U.S. Department of Labor

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

BRB No. 16-0584 BLA

ROBERT E. TACKETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITE COUNTY COAL	)	DATE ISSUED: 08/21/2017
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Patrick C. Thomas and Brian P. Williams (Kahn, Dees, Donovan & Kahn, LLP) Evansville, Indiana, for claimant.

H. Brett Stonecipher and Tighe A. Estes (Fogle Keller Purdy, PLLC) Lexington, Kentucky, for employer.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative 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, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05382) of Administrative Law Judge Alice M. Craft, rendered on a claim 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 16.49 years of underground coal mine employment,[1] and determined that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding total disability established pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer argues further that the administrative law judge erred in finding that it did not rebut the presumption.[3] Claimant responds, challenging the timeliness of employer's appeal, and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge considered pulmonary function study evidence submitted in excess of the evidentiary limitations of 20 C.F.R. §725.414. Employer filed a reply brief, contending that its appeal was timely filed. Additionally, claimant's counsel has filed an attorney's fee petition for services performed before the Board in this appeal.

[1] The record reflects that claimant's last coal mine employment was in Illinois. Director's Exhibit 3 at 1; Hearing Transcript at 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 16.49 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Timeliness of Employer's Appeal

Claimant contends that employer's appeal was not timely filed because it was received by the Board more than thirty days after the administrative law judge's decision was issued. Claimant's contention lacks merit. Section 802.205(a) of the Board's Rules of Practice and Procedure provides that a Notice of Appeal must be filed within thirty days from the date on which the Decision and Order was filed in the Office of the District Director. 20 C.F.R. §802.205(a). Except as otherwise provided in the Rules, a Notice of Appeal is considered filed as of the date it is received in the Office of the Clerk of the Board. 20 C.F.R. §802.207(a). Section 802.207(b) provides that if a Notice of Appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the appeal will be considered to have been filed as of the date of mailing.[4] 20 C.F.R. §802.207(b).

The record reflects that the administrative law judge's Decision and Order was filed in the Office of the District Director on June 29, 2016. The thirtieth day after June 29, 2016 was Friday, July 29, 2016. Employer's Notice of Appeal was received by the Board on August 8, 2016. However, the Notice of Appeal was postmarked July 18, 2016, indicating that it was mailed before the filing period concluded. Therefore, pursuant to 20 C.F.R. §802.207(b), employer's appeal was timely filed.

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

Employer argues that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment. A miner is totally disabled if he has a respiratory or pulmonary impairment which, standing alone, prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232

[4] The date appearing on the United States Postal Service postmark shall be prima facie evidence of the date of mailing. 20 C.F.R. §802.207(b).

(1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). In this case, employer contends that the administrative law judge erred in weighing the pulmonary function study and medical opinion evidence under 20 C.F.R. §718.204(b)(2)(i), (iv).[5]

A. Pulmonary Function Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies dated January 13, 2012, March 26, 2012, August 23, 2012, April 2, 2013, May 9, 2013, and January 21, 2015. Decision and Order at 11-12, 20; Director's Exhibit 10 at 20; Claimant's Exhibits 4; 5; 8 at 42, 76; Employer's Exhibit 4. Before determining whether the studies were qualifying[6] for total disability, the administrative law judge noted a discrepancy in the measurements of claimant's height, which ranged from sixty-nine to seventy-one inches.[7] Decision and Order at 11. The administrative law judge resolved the evidentiary conflict by finding claimant's height to be seventy inches, because that measurement represented the midpoint of the range. *Id.*

Based on that height,[8] and claimant's age at the time of each study, the administrative law judge summarized the results of the pulmonary function studies as follows: 1) the January 13, 2012 study yielded qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values; 2) the March 26, 2012 study, which contained only pre-bronchodilator values, was non-qualifying; 3) the August 23, 2012 study was non-qualifying in both its pre-bronchodilator and post-bronchodilator values; 4) the April 2, 2013 study was non-qualifying pre-bronchodilator, but qualifying post-bronchodilator;

[5] The administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii).

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

[7] Claimant's height was measured as 69 inches for the January 13, 2012 pulmonary function study; as 69.5 inches for the March 26, 2012, April 2, 2013, and January 21, 2015 studies; as 70 inches for the May 9, 2013 study, and as 71 inches for the January 13, 2012 study.

[8] The height of 70 inches found by the administrative law judge falls between the table heights of 69.7 inches and 70.1 inches listed in Appendix B. The administrative law judge did not specifically state which table height she used. However, from her analysis of whether each pulmonary function study was qualifying, it appears that she used the next greater height of 70.1 inches. Decision and Order at 11-12 (table).

5) the May 9, 2013 study was non-qualifying both pre-bronchodilator and post-bronchodilator; and 6) the January 21, 2015 study was qualifying pre-bronchodilator, but non-qualifying post-bronchodilator. Decision and Order at 11-12 (table).

When weighing the pulmonary function study evidence, the administrative law judge began by finding that all six studies "yielded FEV1 values that were qualifying." Decision and Order at 20. She noted further that, in order to be found qualifying under the regulations, a pulmonary function study must also contain either an FVC or MVV value equal to or less than the applicable table value, or an FEV1/FVC ratio of 55% or less. *Id*. The administrative law judge found that "[c]laimant's MVV was tested during three of the six tests, and each time the values were qualifying."[9] *Id*. The administrative law judge concluded that, "[b]ecause all the testing which included a measurement of . . . [c]laimant's MVV was qualifying . . . [c]laimant has established that he is disabled based on the pulmonary function tests." *Id.*

Employer argues that the administrative law judge erred in weighing the January 13, 2012 and April 2, 2013 pulmonary function studies, because they were "submitted as treatment records, and not designated by either party" as affirmative evidence pursuant to the evidentiary limitations of 20 C.F.R. §725.414. Employer's Brief at 11-12. Employer's argument lacks merit. Hospitalization or treatment records "for a respiratory or pulmonary or related disease" are admissible "[n]otwithstanding the limitations" on the submission of medical evidence. 20 C.F.R. §725.414(a)(4). We therefore reject employer's argument that the administrative law judge's reliance on the January 2012 and April 2013 pulmonary function studies was barred by the evidentiary limitations of 20 C.F.R. §725.414.

Employer argues further that the administrative law judge erred in relying on a height of seventy inches to determine whether claimant's pulmonary function studies were qualifying. Employer's Brief at 20. Contrary to employer's argument, the administrative law judge permissibly found that the height of seventy inches represented claimant's actual height, because it was the "mid-point" between the recorded heights that fell within the range of sixty-nine to seventy-one inches. Decision and Order at 11; *see K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983).

[9] The record reflects that the three pulmonary function studies that included a test of claimant's MVV were the March 26, 2012, pre-bronchodilator-only pulmonary function study, the post-bronchodilator portion of the April 2, 2013 study, and the pre-bronchodilator portion of the January 21, 2015 study. Director's Exhibit 10 at 20; Claimant's Exhibits 5; 8 at 76.

Employer further asserts that the administrative law judge erred in finding that the March 26, 2012 pulmonary function study was qualifying for total disability when she weighed the evidence.[10] Employer's argument has merit. The March 26, 2012 pulmonary function study was performed when claimant was 64 years old. Director's Exhibit 10. Under 20 C.F.R. Part 718, Appendix B, a 64 year old miner is totally disabled if his FEV1 value was at or below 1.96 and his MVV value was at or below 79 for a height of 69.7 inches, or for a height of 70.1 inches, if his FEV1 value was at or below 2.00 and his MVV value was at or below 80. Dr. Chavda recorded an FEV1 value of 2.05 and an MVV value of 44. Director's Exhibit 10. Because the FEV1 value was above the table values, the March 26, 2012 pulmonary function study was a non-qualifying study. *Id*. Because the administrative law judge mischaracterized the evidence, we must vacate her finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and remand the case for further consideration. *See Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Further, we agree with employer that the administrative law judge did not address its argument, raised below, that the January 21, 2015 pulmonary function study did not meet the quality standards under 20 C.F.R. §718.103(c) because it lacked sufficient tracings. *See* Employer's Post-Hearing Brief at 7-9. Employer also argues that the January 13, 2012 and April 2, 2013 pulmonary function studies, contained in claimant's treatment records, do not meet the quality standards for the same reason. Because these two studies were not generated in connection with a claim for benefits, they are not subject to the quality standards set forth at 20 C.F.R. §718.103 and Appendix B. *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008); 20 C.F.R. §718.101(b). However, the administrative law judge must still consider whether pulmonary function studies contained in treatment records are sufficiently reliable to support a finding regarding total disability.[11]

[10] As noted earlier, *supra* at 4-5, when the administrative law judge summarized the results of the pulmonary function studies, she accurately listed the March 26, 2012 pulmonary function study as a non-qualifying study. Decision and Order at 11.

[11] The Department of Labor's comments to the regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

Therefore, on remand, the administrative law judge must reconsider whether the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge must determine whether the studies that were developed in connection with the claim are in substantial compliance with the applicable quality standards at 20 C.F.R. §718.103(c), and whether the pulmonary function studies contained in treatment records are sufficiently reliable to support a finding regarding total disability. The administrative law judge should then weigh the qualifying and non-qualifying pulmonary function studies, including both the pre-bronchodilator and post-bronchodilator portions of the studies, *see Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454, 1-459 (1983), and determine whether the pulmonary function studies establish total disability.

B. Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant's usual coal mine employment was that of a belt mechanic.[12] Decision and Order at 4, 22. The administrative law judge weighed the medical opinions of Drs. Chavda, Houser, Selby and Rosenberg. Decision and Order at 15-18. All four physicians agreed that claimant has an obstructive respiratory impairment. Director's Exhibit 10; Claimant's Exhibit 6; Employer's Exhibits 4-6. Drs. Chavda and Houser opined that claimant is totally disabled from his usual coal mine employment, whereas Drs. Selby and Rosenberg opined that claimant is not totally disabled from performing his usual coal mine employment. *Id.*

The administrative law judge found that the opinions of Drs. Chavda and Houser were well-reasoned and documented, as both physicians "demonstrated a clear understanding of [claimant's usual] coal mine work" and their "opinions were consistent with the evidence available to them." Decision and Order at 22. Therefore, the administrative law judge assigned "great weight" to their opinions. *Id.* The administrative law judge also assigned "great weight" to Dr. Houser's opinion based on his history as claimant's treating physician. *Id.* In contrast, the administrative law judge found that the opinions of Drs. Rosenberg and Selby were not well-reasoned or documented, because they did not address the qualifying pulmonary function studies

---

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[12] The administrative law judge's finding that claimant's usual coal mine employment was that of a belt mechanic is affirmed as unchallenged. *See Skrack*, 6 BLR at 1-711.

"which included measurements of [claimant's] MVV" and because "neither described the exertional requirements of [claimant's usual] coal mine job as a belt mechanic." *Id*. Therefore, the administrative law judge found that the preponderance of the medical opinion evidence established total disability.

Because we have vacated the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and the administrative law judge relied on her analysis of the pulmonary function study evidence when weighing the medical opinion evidence, we must also vacate the finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Additionally, employer's arguments that the administrative law judge improperly discredited Dr. Rosenberg's opinion on the bases that Dr. Rosenberg believed that claimant was last employed in coal mining as a roof bolter, and that Dr. Rosenberg did not set forth the exertional requirements of claimant's last coal mine employment, have some merit. As employer points out, Dr. Rosenberg noted that "[i]n various claim application information" claimant was said to have last worked as a roof bolter. Employer's Exhibit 6 at 1. However, Dr. Rosenberg also stated that he reviewed Dr. Chavda's examination report, in which claimant "was said to have last worked in the coal mines from 1984 to 1991, being involved with the maintenance of the belts." *Id*. at 2. The record reflects that Dr. Chavda's report specifically listed claimant as a "Belt Mechanic-He worked 6 days a week, 9-9.5 hr shifts. He was responsible for the maintenance on the belt. He spliced belts, hauled 3/4 wire rope, moved belts, repaired belts, and troubleshot electrical problems."[13] Director's Exhibit 10 at 3. Additionally, Dr. Rosenberg stated that he reviewed the transcript of claimant's deposition, in which claimant testified that he "stopped working after a coworker died. Other employment outside of the mines was noted. Furthermore, he noted that *he was a belt mechanic in the mines troubleshooting.*" Employer's Exhibit 6 at 2 (emphasis added). Dr. Rosenberg further noted claimant's testimony that "[o]ver the years, he also *had been* a drill operator and cutting machine operator, and he also ran a continuous miner and roof bolter." *Id*. (emphasis added).

In light of the foregoing information that Dr. Rosenberg considered, substantial evidence does not support the administrative law judge's finding that Dr. Rosenberg

[13] The above description is the only section of Dr. Chavda's report that describes claimant's work or describes claimant's being involved with maintenance on the belts. Director's Exhibit 10. Thus, the record reflects that Dr. Rosenberg was aware of the nature of claimant's work, along with the exertional-type requirements that Dr. Chavda described.

incorrectly stated that claimant's last job was as a roof bolter. Additionally, the administrative law judge did not consider that Dr. Rosenberg had reviewed Dr. Chavda's statements setting forth the requirements of claimant's job as a belt mechanic. On remand, the administrative law judge must consider the entirety of Dr. Rosenberg's opinion when determining the weight to accord it on the issue of total disability. *See* 30 U.S.C. §923(b)(requiring consideration of all relevant evidence).

Moreover, there is merit in employer's contention that the administrative law judge did not apply the same level of scrutiny to the opinions of Drs. Chavda, Houser, Rosenberg, and Selby. Employer's Brief at 14-19. Specifically, the administrative law judge credited the opinions of Drs. Chavda and Houser because each "demonstrated a clear understanding of [claimant's usual coal mine work]."[14] Decision and Order at 21-22. As just discussed, the administrative law judge did not consider the entirety of Dr. Rosenberg's opinion before discounting it on that issue. In rejecting Dr. Selby's opinion, the administrative law judge found that Dr. Selby did not describe the exertional requirements of claimant's usual coal mine employment. Decision and Order at 22. In making this finding, however, the administrative law judge failed to consider that Dr. Selby specifically identified claimant's usual coal mine work as that of a belt mechanic. Employer's Exhibit 4 at 2. Moreover, Dr. Selby attached Dr. Chavda's description of the position of a belt mechanic to his report, wherein Dr. Chavda indicated that claimant "spliced belts, hauled [three-quarter] wire rope, moved belts, repaired belts and troubleshot electric problems." *Id*. at 10. The administrative law judge also faulted Dr. Selby because he did not discuss all the qualifying pulmonary function studies with measurements of MVV,[15] but did not conversely consider whether Drs. Chavda and Houser addressed the non-qualifying pulmonary function studies.

[14] Specifically, the administrative law judge noted that Dr. Chavda "reported that [claimant's usual coal mine work] was a belt mechanic [and] that [claimant] was responsible for maintenance on the belt, which included splicing belts, hauling [three-quarter] wire rope, moving belts, repairing belts, and troubleshooting electrical problems." Decision and Order at 20; Director's Exhibit 10. The administrative law judge noted that Dr. Houser stated that claimant's "work as a belt mechanic involved 'lifting 80-pound belt rollers, 50-pound bags of rock dust, 8-inch solid blocks, and 6 x 6 timbers during his typical 9.5 hour shift.'" Decision and Order at 20, *quoting* Claimant's Exhibit 6.

[15] Substantial evidence does not support the finding that Dr. Selby did not address the pulmonary function studies that contained a qualifying MVV value. The record reflects that Dr. Selby discussed the results of Dr. Chavda's March 26, 2012 pulmonary function study in his report. Employer's Exhibit 4 at 14.

Whether a physician's opinion is adequately reasoned is for the administrative law judge to determine. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007). However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny to determining the credibility of the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999)(en banc). Because the administrative law judge did not consider all the relevant evidence and render the necessary factual findings as to the credibility of the opinions of Drs. Chavda, Houser, Rosenberg, and Selby,[16] we instruct her to do so on remand.

Therefore, on remand, the administrative law judge should reconsider the medical opinion evidence on the issue of total disability. In weighing the medical opinions, the administrative law judge should address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001).

In light of our decision to vacate the administrative law judge's finding that the evidence established total disability at 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the presumption invoked. If claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17] or by

[16] As the validity of the pulmonary function studies may be relevant to the administrative law judge's finding that the opinions of Drs. Chavda and Houser are documented, we decline to affirm the administrative law judge's decision to assign their opinions "great weight." Decision and Order at 22.

[17] "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

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(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that employer failed to establish both that claimant does not have legal pneumoconiosis and does not have clinical pneumoconiosis. Decision and Order at 23-27. Employer's only argument is that the administrative law judge erred in her weighing of the CT scan evidence on the issue of clinical pneumoconiosis. Employer's Brief at 19-20. Because employer does not challenge the determination that it failed to disprove legal pneumoconiosis, that determination is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding pursuant to 20 C.F.R. §718.305(d)(1)(i). We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

The administrative law judge further found that the medical opinions of Drs. Rosenberg and Selby failed to establish that no part of claimant's total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge discounted their disability causation opinions because the physicians did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. Decision and Order at 27-28; *see Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013). Employer does not challenge that finding, which is therefore affirmed. *See Skrack*, 6 BLR at 1-711. We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption.

IV. Conclusion

On remand, the administrative law judge must reconsider whether the pulmonary function study evidence and the medical opinion evidence establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iv). The administrative law judge must then weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment

---

that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-198.

If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. In that case, in light of our affirmance of the finding that employer failed to rebut the presumption, the administrative law judge may reinstate the award of benefits. If the administrative law judge finds that the evidence does not establish total disability, a necessary element of entitlement under 20 C.F.R. Part 718, an award of benefits is precluded.[18] *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[18] We decline to address, at this time, the fee petition filed by claimant's counsel. Because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). If, on remand, the administrative law judge again awards benefits, claimant may refile the fee petition. *See* 20 C.F.R. §802.203(c).

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

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge