U.S. Department of Labor

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

BRB No. 17-0132 BLA

REGINA K. BUCKLEY (Widow of FRED A. BUCKLEY) Claimant-Respondent v. SHREWSBURY COAL COMPANY and VALLEY CAMP COAL COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/30/2018 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Second Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Andrea Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

BOGGS, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits on Second Remand (2011-BLA-05809) of Administrative Law Judge Thomas M. Burke, rendered on a survivor's claim filed on August 9, 2010,[1] pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a third time.[2]

The Board previously affirmed the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] *Buckley v. Shrewsbury Coal Co.*, BRB No. 15-0184 BLA, slip op. at 3 n.4 (Feb. 29, 2016) (unpub.). However, because the administrative law judge did not consider all of the evidence relevant to rebuttal, the Board vacated the administrative law judge's determination that employer did not rebut the presumption by disproving that the miner had legal pneumoconiosis. *Id*. at 8. On remand, the Board instructed the administrative law judge that he must:

> Consider the reports of Drs. Oesterling and Bush, and all other relevant evidence, and must reconsider the medical opinions of Drs. Rasmussen, Cohen, Rosenberg, and Basheda. When weighing the medical opinion evidence, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation

[1] Claimant is the widow of the miner, who died on July 28, 2008. Director's Exhibit 9. The miner filed his claim on August 30, 2005, which was denied on October 1, 2008. Because the miner was not awarded benefits during his lifetime, claimant is not eligible for derivative benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012) (providing that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis).

[2] We incorporate the procedural history of the case and prior holdings by the Board, as set forth in *Buckley v. Shrewsbury Coal Co.*, BRB No. 15-0184 BLA (Feb. 29, 2016) (unpub.) and *Buckley v. Shrewsbury Coal Co.*, BRB No. 13-0193 BLA (Jan. 31, 2014) (unpub).

[3] Under Section 411(c)(4), the miner's death is presumed to be due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

> underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. After rendering findings under each pertinent subsection of 20 C.F.R. §718.202(a), the administrative law judge must determine whether all of the evidence, when weighed together, is sufficient to satisfy employer's burden to affirmatively disprove the existence of legal pneumoconiosis.

Id. at 8 (internal citations omitted).[4] Thus, the Board vacated the award of benefits and remanded the case for further consideration. *Id*.

In his second remand decision, the administrative law judge again found that employer failed to disprove the existence of legal pneumoconiosis and death causation. Thus, the administrative law judge found that employer failed to establish rebuttal of the Section 411(c)(4) presumption and awarded benefits.

On appeal, employer argues that the administrative law judge failed to follow the Board's remand instructions, erred in weighing the evidence on rebuttal and did not rationally explain his credibility findings. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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.[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).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[6] or by

[4] The Board affirmed, as permissible, the administrative law judge's determination that the credentials of Drs. Cohen and Rasmussen are superior to those of Drs. Rosenberg and Basheda. *Buckley v. Shrewsbury Coal Co.*, BRB No. 13-0193 BLA, slip op. at 7 (Jan. 31, 2014) (unpub.).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

[6] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is

establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

I. Rebuttal of the Section 411(c)(4) Presumption - Legal Pneumoconiosis - Etiology of the Miner's Interstitial Pulmonary Fibrosis

Employer asserts that the administrative law judge failed to follow the Board's remand instructions in determining whether employer disproved the existence of legal pneumoconiosis. Employer contends that the administrative law judge's analysis is based on a generalized premise that coal mine dust can cause interstitial fibrosis and ignores that all of the physicians who reviewed the pathology evidence diagnosed a specific form of fibrosis, usual interstitial pneumonitis/pneumonia (UIP), not related to coal mine dust exposure.[7] Employer further argues that the administrative law judge ignored the majority of experts' explanations that the amount and location of coal dust observed established that the miner did not have legal pneumoconiosis. Employer also submits that the

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not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

For the purposes of the definitions of both legal and clinical pneumoconiosis, "a disease arising out of coal mine employment 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).

[7] The medical records and physicians' opinions in this case reference both usual interstitial pneumonitis/pneumonia (UIP) and idiopathic pulmonary fibrosis (IPF).

administrative law judge's credibility determinations were made by ignoring this evidence and are irrational and not supported by substantial evidence.

At the outset, we observe that the administrative law judge applied an incorrect standard for rebuttal in this case. The administrative law judge found that it is employer's burden to establish "that the miner's pulmonary fibrotic disease *could not have been caused or contributed to in whole or in part by coal dust exposure*." Decision and Order Awarding Benefits on Second Remand at 4 (emphasis added). But the standard for rebuttal under Section 411(c)(4) is not so stringent. The party seeking to establish rebuttal under Section 411(c)(4) need only establish that claimant does not have a chronic lung disease or impairment that is "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)(2)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting).

We further agree with employer that the administrative law judge's weighing of the evidence of record cannot be affirmed, and that the administrative law judge failed to follow our prior instruction to weigh together all relevant evidence under each pertinent subsection of 20 C.F.R. §718.202(a). *See Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). On remand, after summarizing the pathology reports,[8] the administrative law judge stated:

[8] Dr. Oesterling reviewed fourteen slides from a biopsy performed on the miner's left lung on July 7, 2008. Employer's Exhibit 1. He stated that there was minimal coal dust present on the slides and that it was seen only in several small areas. He opined that the miner did not have coal workers' pneumoconiosis and suffered no consequences from his inhalation of coal dust. *Id*. He found that the miner's lung "showed end stage fibrosis, i.e. usual interstitial pneumonitis," and noted that it was referred to by Dr. Mark, *see infra* n.9, as interstitial fibrosis of the usual nature. *Id*. He further stated, "[T]his form of fibrosis [UIP] is not associated with any dust inhalation." *Id*.

Dr. Bush also evaluated the fourteen slides prepared in conjunction with the miner's left lung biopsy. Employer's Exhibit 2. He observed that "a very small amount of dust pigment without significant fibrous reaction is found on a few of the histologic slides" and concluded, "coal worker's [sic] pneumoconiosis or occupational exposure to coal dust did not contribute in any way to the pulmonary or respiratory impairment suffered by [the miner] and coal worker's [sic] pneumoconiosis or coal dust exposure played no role in nor hastened the death of [the miner]." *Id*. He found that "the histologic findings are most consistent with the changes of Usual Interstitial Pneumonia," and opined that the miner

> [T]he pathology evidence and treatment records[9] are in accord with the finding in my 2015 [Decision and Order] that the miner suffered from a diffuse interstitial fibrosis. The pathologists' reports differ from my decision in that they conclude that the pulmonary condition was not caused or contributed to by coal dust exposure. Drs. Oesterling and Bush both opined that the miner's pulmonary fibrotic disease was not caused by coal mine dust. Their opinions on causation were based on their understanding that usual interstitial pneumonitis is a form of fibrosis that is not caused by coal mine dust and because they found that only a small amount of dust pigmentation was present in the tissue without any significant fibrotic reaction.
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> *At issue is whether the pathologists are correct when they found that the miner's pulmonary fibrotic disease could not have been caused or contributed to in whole or in part by coal dust exposure.*

Decision and Order Awarding Benefits on Second Remand at 4 (emphasis added).

Instead of addressing the probative value of the pathologists' opinions based on their credentials, respective rationales and the documentation underlying them, the administrative law judge turned to the medical opinion evidence to resolve the cause of the miner's pulmonary fibrosis. Weighing the medical opinions, the administrative law judge gave controlling weight to the opinions of Drs. Rasmussen and Cohen that the miner's

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"appears to have been totally disabled prior to death as a result of pulmonary fibrotic disease appearing histologically as Usual Interstitial Pneumonia." *Id.*

[9] The treatment records span between March 16, 2005, until the miner's death on July 28, 2008, and include diagnoses of interstitial lung disease and idiopathic pulmonary fibrosis. Director's Exhibit 11. The CT scans contained in the treatment records were interpreted as showing multiple enlarged mediastinal lymph nodes, a nodular density adjacent to the left cardiac apex, extensive interstitial fibrotic changes and end stage honeycombing. *Id*. A PET scan also was interpreted as showing interstitial fibrosis. *Id.* The report of the July 7, 2008 biopsy indicated the miner's left lung nodule was a benign hamartoma. *Id*. Dr. Tomchin reviewed the biopsy slides and diagnosed interstitial fibrosis. *Id*. The administrative law judge also identified a report by Dr. Tomchin which states that the biopsy materials are "suggestive but not diagnostic of end-stage [UIP]." *Id*. Dr. Mark also reviewed the slides, stating that UIP "is the diagnosis I prefer," but that he could not make that diagnosis with certainty because the disease was too far advanced and there was too much chronic organizing pneumonia present. *Id*.

fibrosis was coal dust-related over the contrary opinions of Drs. Basheda and Rosenberg. Decision and Order Awarding Benefits on Second Remand at 10. The administrative law judge specifically found that Dr. Cohen's opinion was the most credible due to his superior credentials in diagnosing coal mine dust-induced lung diseases. *Id*. at 8, 10.

Employer is correct that there are several flaws in the administrative law judge's analysis of the evidence. First, although the administrative law judge relied, in part, on the pathology evidence to find that the miner suffered from interstitial fibrosis, the administrative law judge relied solely on the medical opinion evidence to determine *the etiology* of the fibrosis. The administrative law judge did not properly take into account that the pathologists specifically excluded coal dust *as a cause of the fibrosis, and as relating to or aggravating the miner's respiratory or pulmonary impairment*, based on the minimal amount of anthracotic pigment associated with the fibrosis seen on the autopsy slides. Employer's Exhibits 1, 2. He noted that Drs. Oesterling and Bush diagnosed UIP, but failed to actually consider the pathology evidence in totality and weigh it together with the remaining evidence of record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998.

Second, we agree with employer that the administrative law judge did not address the qualifications of the pathologists. Although the administrative law judge credited Dr. Cohen as the most qualified, in comparison to Drs. Basheda and Rosenberg, he did not discuss the credentials of Drs. Oesterling and Bush. When determining the weight to accord to the pathology and medical opinion evidence, the administrative law judge must take into account and explain the impact of all of the physicians' comparative credentials.[10] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Third, because the administrative law judge failed to weigh the pathology evidence and the treatment records, we are unable to affirm his credibility findings with respect to the medical opinion evidence. The administrative law judge should specifically address on remand whether the failure of Drs. Cohen and Rasmussen to review the pathology

[10] Employer argues that the administrative law judge erred in crediting the medical opinions of Drs. Rasmussen and Cohen, based solely on his belief that they have superior experience in diagnosing coal mine dust-induced lung disease. Employer maintains that the relevant issue in this case is whether a physician has demonstrated experience in diagnosing idiopathic diseases such as UIP. As we are remanding this case for further consideration, the administrative law judge on remand may consider employer's argument.

evidence and the miner's later treatment records undermines the credibility of their opinions.[11]

For the above-stated reasons, we vacate the administrative law judge's determination that employer failed to disprove the existence of legal pneumoconiosis. Consequently, we vacate the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).

II. Rebuttal of the Section 411(c)(4) Presumption – Death Causation

In considering whether employer disproved the presumed fact of death causation, the administrative law judge found that the opinions of Drs. Basheda and Rosenberg were not credible as to the cause of death because they did not diagnose legal pneumoconiosis. Decision and Order Awarding Benefits on Second Remand at 10. Because we have vacated the administrative law judge's finding regarding legal pneumoconiosis, we vacate the administrative law judge's determination that employer failed to establish that no part of the miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). We therefore vacate the award of benefits.

III. Remand Instructions

As this case is being remanded for a third time, we conclude that it would be in the interest of justice and judicial economy to assign this case to a new administrative law judge, for a "fresh look at the evidence" and proper application of the law. *See Hicks*, 138 F.3d at 537, 21 BLR at 2-343; *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). We therefore remand this case for reassignment to a different administrative law judge and for further consideration of whether employer has established rebuttal of the Section 411(c)(4) presumption.[12]

[11] Our dissenting colleague posits that the administrative law judge permissibly inferred that Dr. Cohen would not have altered his opinion in this case if he had the opportunity to review the pathology evidence because a diagnosis of UIP or IPF requires exclusion of all known environmental exposures. It is not clear that the administrative law judge made this inference, but if made, it would constitute pure speculation.

[12] Because we are remanding this case for a fresh look at the evidence, we do not address employer's additional assertions of error regarding the weighing of the opinions of Drs. Basheda, Rosenberg, Rasmussen and Cohen. We conclude, however, that the administrative law judge's credibility determinations pertaining to these physicians were

On remand, the administrative law judge must apply the correct legal standards, and reconsider the evidence relevant to whether employer has rebutted the presumption that the miner had legal pneumoconiosis. In resolving this issue the administrative law judge should consider the evidence under each of the pertinent subsections of 20 C.F.R. §718.202(a). The administrative law judge must analyze the physicians' opinions by considering their qualifications and "the explanations for [the physicians'] conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses." *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. The administrative law judge should also address whether the physicians' opinions regarding the etiology of the miner's pulmonary fibrosis are based on the specifics of this case, as opposed to generalized findings in the medical literature. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

After rendering findings under each pertinent subsection of 20 C.F.R. §718.202(a), the administrative law judge must determine whether the evidence, when weighed together, rebuts the presumed fact of legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(2)(i); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge is further instructed to consider whether employer has rebutted the presumed fact of death causation. *See* 20 C.F.R. §718.305(d)(2)(ii). Lastly, the administrative law judge must set forth his or her findings in detail, including the underlying rationale, as required by the Administrative Procedure Act.[13] *See Wojtowicz*, 12 BLR at 1-165.

affected by the administrative law judge failure to consider all relevant evidence. Thus, employer's arguments in this regard may be raised on remand.

[13] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur.

RYAN GILLIGAN
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. There is no dispute among the physicians in this case that the miner suffered from interstitial pulmonary fibrosis. On remand, the administrative law judge followed the Board's instruction and reconsidered the pathology evidence, treatment records, and medical opinions relevant to whether the miner's interstitial pulmonary fibrosis was significantly related to coal dust exposure. Decision and Order Awarding Benefits on Second Remand at 2-3. The administrative law judge found that Drs. Oesterling and Bush reported biopsy findings consistent with an *idiopathic* form of interstitial pulmonary fibrosis they identify as usual interstitial pneumonitis/pneumonia (UIP). *Id*. at 3; Employer's Exhibits 1, 2. The administrative law judge found that the miner's treatment records were "generally in accord with the pathology evidence" in diagnosing UIP. Decision and Order Awarding Benefits on Second Remand at 3; *see* Director's Exhibit 11. He also noted that Drs. Rosenberg and Basheda specifically relied on the pathological and radiological evidence to support their diagnoses of UIP. Decision and Order Awarding Benefits on Second Remand at 4-5.

The administrative law judge observed correctly that Drs. Oesterling and Bush eliminated coal dust exposure as a cause of the miner's UIP "based on their understanding

that [it] is a form of fibrosis that is not caused by coal mine dust," and because they found only minimal dust pigmentation in the lung tissue. Decision and Order Awarding Benefits on Second Remand at 4; *see* Employer's Exhibits 1, 2. Drs. Rosenberg and Basheda excluded coal dust as a causative factor for UIP to the extent it is characterized with *linear opacities.*[14] Employer's Exhibits 8, 10. Dr. Rosenberg acknowledged that "there are various medical [studies] purporting to demonstrate that *linear* interstitial lung disease occurs in relationship to coal mine dust exposure," but he disputed their validity. *Id*.

In contrast to employer's physicians, the administrative law judge found that Drs. Rasmussen and Cohen disagreed that a diagnosis of any type of idiopathic pulmonary disease was not appropriate in this case because the miner's interstitial pulmonary fibrosis had a known cause - his twenty-one years of coal dust exposure. Decision and Order Awarding Benefits on Second Remand at 6-7. Drs. Rasmussen and Cohen referenced medical studies by Cockroft, Brichet, and McConnochie as showing, *inter alia*, that diffuse interstitial fibrosis is more common among coal miners than in the general population. Claimant's Exhibits 1, 10. Dr. Cohen specifically explained that "lung scarring which appears quite similar to IPF can result from exposure to coal mine dust and silica dust which is why it is mandatory to exclude such exposures when making the diagnosis." Claimant's Exhibit 1.

In resolving the conflict in the evidence, the administrative law judge determined that Dr. Cohen is more qualified than Dr. Rosenberg to assess the reliability of the medical studies referenced in their reports.[15] Decision and Order Awarding Benefits on Second Remand at 8. The administrative law judge gave less weight to Dr. Rosenberg's criticisms of the medical studies and his overall opinion that coal dust exposure does not cause the pattern of fibrosis seen in UIP/IPF. *Id*. The administrative law judge also rejected Dr. Basheda's opinion that the miner's UIP/IPF was not coal dust-related on the ground that Dr. Basheda's explanation confused the issues of clinical and legal pneumoconiosis. Decision and Order Awarding Benefits on Second Remand at 8. The administrative law

[14] Dr. Rosenberg described that the miner's radiographic changes were linear and in the lung bases with no macronodules present. Employer's Exhibit 9. He also noted that the pathology findings showed basilar-predominant fibrosis with honeycombing, which is consistent with UIP. *Id*. Dr. Basheda similarly explained that coal dust does not cause UIP and stated that the "pathology findings of coal dust, they would not translate into linear opacities in the lower lung fields that you see in [UIP.]" Employer's Exhibit 11 at 13.

[15] The Board has affirmed the administrative law judge's determination that Dr. Cohen's credentials are superior to those of Drs. Rosenberg and Basheda. *Buckley,* BRB No. 13-0193 BLA, slip op. at 7.

judge further found that the opinions of Drs. Rasmussen and Cohen were sufficiently reasoned and documented to support a finding that the miner had legal pneumoconiosis, despite employer's arguments to the contrary. *Id*. at 8-10. Thus, having rejected the underlying rationale of employer's physicians that "coal dust exposure cannot produce a diffuse interstitial fibrosis as was seen in the miner's lungs," the administrative law judge concluded that employer failed to persuasively explain why the miner did not have legal pneumoconiosis. *Id*. at 10, *citing Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013).

Employer summarily states that the administrative law judge mischaracterized Dr. Basheda's testimony but does not explain its argument on appeal with specificity. For that reason alone, the administrative law judge's discrediting of Dr. Basheda's opinion may be affirmed. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), aff'g 7 BLR 1-610 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). However, I disagree with employer that the administrative law judge mischaracterized Dr. Basheda's opinion. The administrative law judge noted correctly that Dr. Basheda opined that coal dust exposure was not a causal factor for the miner's respiratory disease, in part, because the miner's lungs showed linear changes and did not show rounded opacities consistent with clinical pneumoconiosis. The administrative law judge permissibly assigned less weight to Dr. Basheda's opinion to the extent it "confuses clinical pneumoconiosis, which is evidenced by opacities, with legal pneumoconiosis, which may exist in the absence of clinical pneumoconiosis." Decision and Order Awarding Benefits on Second Remand at 8; *see* 20 C.F.R. §§718.201, 718.202(a); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The regulatory definition of legal pneumoconiosis does not require the presence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

Employer more specifically argues that the administrative law judge erred in crediting Dr. Cohen's opinion over Dr. Rosenberg's opinion because Dr. Cohen did not review the pathology evidence showing that the miner had UIP. Employer maintains that the diagnosis of UIP by autopsy in this case establishes that the miner did not have legal pneumoconiosis. The administrative law judge permissibly concluded to the contrary. The administrative law judge drew a rational inference from Dr. Cohen's report that a pathological finding of UIP would not alter Dr. Cohen's conclusion that claimant's pulmonary fibrosis cannot be deemed *idiopathic* in origin. The administrative law judge observed correctly that Dr. Cohen specifically opined that IPF was not an appropriate diagnosis in this case, based on the criteria established by the American Thoracic Society

(ATS). Decision and Order Awarding Benefits on Second Remand at 9; Claimant's Exhibit 1. Dr. Cohen specifically explained that according to ATS, *even where the biopsy evidence shows histological findings consistent with UIP*, a definitive diagnosis of IPF requires "the exclusion of other known causes of interstitial lung disease such as drug toxicities, *environmental exposures* and connective tissue diseases." Decision and Order Awarding Benefits on Second Remand at 9 (emphasis added), *quoting* Claimant's Exhibit 1. Dr. Cohen concluded that the miner's twenty-one years of coal dust exposure must be considered a causative factor for the miner's lung disease under the ATS guidelines. Claimant's Exhibit 1. I see no error by the administrative law judge in crediting Dr. Cohen's view as it is corroborated by the guidelines of the ATS.

Furthermore, it is not necessary to remand this case for consideration of whether the treatment records contradict Dr. Cohen's rationale that the miner "did not develop severe restriction" consistent with idiopathic pulmonary fibrosis. Claimant's Exhibit 1. Although the treatment records described "end-stage UIP," Dr. Cohen acknowledged in his 2006 report that the miner was totally disabled by a "severe diffusion impairment and blood gas exchange abnormalities" consistent with pulmonary fibrosis caused by coal dust exposure. Claimant's Exhibit 1. As noted by the administrative law judge, Dr. Cohen's explanation that the miner did not have a severe restrictive impairment typically seen with idiopathic pulmonary fibrosis is supported by four pulmonary function tests in the record from 2005 to 2008, which were interpreted as normal, and a final February 2008 tests showing only mild restriction. Thus, the fact that the miner had end-stage UIP and ultimately died from a respiratory death does not contradict Dr. Cohen's opinion.

Lastly, although the administrative law judge did not discuss the qualifications of Drs. Oesterling and Bush, I would hold the error to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Neither Dr. Oesterling nor Dr. Bush addressed the medical literature or the ATS criteria relied on by Dr. Cohen in rendering his opinion in this case.

In conclusion, I see no error in the administrative law judge's rational determination that employer's evidence was not persuasive to establish that the miner's respiratory disease was idiopathic and not significantly related to or substantially aggravated by his coal dust exposure.[16] The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Grizzle v. Pickands Mather & Co.*,

[16] The administrative law judge applied the correct legal standard in considering whether the miner had legal pneumoconiosis, as he credited Dr. Cohen's opinion, that the miner's pulmonary fibrosis was significantly related to coal dust exposure, over the contrary opinions of employer's physicians. *See* 20 C.F.R. §718.201(b).

994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999). Taking into consideration Dr. Cohen's specific rationale, the administrative law judge permissibly found that Dr. Cohen's opinion was reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Relying on Dr. Cohen's reasoned opinion and his superior credentials, I would affirm the administrative law judge's finding that Dr. Cohen's opinion is more credible than the opinions of Drs. Rosenberg and Basheda regarding the etiology of the miner's lung disease.[17] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336. I would therefore affirm the administrative law judge's finding that employer failed to disprove legal pneumoconiosis and rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).[18]

Because employer failed to disprove legal pneumoconiosis, I would further affirm the administrative law judge's finding that employer is unable to establish that no part of the miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-22 (4th Cir. 2015); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Thus, I would affirm the award of benefits.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[17] It is not necessary to address employer's arguments on appeal regarding the weight accorded Dr. Rasmussen's opinion. Any error committed by the administrative law judge with regard to Dr. Rasmussen's opinion is harmless, as the administrative law judge gave permissible reasons for discrediting Dr. Basheda's opinion and for giving controlling weight to Dr. Cohen's opinion over Dr. Rosenberg's opinion and the pathology evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[18] Because employer must disprove both legal and clinical pneumoconiosis, employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis under 20 C.F.R. §718.305(d)(2)(i).