U.S. Department of Labor

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

BRB No. 17-0364 BLA

DELORES C. HUBBARD (o/b/o GEORGE L. HUBBARD)	)	
Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	
and	)	DATE ISSUED: 04/25/2018
WELLS FARGO DISABILITY MANAGEMENT	)	
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 on Remand of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2012-BLA-05182) of Administrative Law Judge Alan L. Bergstrom, awarding benefits on a subsequent claim filed on September 29, 2010,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.[2]

The Board previously affirmed the administrative law judge's unchallenged determination that the miner worked for twenty-three years and nine months in underground coal mine employment.[3] *See Hubbard v. Westmoreland Coal Co.*, BRB No. 15-0089 BLA (Jan. 20, 2016) (unpub.). The Board also affirmed as unchallenged the administrative law judge's findings that claimant failed to establish that the miner had complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a)-(c). *Hubbard*, slip op. at 2-3 n. 3. In addition, the Board affirmed the administrative law judge's unchallenged findings that claimant failed to establish with pulmonary function study evidence, arterial blood gas study evidence, or evidence of cor pulmonale that the miner had a totally disabling respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Id*. However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv), and therefore vacated his

[1] The miner's prior claim, filed on August 18, 2008, was finally denied by the district director on March 6, 2009 for failure to establish total disability. Director's Exhibit 2. The miner died on September 20, 2013. Administrative Law Judge Exhibit 9. Claimant, the widow of the miner, is pursuing this claim on his behalf. *Id*.

[2] The Board set forth the full procedural history of this case in its prior decision. *Hubbard v. Westmoreland Coal Co.*, BRB No. 15-0089 BLA, slip op. at 2 & n.1 (Jan. 20, 2016) (unpub.).

[3] The miner's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

determination that claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012).[4] *Id*. at 5-6.

The Board also affirmed the administrative law judge's unchallenged findings that, in seeking to rebut the Section 411(c)(4) presumption, employer failed to disprove the existence of clinical pneumoconiosis through x-ray evidence or biopsy or autopsy evidence, pursuant to 20 C.F.R §718.202(a)(1)-(2). *Hubbard*, slip op. at 2-3 n.3. However, the Board held that the administrative law judge erred in considering the medical opinion evidence regarding the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. at 6-7. Therefore, the Board vacated his findings that employer failed to disprove the existence of clinical pneumoconiosis, failed to establish that "no part" of the miner's totally disabling impairment was caused by pneumoconiosis, and failed to rebut the presumption pursuant to 20 C.F.R. §718.305(d)(1). *Id*. at 6-7 & n.12. The Board remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge granted claimant's unopposed motion to reopen the record and, pursuant to 20 C.F.R. §725.413(f)(3)(i), admitted readings by Dr. Shipley of three CT scans, which claimant asserted established that the miner had complicated pneumoconiosis.[5] The administrative law judge found that the new evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). However, the administrative law judge found that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, the administrative law judge found that the miner invoked the Section 411(c)(4) presumption, and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis when the miner had fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] 20 C.F.R. §718.304 provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b).

law judge further found that employer failed to rebut the Section 411(c)(4) presumption, and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and failed to weigh the evidence as a whole pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits, and also argues that the administrative law judge erred in finding that she failed to establish the existence of complicated pneumoconiosis. The Director, Office of Workers' Compensation Programs, did not file a 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Complicated Pneumoconiosis

Initially, we address claimant's contention that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). On remand, the administrative law judge admitted Dr. Shipley's interpretations of CT scans conducted on September 24, 2009, June 22, 2011, and January 17, 2012.[6] Decision and Order on Remand at 5-6; Claimant's Exhibits 14-16. Although Dr. Shipley did not find that the September 24, 2009 CT scan supported a finding of complicated pneumoconiosis, he concluded that the June 22, 2011 and January 17, 2012 CT scans were positive for complicated pneumoconiosis in the upper lung zones, with a large opacity measuring greater than one centimeter in diameter.[7] Claimant's Exhibits 14-16. The administrative law judge, however, found that the CT scan evidence did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c)

[6] Claimant also contends that Dr. Shipley's interpretation of a June 22, 2011 x-ray is evidence of complicated pneumoconiosis. Claimant's Response Brief at 3 n.2. We need not address that argument, however, because claimant does not challenge the administrative law judge's determination that the x-ray reading exceeded the evidentiary limitations and was inadmissible. *See* 20 C.F.R. §725.414(a)(2); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 5.

[7] In his initial Decision and Order, the administrative law judge considered interpretations of the same three CT scans by Dr. Wheeler, who concluded that each was negative for pneumoconiosis. Decision and Order (Nov. 5, 2014) at 27-28, 30.

because Dr. Shipley did not assert that the large mass would produce an opacity at least one centimeter in diameter on an x-ray. Decision and Order on Remand at 9-10.

Claimant points out that Dr. Shipley expressly stated in both the June 22, 2011 and January 17, 2012 CT scan readings that the lesion in question "measures greater than 1cm in diameter," and contends that the administrative law judge therefore erred in finding Dr. Shipley's interpretations insufficient to establish complicated pneumoconiosis. Claimant's Brief at 4; Claimant's Exhibits 14, 15. We disagree. Under the case law of the United States Court of Appeals for the Fourth Circuit, a finding that evidence under 20 C.F.R. §718.304(c) supports a finding of complicated pneumoconiosis requires a determination that the evidence shows a condition that would produce opacities greater than one centimeter in diameter on an x-ray. *See Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999); *see also E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000). Although Dr. Shipley reported that the large mass was greater than one centimeter in diameter on the CT scans, the administrative law judge noted correctly that he did not address whether it would appear as greater than one centimeter on an x-ray. Decision and Order on Remand at 9-10; Claimant's Exhibits 14, 15. We therefore affirm the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Blankenship*, 177 F.3d at 243-44, 22 BLR at 2-561-62.

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

On remand, pursuant to the Board's instructions, the administrative law judge reconsidered the opinions of Drs. Rasmussen, Zaldivar, and Tuteur to determine if the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8] Drs. Rasmussen and Zaldivar concluded that the miner was totally disabled, based on his severely reduced diffusion capacity. Director's Exhibit 13; Employer's Exhibits 5, 17. Dr. Tuteur opined that the miner was not totally disabled because his pulmonary function studies, arterial blood gas studies and total lung capacity were normal. Employer's Exhibits 6, 18. The administrative law judge gave "much less weight" to Dr. Tuteur's opinion than those of Drs. Rasmussen and Zaldivar, and found that claimant established that the miner was totally disabled. Decision and Order at 17-18.

[8] We affirm the administrative law judge's unchallenged initial finding that the miner's usual coal mining job was that of a roof bolter, which required him to regularly perform moderate-to-heavy lifting and carrying. *See Skrack*, 6 BLR at 1-711; Decision and Order (Nov. 5, 2014) at 34.

Employer contends that the administrative law judge did not sufficiently explain why he credited the opinions of Drs. Rasmussen and Zaldivar over Dr. Tuteur's.[9] Employer's Brief at 11. We agree. Initially, we note that when he summarized the evidence of total disability, the administrative law judge found Dr. Rasmussen's opinion *that the miner had legal pneumoconiosis* to be well-documented and reasoned. Decision and Order on Remand at 11-12. Without any analysis of Dr. Rasmussen's opinion regarding total disability, the administrative law judge determined that it was entitled to more weight than Dr. Tuteur's contrary opinion. *Id*. at 18. If the administrative law judge credited Dr. Rasmussen's opinion on total disability based upon his finding that Dr. Rasmussen's opinion as to the existence of legal pneumoconiosis is "well-documented and reasoned," that was erroneous. *Id*. at 12. Whether the miner had legal pneumoconiosis, an impairment arising out of coal mine employment, is distinct from the issue of whether he had a totally disabling respiratory or pulmonary impairment that prevented him from performing his usual coal mine work. *See* 20 C.F.R. §§718.201(a)(2), (b), 718.204(b)(1). If the administrative law judge had other reasons for crediting Dr. Rasmussen's opinion over Dr. Tuteur's, he did not adequately explain them, and thus failed to fulfill the requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Under the APA, 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 on the record." *Id*.; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We also agree with employer that the administrative law judge failed to adequately explain his crediting of Dr. Zaldivar's opinion that the miner was totally disabled over Dr. Tuteur's contrary opinion. Summarizing Dr. Zaldivar's opinion, the administrative law judge observed that Drs. Zaldivar and Tuteur both cited a study concluding that pneumoconiosis is typically confirmed through biopsy or autopsy evidence by the presence of "round nodules in the upper lung zones." Decision and Order on Remand at 13. The administrative law judge remarked that it was "noteworthy" that Dr. Shipley reported such findings in his CT scan readings, and that Drs. Zaldivar and Tuteur did not have access to Dr. Shipley's readings when they provided their opinions. *Id*.

Later, when weighing the medical opinion evidence regarding total disability, the administrative law judge again noted that Dr. Shipley observed interstitial pneumonia

[9] We reject employer's argument that the administrative law judge erred in reconsidering the weight given to the opinions of Drs. Rasmussen and Tuteur. Employer's Brief at 4-11. The administrative law judge correctly articulated and followed the Board's remand instructions to reconsider the medical opinion evidence. *Hubbard*, slip op. at 5; Decision and Order on Remand at 3.

likely unrelated to coal dust exposure in the miner's lower lung zones and "an upper zone [predominant] fibrotic process consisting of perilymphatic tiny nodules associated with architectural distortion consistent with coal workers' pneumoconiosis." *Id*. at 17; *see* Claimant's Exhibits 14-15. The administrative law judge then found Dr. Tuteur's opinion well-documented and well-reasoned with regard to the miner's "lower lung zone interstitial fibrosis," but determined that Dr. Tuteur "expressed no medical opinion as to the lung process seen in the upper lung zone[,] which lessens the weight to be given his medical opinion on the ultimate issues in this claim." *Id*. The administrative law judge concluded that, except for his opinions about "the lower lung zone process, Dr. Tuteur's medical opinions are entitled to lesser weight in evaluating total respiratory/pulmonary disability under 20 C.F.R. §718.204(b)(2)(iv)." *Id*. As for Dr. Zaldivar, the administrative law judge noted that he referred to Dr. Wheeler's interpretations of the CT scans, but appeared to credit Dr. Zaldivar's opinion because he concluded that the miner was totally disabled "without benefit of the readings [by Dr. Shipley] known to Employer's counsel at the time of Dr. Zaldivar's deposition testimony and yet undisclosed to either Dr. Zaldivar or Claimant's attorney." *Id*. at 17-18.

In weighing the opinions of Drs. Zaldivar and Tuteur, the administrative law judge failed to explain how the fact that they did not have access to Dr. Shipley's CT scan readings — which in Dr. Shipley's opinion demonstrated pneumoconiosis in the miner's upper lung zones — impacted their opinions regarding total disability. As an initial matter, the administrative law judge did not explain why he credited Dr. Zaldivar and discredited Dr. Tuteur, even though both concluded in their reports, contrary to Dr. Shipley's CT scan readings, that the miner had neither clinical nor legal pneumoconiosis. Employer's Exhibits 5 at 3-4; 6 at 4. Moreover, as explained above, whether a miner has pneumoconiosis is a distinct issue from whether he is totally disabled. The administrative law judge's analysis does not meet the requirements of the APA. *See Wojtowicz*, 12 BLR at 1-165 (1989). Thus, we vacate his findings that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10] Decision and Order on Remand at 17-18. As a result, we also vacate his findings that claimant established a change in an

[10] We reject employer's argument that the administrative law judge should not have credited the opinions of Drs. Rasmussen and Zaldivar because they failed to explain how the miner could be totally disabled in light of the nonqualifying values at 20 C.F.R. §718.204(b)(2)(i)-(ii). Employer's Brief at 11-12. The administrative law judge may credit a physician's opinion based on medically acceptable tests, even if the pulmonary function studies and arterial blood gas studies are nonqualifying. 20 C.F.R. §718.204(b)(2)(iv); *see also Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (4th Cir. 1991).

applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption. *Id*. at 18-19.

In reconsidering whether the medical opinion evidence established that the miner suffered from a totally disabling pulmonary impairment, the administrative law should reconsider the opinions of Drs. Rasmussen,[11] Zaldivar, and Tuteur. The administrative law judge should consider the comparative credentials of the physicians, the explanations for their conclusions, their knowledge of the exertional requirements of the miner's usual coal

[11] In her response brief, claimant contends that the administrative law judge erred in his initial decision and order in discrediting Dr. Rasmussen's opinion. Claimant's Brief at 7. Claimant raised the same argument when this case first came before the Board, but the Board did not address it. We address it now, in the interest of judicial economy, and agree with claimant. Dr. Rasmussen opined that the miner's markedly reduced diffusion capacity satisfied the American Thoracic Society's standards for total disability. Director's Exhibit 13. He classified the miner's impairment as a Class IV impairment under the American Medical Association's (AMA) Guides to the Impairment of Pulmonary Function, 6th Edition. *Id*. In his initial Decision and Order, the administrative discredited Dr. Rasmussen's opinion regarding total disability because he diagnosed complicated pneumoconiosis, contrary to the administrative law judge's findings, and because his diffusion capacity test did not meet the reproducibility requirements in the AMA guidelines. Decision and Order (Nov. 5, 2014) at 35.

In so doing, the administrative law judge failed to explain how Dr. Rasmussen's diagnosis of complicated pneumoconiosis detracted from his opinion that the miner was totally disabled based upon his diffusion capacity. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, in finding that Dr. Rasmussen's diffusion capacity test did not meet the AMA guidelines for reproducibility, the administrative law judge improperly made a medical determination, substituting his opinion for that of the physicians. *Marcum v. Director*, OWCP, 11 BLR 1-23 (1987). Furthermore, because Dr. Rasmussen's testing reflects multiple trials with DLCO values ranging from 9.4 to 10.5, we agree with claimant that the administrative law judge made a factual mistake in determining that the testing did not include at least two tests within three units of measurement. Decision and Order at 25; Claimant's Brief at 7; Director's Exhibit 13. Consequently, on remand, the administrative law judge must reconsider Dr. Rasmussen's opinion that the miner was totally disabled based upon his reduced diffusion capacity.

mine employment,[12] and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). After reconsidering whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant evidence together to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[13] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

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

In the interest of judicial economy, we address employer's arguments that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Upon invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,[14] or 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)(i), (ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 502, 25 BLR 2-713, 2-716 (4th Cir. 2015). The administrative law judge found that employer failed to rebut the presumption by either method.

Employer contends that the administrative law judge erred in weighing the medical opinion evidence when he determined that employer failed to rebut the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Employer's Brief at 15-17. Rebutting the presumption of legal pneumoconiosis requires employer to prove that the

[12] On remand, the administrative law judge should follow the Board's prior instructions to consider Dr. Tuteur's knowledge of the miner's work duties when weighing his opinion. *Hubbard*, slip op. at 5.

[13] If the evidence does not establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[14] "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). "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).

miner did not suffer from a "chronic lung disease or impairment" that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2),(b),718.305(d)(1)(i)(A). The administrative law judge considered the opinions of Drs. Rasmussen, Zaldivar, and Tuteur. Dr. Rasmussen concluded that the miner had legal pneumoconiosis in the form of diffuse interstitial fibrosis due to cigarette smoking and coal mine dust exposure. Director's Exhibit 13. Dr. Zaldivar opined that the miner did not have legal pneumoconiosis, but a form of diffuse pulmonary fibrosis of unknown origin.[15] Employer's Exhibit 17 at 60. Dr. Tuteur also concluded that the miner did not have legal pneumoconiosis, diagnosing pulmonary fibrosis due to gastroesophageal reflux disease (GERD). Employer's Exhibits 6, 18.

The administrative law judge gave little weight to the opinions of Drs. Zaldivar and Tuteur because the physicians failed to address Dr. Shipley's CT scan diagnosis of simple clinical pneumoconiosis in the upper lung zones. Decision and Order on Remand at 21-22. Although he noted that Dr. Rasmussen did not explore the role GERD may have played in the miner's fibrosis, the administrative law judge gave greater weight to Dr. Rasmussen's opinion than to the opinions of Drs. Zaldivar and Tuteur, and determined that employer failed to rebut the existence of legal pneumoconiosis. *Id*. at 22.

We agree with employer that the administrative law judge failed to explain why the failure of Drs. Zaldivar and Tuteur to address Dr. Shipley's diagnosis of clinical pneumoconiosis on CT scans undermined their opinions that the miner did not have legal pneumoconiosis. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge also erred in relying on Dr. Shipley's opinion regarding clinical pneumoconiosis to assess opinions regarding legal pneumoconiosis without determining whether employer disproved the existence of clinical pneumoconiosis. The Board previously affirmed the administrative law judge's findings that employer failed to disprove the existence of clinical pneumoconiosis with chest x-ray, biopsy, or autopsy evidence, *see* 20 C.F.R. §718.202(a)(1)-(2), but vacated his finding that employer failed to disprove the existence of clinical pneumoconiosis with medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *Hubbard*, slip op. at 2-3 n.3, 6-7. The administrative law judge failed to follow the Board's instructions on remand and mistakenly concluded that the Board "affirmed the original finding that the Claimant had failed to establish by a preponderance of the evidence that the Miner suffered from clinical pneumoconiosis." Decision and Order

[15] Dr. Zaldivar opined that the miner's fibrosis required a biopsy to determine its cause, but noted that the miner's smoking history predisposed him to pulmonary fibrosis, and that his gastroesophageal reflux disease also could have contributed to it. Employer's Exhibit 7, 17 at 19. Dr. Zaldivar concluded that coal mine dust exposure was not a cause of the miner's diffuse pulmonary fibrosis. *Id*.

on Remand at 20; *Hubbard*, slip op. 6-7; Employer's Brief at 12-14. Consequently, we vacate the determination that employer failed to rebut the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).

Finally, given the errors we have identified in weighing the opinions of Drs. Rasmussen, Zaldivar, and Tuteur regarding total disability and pneumoconiosis, we must vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of the miner's totally disabling respiratory impairment was caused by pneumoconiosis. Decision and Order on Remand at 22-23.

If the administrative law judge finds on remand that claimant has invoked the Section 411(c)(4) presumption, he should address whether employer has rebutted the presumption by determining whether employer has disproved the presumed existence of both legal *and* clinical pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i)(A), (B); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-698-99 (4th Cir. 2015). The administrative law judge should first consider whether employer has affirmatively established the absence of legal pneumoconiosis by demonstrating that the miner's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[17] 20 C.F.R. §718.201(a)(2), (b). He should then determine whether employer has disproven the presence of clinical pneumoconiosis, considering the relevant medical opinion evidence as well as the chest x-ray and CT scan evidence.

If the administrative law judge finds that employer has failed to rebut the existence of legal and clinical pneumoconiosis, he must then consider whether employer has rebutted the presumed fact of disability causation by proving that "no part of the miner's respiratory

[16] We reject employer's argument that the administrative law judge erred in not requiring claimant to prove that the miner had legal pneumoconiosis or causation of disability. Employer's Brief at 16. After the miner invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to prove that the miner did not have legal or clinical pneumoconiosis, or by establishing that no part of his impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii).

[17] On remand, the administrative law judge must evaluate the credibility of the medical opinions in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

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); *see Bender*, 782 F.3d at 143-44, 25 BLR at 2-708-10. The administrative law judge must consider all relevant evidence and set forth his findings and conclusions in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, 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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge