U.S. Department of Labor

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

BRB Nos. 17-0237 BLA
and 17-0315 BLA

VONNIE McINTOSH (o/b/o and Widow of JAMES A. McINTOSH)	)	
Claimant-Respondent	)	
v.	)	
KEYSTONE COAL MINING CORPORATION c/o HEALTHSMART CASUALTY SOLUTIONS	)	DATE ISSUED: 08/27/2018
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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 BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decisions and Orders (2013-BLA-05751; 2016-BLA-05800) of Administrative Law Judge Drew A. Swank awarding benefits in a miner's claim and a survivor's claim[1] filed pursuant to the Black Lung Benefits Act, as amended 30 U.S.C. §901-944 (2012) (the Act). The miner's claim, filed on June 22, 2012, is before the Board for the second time. The survivor's claim, filed on April 8, 2016, was consolidated with the miner's claim by the Board for purposes of decision only.[2]

The miner's claim was previously before the Board to address the miner's interlocutory appeal of the administrative law judge's Order Striking Claimant's Medical Opinion Evidence for Failure to Show Cause. *McIntosh v. Keystone Coal Mining Co.*, BRB No. 14-0251 BLA (Mar. 18, 2015) (unpub.). In that Order, the administrative law judge found that the miner had unreasonably refused to attend a physical examination by employer's doctor. Although the miner provided a note from his treating physician indicating that the miner could not travel to the scheduled appointment,[3] the administrative law judge found that the note was not adequate to justify the miner's failure to attend. Therefore, the administrative law judge sanctioned claimant by excluding all of claimant's medical opinion evidence.

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[1] The administrative law judge titled the survivor's decision as a Decision and Order *on Remand* Awarding Benefits. A review of the record, however, does not indicate that a survivor's claim was previously before the Board.

[2] Claimant is the widow of the miner who died on March 20, 2016. Survivor's Claim (SC) Director's Exhibit 9. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate. *See* April 6, 2016 Notice of Substitution of Party.

[3] The miner's treating physician, Dr. Holsinger, faxed a note on a prescription pad stating, "[Patient] is unable to travel to Canonsburg for [physical examination] due to [shortness of breath] and fatigue." Exhibit 3 to Employer's January 31, 2014 Motion to Compel.

On appeal, the Board held that the administrative law judge erred in failing to explain to the miner, who was not represented by an attorney, what information was needed to document his inability to attend the examination. The Board also held that he erred in failing to consider all of the relevant evidence prior to finding that the miner's refusal to attend the examination was unreasonable.[4] Finally, the Board held that the administrative law judge abused his discretion by striking all of the miner's medical opinion evidence without considering whether lesser sanctions would better serve the interests of justice. *McIntosh*, BRB No. 14-0251 BLA, slip op. at 6.

On remand, the administrative law judge issued an Order to Show Cause instructing the miner to submit a reasoned medical opinion from a licensed physician explaining why the miner was physically unable to attend the examination scheduled by employer. He further instructed the miner to explain why remedial sanctions should not be imposed. August 4, 2015 Order to Show Cause at 2. In response, the miner submitted a letter from his treating physician, Dr. Khalil,[5] who opined that the miner's "pulmonary status does not allow him to be able to complete pulmonary physical testing far from home" and that the miner was "not able to travel more than 100 miles for testing." August 25, 2015 Letter from Dr. Khalil. In addition, the miner asserted that he had already been examined by Dr. Celko on behalf of the Department of Labor (DOL) and by employer's expert, Dr. Pickerill, and that all of the doctors of record were in agreement that he had a totally disabling obstructive lung impairment. Therefore, the miner contended that a records review would provide employer the opportunity to adequately address the issues without the need for additional pulmonary testing.

The administrative law judge found that because Dr. Khalil's letter stated that the miner could not travel more than 100 miles, it was insufficient to establish that the miner was physically unable to travel the approximately 97 miles necessary to attend the examination arranged by employer. September 28, 2015 Order Striking Evidence at 2. Because employer was deprived of the opportunity to obtain a second examination report,

[4] The Board noted that, in addition to the note from the miner's treating physician, the record included hospitalization records, as well as opinions from Drs. Celko and Pickerill, who each diagnosed a totally disabling respiratory impairment.

[5] Dr. Khalil further stated that the miner suffered from severe pulmonary hypertension and severe obstructive lung disease, demonstrated by his pulmonary function studies. August 25, 2015 Letter from Dr. Khalil. Dr. Khalil also indicated that the miner has "worsening shortness of breath and decreased exercise tolerance." *Id*. Dr. Khalil's letter was accompanied by an August 5, 2015 echocardiogram report diagnosing "severe pulmonary hypertension." *Id*.

the administrative law judge struck the miner's second medical opinion, that of Dr. Houser, from the record, thus leaving the parties with one medical opinion each; the miner had an opinion from Dr. Rasmussen and employer had an opinion from Dr. Pickerill.[6] *Id*. The administrative law judge stated that he was taking this action to ensure that the miner did "not gain an unfair advantage in litigating the claim." *Id*.

Subsequently, employer sought to submit Dr. Rosenberg's medical report and deposition testimony into evidence. October 27, 2015 Letter from Employer's Counsel. In response, the miner requested either that Dr. Rosenberg's opinion be stricken from the record, or that the miner be allowed to re-submit the medical opinion of Dr. Houser, so that the "balance of evidence" would remain equal for both the miner and employer. Miner's November 9, 2015 Motion to Strike. On April 13, 2016 claimant, on behalf of the miner,[7] added that if she was limited to one medical report, she wished to substitute the report of Dr. Houser for that of Dr. Rasmussen because Dr. Rasmussen had died and would not be able to supplement his opinion. Claimant's Request for Ruling on Pending Motion and Notice Redesignating Claimant's Affirmative Evidence.

By letter dated April 18, 2016, the administrative law judge acknowledged that the regulations allow the parties to submit two medical reports, and he advised employer that if employer elected to rely on the medical opinions of both Dr. Pickerill and Dr. Rosenberg as affirmative medical evidence, then claimant would be permitted to resubmit the medical opinion of Dr. Houser. *Id*. If, however, employer chose to rely on only one medical opinion, then Dr. Houser's opinion would remain stricken from the record. *Id*. He instructed employer to provide notification as to whether it would be relying on one or two medical opinions, and if so, which one.

By letter dated May 4, 2016, employer indicated that it was "elect[ing] to submit only the medical opinion evidence of Dr. Rosenberg," and was withdrawing Dr. Pickerill's opinion. May 4, 2016 Letter from Employer's Counsel. Claimant responded, arguing that if employer was submitting only one report, employer should be required to submit the report of Dr. Pickerill, the physician who examined the miner. Claimant argued that it was Dr. Pickerill's report that claimant's expert, Dr. Rasmussen, had

[6] The record does not reflect that the miner was allowed to choose which opinion to keep, or otherwise indicate why the administrative law judge struck Dr. Houser's opinion and not Dr. Rasmussen's opinion.

[7] In a Notification of Substitution of Party received April 6, 2016, the administrative law judge was notified that the miner had died on March 20, 2016 and that claimant was pursuing the miner's claim on his behalf.

responded to and in light of Dr. Rasmussen's death, there was no opportunity for Dr. Rasmussen to respond to Dr. Rosenberg's opinion. May 6, 2016 Letter from Claimant's Representative. In the alternative, claimant renewed her request to withdraw Dr. Rasmussen's report and substitute Dr. Houser's opinion, as this would allow claimant to obtain a supplemental report responding to Dr. Rosenberg's report. *Id*. Employer then submitted a letter to the administrative law judge, restating that it "will not submit into evidence the report or objective findings of Dr. Pickerill." May 11, 2016 Letter from Employer's Counsel.

By Order dated May 13, 2016, the administrative law judge denied claimant's request to require employer to submit Dr. Pickerill's report, stating that "it is for the designating party to choose what evidence will be submitted in support of its case." May 13, 2016 Order at 4. The administrative law judge also denied claimant's request to substitute Dr. Houser's report for that of Dr. Rasmussen, who had died. He found that because employer was deposing Dr. Rosenberg post-hearing, claimant would have the opportunity to cross-examine Dr. Rosenberg at that time, and thus protect her due process rights.[8] *Id*. at 3-4.

A formal hearing was held on June 6, 2016.[9] In a Decision and Order issued January 12, 2017, the administrative law judge credited the miner with 19.92 years of

[8] Claimant again requested that the administrative law judge reconsider allowing claimant to substitute Dr. Houser's report for that of Dr. Rasmussen in a May 16, 2016 letter. Her request was denied in a May 17, 2016 order. May 16, 2016 Letter from Claimant's Representative; May 17, 2016 Order Denying Claimant's Request to Submit Dr. Houser's Report.

[9] At the June 6, 2016 hearing, employer withdrew Dr. Pickerill's report and the transcript of his deposition (which employer had not yet taken). June 6, 2016 Hearing Transcript at 9-10. Employer noted on its exhibit list that the exhibits were "withdrawn in compliance with [the] April 18, 2016 direction of [the] Administrative Law Judge" but did not raise any objection on the issue at the hearing. *See* May 17, 2016 Letter from Employer's Counsel; June 6, 2016 Hearing Transcript.

In its post-hearing brief, employer characterized the administrative law judge's April 18, 2016 letter as "advising the parties that the [e]mployer would be limited to submission of only one of its two available affirmative reports into evidence." Employer's Closing Brief at 3. Employer stated that it "complied with" the administrative law judge's instructions, "electing to submit the report of Dr. Rosenberg and not the report of Dr. Pickerill." *Id*. Employer further stated, "[e]mployer hereby formally advises on the record for purposes of further appeal that it disagrees with Judge

underground coal mine employment and found that claimant established that the miner was totally disabled 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 pursuant to Section 411(c)(4) of the Act.[10] He further found that employer did not rebut the presumption, and awarded benefits in the miner's claim accordingly.

In a separate Decision and Order in the survivor's claim, issued on February 22, 2017, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act.[11] Accordingly, the administrative law judge awarded benefits in the survivor's claim.

Swank's ruling on this issue and maintains that it is entitled to submit two medical reports…." *Id*.

In the January 12, 2017 Decision and Order, in summarizing the procedural history of the claim, the administrative law judge stated that his April 18, 2016 letter "directed [e]mployer to notify this Court whether it [would] be relying on one or both of its available medical reports." Miner's Claim (MC) Decision and Order at 3. The administrative law judge further stated that his April 16, 2018 Letter explained that "[i]f [e]mployer elected to submit the affirmative reports of both Dr. Pickerill and Dr. Rosenberg, [c]laimant would be allowed to resubmit Dr. Houser's report," but "if [e]mployer elected to submit only one of its two available affirmative reports, Dr. Houser's report would remain stricken from the record." *Id*. The administrative law judge noted that in response to his April 16, 2018 letter, "[e]mployer indicated that it would not be submitting Dr. Pickerill's report or testimony and would, instead, only be relying on the medical opinion of Dr. Rosenberg." *Id*.

[10] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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); *see* 20 C.F.R. §718.305.

[11] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

On appeal in the miner's claim, employer contends that the administrative law judge erred in limiting it to one affirmative medical report. Employer also contends that the administrative law judge did not properly weigh the medical opinion of Dr. Rosenberg in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), did not file a response to employer's appeal in the miner's claim.[12]

In the survivor's claim, employer argues that the administrative law judge erred in awarding benefits under Section 422(*l*) of the Act before the award of benefits in the miner's claim became final. Claimant responds urging affirmance of benefits in the survivor's claim.[13] The Director responds, urging the Board to reject employer's allegations of error.

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.[14] 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).

[12] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 19.92 years of underground coal mine employment and was totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, that claimant invoked the Section 411(c)(4) presumption in the miner's claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 5, 8, 25.

[13] Claimant also filed a motion with the Board seeking summary affirmance of the award of benefits in the survivor's claim. The Board advised claimant that her motion would be addressed in the Board's decision on the merits. *McIntosh v. Keystone Coal Mining Co.*, BRB Nos. 17-0237 BLA & 17-0315 BLA (Order) (July 11, 2017) (unpub.).

[14] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 3.

The Miner's Claim

Evidentiary Ruling

Employer asserts that the administrative law judge violated the evidentiary limitations under 20 C.F.R. §725.414[15] by allowing it to submit only one medical report instead of two, as expressly provided by the regulations. Employer's Brief at 11. Employer asserts that it was prejudiced by this limitation because it was "without the benefit of important medical evidence in support of its defense of this claim." *Id*. at 12. Thus, employer requests that the case be remanded so that Dr. Pickerill's report can be admitted into evidence, and so that his deposition can also be taken and admitted into evidence. Employer's arguments are without merit.

Employer argued to the administrative law judge that because the miner did not attend the second physical examination employer scheduled with Dr. Basheda, its ability to develop evidence in defense of this claim was prejudiced. *See* March 14, 2014 Letter from Employer's Counsel. The administrative law judge sanctioned claimant by striking claimant's second medical opinion, that of Dr. Houser, from the record. September 28, 2015 Order Striking Evidence. He emphasized that he was acting to ensure that claimant did not "gain an unfair advantage" by failing to attend employer's second physical examination, and he noted that by striking one of claimant's opinions "each side is left with one medical opinion" from an examining physician. *Id.* When employer subsequently sought to submit a second medical opinion, the administrative law judge acknowledged its entitlement to do so, but served notice that if employer submitted a second opinion, he would modify the sanction against claimant out of a concern that employer's submission would "shift the balance of evidence in this claim." April 18, 2016 Letter from Judge Swank. Employer then elected to submit only the medical report of Dr. Rosenberg.

As the adjudication officer empowered to conduct formal hearings and render decisions under the Act, an administrative law judge is granted broad discretion in resolving procedural issues. *See Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-153 (1989) (en banc); *Morgan v. Director, OWCP*, 8 BLR 1-491, 1-493 (1986). Under these facts, employer has not demonstrated that the administrative law judge abused his discretion. Employer was provided the opportunity to submit two medical opinions pursuant to 20 C.F.R. §725.414(a)(3)(i), and chose to submit only one, that of Dr.

[15] Pursuant to Section 725.414(a)(3)(i), the claimant and the responsible operator are entitled to obtain and submit "no more than two medical reports." 20 C.F.R. §725.414(a)(3)(i).

Rosenberg. Employer has not shown that its election to submit one report was not voluntary. Nor has employer demonstrated that the administrative law judge's proposed modification of the sanction was an abuse of his discretion. *See Clark*, 12 BLR at 1-153; *Morgan*, 8 BLR at 1-493. Accordingly, we find that the administrative law judge did not limit employer to submitting only one report and we determine that employer is not entitled to the relief it seeks.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[16] 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). The administrative law judge found that employer failed to establish rebuttal by either method.

In order to rebut the presumed existence of legal pneumoconiosis in a miner's claim,[17] employer must show that the 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 medical opinion of Dr. Rosenberg that the miner does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) due solely to smoking.[18] Miner's Claim (MC)

[16] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[17] Based on his evaluation of the x-ray, computed tomography, and medical opinion evidence, the administrative law judge found that employer disproved the existence of clinical pneumoconiosis. MC Decision and Order at 19.

[18] The administrative law judge also considered the medical opinions of Dr. Celko, who examined the miner on the behalf of the Department of Labor, and Dr. Rasmussen, both of whom diagnosed legal pneumoconiosis. The administrative law judge noted,

Decision and Order at 16-18, 19; MC Employer's Exhibits 2, 11, 12. The administrative law judge accorded little weight to Dr. Rosenberg's opinion, finding it to be inadequately explained and inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions. MC Decision and Order at 16-18, 19. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion relevant to the existence of legal pneumoconiosis. MC Employer's Brief at 13-17. We disagree. The administrative law judge correctly noted that in his report, Dr. Rosenberg concluded that the miner did not have legal pneumoconiosis based, in part, on his view that an obstructive impairment due to smoking results in a reduced FEV1/FVC ratio, as seen in claimant's pulmonary function testing, but that the ratio is preserved when an obstructive impairment is due to coal mine dust exposure.[19] MC Decision and Order at 16-17; MC Employer's Exhibit 2 at 5-7, 10. The administrative law judge permissibly discounted this aspect of Dr. Rosenberg's opinion as inconsistent with the DOL's recognition that a reduced FEV1/FVC ratio may support a finding that a miner's respiratory impairment is related to coal mine dust exposure. 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *see Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011); *see also Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); MC Decision and Order at 17. Further, the administrative law judge permissibly found that Dr. Rosenberg did not explain why coal dust exposure did not contribute, along with cigarette smoking, to the miner's impairment as his opinion "did not account for the possibility that the miner's smoking history . . . caused the majority of the substantial drop in the FEV1/FVC ratio and the coal dust exposure made the impairment worse."[20]

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however, that their opinions do not assist employer in rebutting the Section 411(c)(4) presumption. MC Decision and Order at 14-15, 19; MC Director's Exhibit 11; MC Claimant's Exhibit 1.

[19] Dr. Rosenberg stated that "when coal mine dust exposure causes obstruction, the general pattern is that of a reduced FEV1, with a symmetrical reduction of the FVC, such that the FEV1/FVC ratio is preserved." MC Employer's Exhibit 2 at 7. Specific to the miner's situation, Dr. Rosenberg noted there was an "extreme decline" in his FEV1/FVC ratio, indicating the miner's obstruction was "entirely related to cigarette smoking." *Id.*

[20] In his deposition, Dr. Rosenberg acknowledged that the scientific studies set forth in the preamble indicate that miners can have a significantly reduced FEV1/FVC

MC Decision and Order at 17; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *see also Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007) (administrative law judge rejected physician's opinion where physician failed to adequately explain why coal dust exposure did not exacerbate claimant's smoking-related impairments).

The administrative law judge also considered Dr. Rosenberg's opinion that while coal dust and cigarette smoking are additive, the miner was not exposed to sufficient levels of coal mine dust for it to have significantly contributed to his impairment.[21] MC Decision and Order at 17; MC Employer's Exhibit 2 at 9. The administrative law judge noted, however, that Dr. Rosenberg did not know how much dust the miner was actually exposed to, or how many hours he worked per year, as "[n]either figure is of record in this case." MC Decision and Order at 17. Thus, administrative law judge permissibly discredited Dr. Rosenberg's opinion as speculative. *See Balsavage*, 295 F.3d at 396, 22 BLR at 2-394-95; *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); MC Decision and Order at 17. We, therefore, affirm the administrative law judge's discounting of Dr. Rosenberg's opinion, as it is supported by substantial evidence and in accordance with law. *See Lango v. Director, OWCP*, 104 F.3d 573, 577-78, 21 BLR 2-12, 2-20-21 (3d Cir. 1997).

Because the administrative law judge permissibly discredited the opinion of Dr. Rosenberg, the sole opinion supportive of employer's burden,[22] we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4)

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ratio. MC Employer's Exhibit 12 at 18-19. He emphasized, however, that the studies did not demonstrate the marked reduction seen in the miner's testing. *Id.*

[21] Dr. Rosenberg stated that the bulk of the miner's coal mine employment occurred after 1970 when dust-control measures were imposed at coal mines. He also assumed that the miner worked a full time scheduled of 1800 hours per year and thus he calculated that the miner was likely exposed to "72 gram hour/m^3" of coal dust over the course of his career which "would not be expected to have had any significant additive effect . . . ." MC Employer's Exhibit 2 at 9.

[22] Because the administrative law judge provided valid bases for discrediting the opinion of Dr. Rosenberg, we need not address employer's remaining arguments regarding the weight accorded to his opinion. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

presumption by establishing that the miner did not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); MC Decision and Order at 19.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 25-26. The administrative law judge rationally rejected the opinion of Dr. Rosenberg that the miner's disability was not due to pneumoconiosis because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that the miner had the disease.[23] *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-720-21 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); Decision and Order at 20. Moreover, employer raises no specific challenge to this determination. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

Relying on the award of benefits in the miner's claim, the administrative law judge issued a separate decision finding that claimant satisfied the prerequisites for automatic entitlement under Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. *See* 30

[23] The administrative law judge found there were no "specific or persuasive reasons" for concluding that Dr. Rosenberg's opinion on the issue of disability causation was independent of his opinion regarding the existence of legal pneumoconiosis. MC Decision and Order at 26; *see Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); *see also Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015).

U.S.C. §932(*l*); Survivor's Claim (SC) Decision and Order at 3. Noting that the award in the miner's claim need not be final, the administrative law judge awarded benefits in the survivor's claim pursuant to Section 932(*l*). SC Decision and Order at 3, *citing Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014) and *Bender v. Logan Coals, Inc.*, BRB No. 14-0303 BLA (Sept. 24, 2012) (unpub.).

Employer challenges the administrative law judge's award of derivative benefits in the survivor's claim, arguing that the Board's decision in *Rothwell* is "erroneous as a matter of law" as it is inconsistent with the plain language of Section 932(*l),* its implementing regulation at 20 C.F.R. §725.212(a)(3)(ii), legislative history, and administrative practice. Employer's Survivor's Claim Brief at 2-6. Claimant responds in support of the award of benefits and seeks a summary affirmance of the award. The Director asserts that *Rothwell* was correctly decided, and urges the Board to reject employer's arguments, and affirm the award of derivative benefits in the survivor's claim, if the award in the miner's claim is affirmed.

As employer recognizes, the Board has determined that an award of benefits in a miner's claim need not be final for a claimant to receive benefits pursuant to Section 932(*l*). *Rothwell*, 25 BLR at 1-145-47. To the extent employer seeks reconsideration of the Board's holding in *Rothwell*, we decline employer's request. Moreover, several of employer's additional arguments on appeal are substantially similar to those rejected by the Board in *Ferguson v. Oak Grove Resources, LLC*, BLR , BRB No. 16-0570 BLA (Aug. 7, 2017), and we reject them here for the reasons set forth in that decision. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*).[24] 30 U.S.C. §932(*l*); *Rothwell*, 25 BLR at 145-47.

[24] In light of our affirmance of the award of benefits in the survivor's claim, claimant's motion for summary affirmance is moot.

Accordingly, the administrative law judge's Decisions and Orders awarding benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge