at 79,946.[19]

Under the principle of consistent usage in statutory interpretation, a term "should be construed, if possible, to give it a consistent meaning throughout the [Act.]" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995); *see* 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction §22.34 (7th ed. 2008). Thus, upon invocation of the Section 411(c)(4) presumption, when the burden shifts to the party opposing entitlement to disprove the causal nexus between pneumoconiosis and the miner's total respiratory disability, under the principle of consistent usage, the party opposing entitlement is required to show that the miner's disability is not *due to* pneumoconiosis, as defined and interpreted in 20 C.F.R. §718.204(c)(1).

---

[18] In *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989), as employer points out, the Third Circuit interpreted *Carozza* as requiring that there be a *substantial nexus* between the miner's pneumoconiosis and his impairment. OA Tr. at 9-11. The court addressed the definition of disability "due to" pneumoconiosis, and cited *Carozza* for the proposition that, while pneumoconiosis need not be the sole contributor, it must be a *significant contributor* to the disability. *Bonessa*, 884 F.2d at 733, 13 BLR at 2-35-36 (a *substantial nexus* must exist between the disease and the impairment) (emphasis added). Thus, the court recognized that there were two issues involved— (1) whether pneumoconiosis had to be the sole contributor to the disability, and (2) since the court had determined that pneumoconiosis need not be the sole contributor, the degree of relationship between pneumoconiosis and the disability. In this case, the rebuttal regulation of the Department of Labor (the Department), 20 C.F.R. §718.305(d), addresses the first issue (whether rebuttal can be established by showing that pneumoconiosis is not the sole contributor to the disability) through its "no part" language, but, as noted *supra*, does not address the second issue.

[19] In establishing this standard in the regulations, the Department indicated it was mindful that Congress enacted the Act in large part to permit benefit awards to miners whose entitlement under state workers' compensation laws was precluded by burdensome causation requirements. 65 Fed. Reg. 79,920, 79,946 (Dec. 20, 2000).

The Director takes the position that, by reinstating the provisions at Section 411(c)(4), Congress sought to lessen the burden of establishing entitlement to benefits for miners with at least fifteen years of qualifying coal mine employment through a presumption of total disability due to pneumoconiosis. The Director maintains that it is appropriate to lessen the burden further by imposing a different disability causation standard on rebuttal from that applicable to miners under the general 20 C.F.R. Part 718 criteria because "Congress effectively singled out these miners for special treatment."[20] 78 Fed. Reg. at 59,106. However, neither the statutory language nor the legislative history cited by the Director evinces any intent to change the concept of disability causation in the Act for purposes of an operator's rebuttal of the presumption. *See* 78 Fed. Reg. at 59,106-07 (citing S. Rep. No. 92-743 at 13 (1972)). By establishing a rebuttable presumption, Congress reallocated the burden of persuasion; however, it did not revise the elements at issue for establishment of entitlement, or the definition of those elements. Indeed, by reinstating the prior statutory language without modification, Congress chose not to apply to operators the restrictive language it adopted with respect to rebuttal by the Secretary, as it certainly could have. *See Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976).[21]

Congress explicitly articulated that the purpose of the Act is to provide benefits to miners who are totally disabled *due to* pneumoconiosis and to the surviving dependents of miners whose death was *due to* pneumoconiosis. The Department has set forth in the regulations a definition of "total disability *due to* pneumoconiosis," as that phrase is used with respect to a miner's entitlement to benefits, and, as to the degree of relationship between pneumoconiosis and disability, that definition requires that pneumoconiosis make a *material* contribution to the disability. 20 C.F.R. §718.204(c)(1). Further, in the context of rebuttal of the Section 411(c)(4) presumption relevant to miners' claims of

[20] The majority, citing *W. Va. CWP Fund v. Bender*, F.3d , No. 12-2034, 2015 WL 1475069 (4th Cir. Apr. 2, 2015), suggests that applying the standard of the Department's causation regulation would require the miner to obtain medical opinions at least as persuasive as those paid for by employer to prove that the miner's pneumoconiosis made a greater contribution to his disability. However, this argument fails to recognize that the burden of persuasion in this regard would rest on employer, not on the miner. Under the circumstances, this would hardly be an easy task for the employer.

[21] Consequently, in promulgating and interpreting the implementing regulations, the Department is constrained by the fact that the restrictions on rebuttal in the statute apply only to the Secretary and cannot provide a basis for restricting employers in establishing rebuttal of the presumed fact of disability causation.

entitlement, the Department has not issued a regulatory definition of "due to" that differs from that in 20 C.F.R. §718.204(c)(1). Thus, an infinitesimal or clinically insignificant contribution by pneumoconiosis to a miner's disability cannot satisfy the declared purpose of the Act. *See* 30 U.S.C. §901; 20 C.F.R. §718.204(c). Rather, the contribution by pneumoconiosis must be material in order for the disability or death to be *due to* pneumoconiosis.

In sum, the statutory structure and purpose of the Act, the regulatory definition of disability due to pneumoconiosis, the fact that the rebuttal restrictions of the statute apply only to the Secretary, and the traditional canons of statutory construction require that pneumoconiosis materially contribute to a miner's disability before benefits may be awarded. I would hold, therefore, that rebuttal may be established at 20 C.F.R. §718.305(d)(1)(ii) if the party opposing entitlement establishes that pneumoconiosis is merely a *de minimis* factor, and has no material adverse effect on the miner's respiratory or pulmonary condition or does not materially worsen the miner's totally disabling respiratory or pulmonary impairment.

_____

JUDITH S. BOGGS
Administrative Appeals Judge