BRB No. 13-0238 BLA

CHARLES D. TROSPER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RONCAT MINING, INCORPORATED	)	DATE ISSUED: 02/27/2014
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Awarding Benefits of Stephen M. Reilly, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6037) of Administrative Law Judge Stephen M. Reilly rendered on a claim filed on May 27, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with 20.48 years of coal mine employment, including at least fifteen years of underground, or substantially similar, coal mine employment. Additionally, the administrative law judge found employer to be the properly designated responsible operator for purposes of the payment of any applicable benefits. Addressing the merits of the claim, the administrative law judge found the evidence sufficient to establish the existence of clinical and legal pneumoconiosis arising out of claimant's coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b).[1] The administrative law judge also found the evidence sufficient to establish a totally disabling respiratory impairment due to claimant's pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Further, because he credited claimant with at least fifteen years of underground, or substantially similar, coal mine employment and found that claimant established a total respiratory disability pursuant to Section 718.204(b), the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge additionally found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it was the properly designated responsible operator. Employer also challenges the administrative law judge's weighing of the evidence on the issues of clinical pneumoconiosis, legal pneumoconiosis and disability causation. In response, the

[1] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. In pertinent part, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012).

Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's award of benefits. However, the Director agrees with employer that the administrative law judge did not adequately explain his finding that employer was the properly designated responsible operator. Therefore, the Director urges the Board to vacate the administrative law judge's finding with regard to the responsible operator issue and remand the case for the administrative law judge to further consider this issue. Employer, in a reply brief, reiterates its arguments that the administrative law judge erred in finding that it was the properly designated responsible operator and in weighing the evidence on the merits. Claimant has not responded to employer's appeal.[3]

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.[4] 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).

Responsible Operator

The operator responsible for the payment of benefits is the most recent operator to employ the miner, provided that it meets the criteria of a "potentially liable operator." 20 C.F.R. §§725.494(c), 725.495(a)(1). The Director "bear[s] the burden of proving that the [designated] responsible operator . . . is a potentially liable operator." 20 C.F.R. §725.495(b). To prove that a coal mine operator is a potentially liable operator, the Director must establish, inter alia, that the operator employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §725.494(c). A "year" is defined as "one

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, that he established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), and that he was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[5] In addition to establishing that the miner worked for the operator for at least one year, the Director, Office of Workers' Compensation Programs (the Director), must also establish that the miner's disability or death arose out of employment with that operator;

calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[6] 20 C.F.R. §725.101(a)(32). In "determining whether the miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*. An unpaid leave of absence may be counted where there is no evidence that the employment was terminated and the record indicates that the miner retained the right to employment. *See Elswick v. New River Co.*, 2 BLR 1-1109, 1-1113-14 (1980).

In addressing the responsible operator issue, the administrative law judge noted that, because employer challenges its designation by the district director as the potentially liable operator pursuant to 20 C.F.R. §725.495(b), employer bears the burden under 20 C.F.R. §725.495(c) to show that claimant worked for another operator for at least one cumulative year after his work with employer. Decision and Order at 17. Initially, the administrative law judge found that claimant had yearly earnings in 1988 and 1989 with employer in the amounts of $22,278.55 and $16,152.58, respectively. Decision and Order at 17. Based on a comparison with the annual salary shown in the Table of Coal Mine Industry Average Earnings for 1988 and 1989, the administrative law judge found that claimant had at least one year of coal mine employment with employer. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 17. The administrative law judge then found that claimant was employed in coal mining by Clinchfield Coal Company (Clinchfield Coal),[7] Hill Contractors, Black Mountain Construction, and Brawny Transport subsequent to his employment with employer.[8] However, based on claimant's earnings

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that the entity was an operator after June 30, 1973; that the miner's employment included at least one working day after December 31, 1969; and that the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e).

[6] Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

[7] The record indicates that claimant was employed by Clinchfield Coal Company from February 24, 1971-June 7, 1971, June 14, 1971 - June 25, 1971, and August 14, 1989-February 16, 1990, for a total of 317 days. Director's Exhibit 9.

[8] Based on the Social Security Administration Earnings Statement, the administrative law judge found that, subsequent to working for employer, claimant had earnings of $3,697.50 in 1990 for Hill Contractors, $11,200.00 in 1990 and $2,393.75 in 1991 for Black Mountain Construction, and $4,949.55 in 1991 for Brawny Transport. Director's Exhibit 12.

records, the administrative law judge found that this evidence does not establish a full year of employment with any of these companies. Decision and Order at 18. Lastly, the administrative law judge found that claimant was employed by Roy C. Mullins Trucking (Mullins Trucking) from 1992-1994. Noting that the Director found no record of Mullins Trucking carrying insurance or being self-insured, the administrative law judge found that Mullins Trucking was not capable of paying benefits and, therefore, did not meet the regulatory criteria of being designated as the responsible operator pursuant to 20 C.F.R. §725.494(e). *Id*. Consequently, the administrative law judge found that employer was the last company to employ claimant for at least one year, that it was financially capable of assuming liability for the payment of benefits and, therefore, that it was the properly designated as the responsible operator. *Id*.

On appeal, employer contends that the administrative law judge erred in finding that it was the properly designated responsible operator liable for payment of benefits, arguing that the administrative law judge erred in finding that claimant worked for it for the at least one full calendar year and that it was not the employer for whom claimant last worked for at least one year. Specifically, employer argues that Mullins Trucking was the most recent company to employ claimant for a cumulative period of at least one year and that the administrative law judge erred in finding that Mullins Trucking was not financially capable of paying benefits.[9] The Director, in response to employer's arguments, contends that the administrative law judge reasonably found that claimant worked for employer for at least one year. However, the Director agrees with employer that the administrative law judge did not adequately explain his rationale for finding that Mullins Trucking was not financially capable of paying benefits.

[9] Employer also generally contends that the Department of Labor (DOL) erred in dismissing Mullins Trucking as a potentially liable operator without first investigating the financial ability of Mullins Trucking's corporate officers to assume responsibility for the payment of benefits. Employer alleges that DOL failed to make a diligent search concerning the assets of the corporate officers, and that such an investigation is required by 30 U.S.C. §933(d). Employer's Brief at 25, 26-27. Contrary to employer's contention, 20 C.F.R. §725.495 allows, but does not require, DOL to hold certain corporate officers personally liable for debts of a corporation that has failed to secure the appropriate black lung insurance. Rather, the district director has discretion to proceed against the corporate officers if he finds that the corporate officers are financially viable. *See* 20 C.F.R. § 725.491(b). Moreover, Section 725.495(c)(2) places the burden on the designated responsible operator to demonstrate that the more recent employer possesses sufficient assets to secure the payment of benefits. 20 C.F.R. §725.495(c)(2). In this case, employer did not provide any evidence concerning the corporate officers of Mullins Trucking, or any evidence regarding the assets of the corporate officers.

Contrary to employer's contention, the administrative law judge reasonably found that claimant worked for employer for at least one year. Because the record does not contain the actual beginning and ending dates for claimant's employment in 1988 and 1989 with employer, the administrative law judge reasonably used the default formula set forth at 20 C.F.R. §725.101(a)(32)(iii),[10] and calculated claimant's cumulative employment with employer as at least one year. Decision and Order at 17. Similarly, based on this formula, the administrative law judge found that claimant did not work for at least one full year for Hill Contractors, Black Mountain Construction and Brawny Transport subsequent to his employment with employer. *Id*. at 18. Moreover, contrary to employer's contention, the administrative law judge did not err in finding that claimant did not work for at least one full year for Clinchfield Coal, as a review of the record indicates that claimant worked for Clinchfield in 1971, and 1989-90 for a total of 317 days, or less than a full year. 20 C.F.R. §725.101(a)(32)(ii). *See* Director's Exhibit 9.

However, the Director and employer are correct in asserting that remand of the case is required, as the administrative law judge did not adequately discuss all of the relevant evidence in his determination that Mullins Trucking was not financially capable of paying benefits. As the parties contend, the record contains evidence that may show that Mullins Trucking was insured and the administrative law judge erred in not discussing this evidence. *See* Director's Exhibits 8, 29, 48. Specifically, the parties note that the owner of Mullins Trucking stated that it was insured by U S F & G, but did not specify the beginning and ending dates of that insurance. Director's Exhibit 8. However, the Office of Workers' Compensation Programs (the OWCP), in considering the potential responsible operators, found that Mullins Trucking was the last company to employ claimant for at least one year, but that Mullins Trucking was not insured on the last day of claimant's employment.[11] Director's Exhibit 29. In light of this conflicting evidence, we vacate the administrative law judge's designation of employer as the responsible operator, and remand the case for the administrative law judge to consider and discuss all of the evidence relevant to the responsible operator issue and to fully explain his findings.

[10] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[11] To set forth a prima facie case that the most recent operator is incapable of paying benefits, the district director need only include within the record a statement that the Office of Workers' Compensation Programs has searched its files and found no record of insurance coverage or authorization to self-insure for that operator. 20 C.F.R. §725.495(d).

Wojtowicz v. Duquesne Light Co., 12 BLR 1-162 (1989); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 329, 24 BLR 2-1, 2-15 (4th Cir. 2002); *Armco, Inc. v. Martin*, 277 F.3d 468, 475, 22 BLR 2-334, 2-344 (4th Cir. 2002).

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

In order to establish rebuttal of the presumption at amended Section 411(c)(4), employer is required to establish that claimant has neither clinical nor legal pneumoconiosis or that his disability "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4) (2012); *see also Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). In finding that the presumption was not rebutted, the administrative law judge found that the evidence established the existence of both clinical and legal pneumoconiosis, and that claimant's totally disabling respiratory impairment arose out of coal mine employment.[12]

Employer first contends that the administrative law judge erred in failing to consider all of the x-ray evidence when he found that it established the existence of clinical pneumoconiosis. Specifically, it contends that the administrative law judge failed to consider the negative reading of the May 13, 2009 x-ray film by Dr. Wheeler, a B reader and Board-certified radiologist, Employer's Exhibit 2, and the negative readings of the January 19, 2011 x-ray film by Dr. Halbert, a B reader and Board-certified radiologist, and Dr. Rosenberg, a B reader, Employer's Exhibits 3, 4. Employer also contends that the administrative law judge erred in relying on the numerical superiority of the positive x-ray readings and did not properly weigh the conflicting evidence in finding that the weight of the x-ray evidence was sufficient to establish clinical pneumoconiosis.

Initially, we note that it was not error for the administrative law judge to decline to consider the negative x-ray reading of the January 19, 2011 x-ray film by Dr. Halbert because employer withdrew this exhibit from the record at the formal hearing. Hearing Transcript at 17. Moreover, a review of the record does not establish that Dr. Rosenberg, a B reader, provided his own separate reading of the January 19, 2011 x-ray.[13] Employer's Exhibit 3.

[12] As the Director notes, because the administrative law judge considered the evidence relevant to the rebuttal of the amended Section 411(c)(4) presumption, we conclude that the administrative law judge's error in considering it pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Response Brief at 2-4.

[13] Within his report dated February 7, 2011, Dr. Rosenberg stated, in pertinent part, "[n]ext, his **chest X-ray** was reviewed, and it revealed severe findings of

In finding that the x-ray evidence established the existence of clinical pneumoconiosis, the administrative law judge found that the record contained readings of the May 13, 2009, June 26, 2009, February 9, 2010 and January 19, 2011 x-ray films. Weighing the x-ray evidence, the administrative law judge found that the May 13, 2009 x-ray was positive for pneumoconiosis because the film was read as positive for pneumoconiosis by Dr. Alexander, a B reader and Board-certified radiologist. Decision and Order at 4; Director's Exhibit 22. Similarly, the administrative law judge found that the January 19, 2011 x-ray was positive for pneumoconiosis because the film was read as positive for pneumoconiosis by Dr. Miller, a B reader and Board-certified radiologist. Decision and Order at 4; Claimant's Exhibit 2. The administrative law judge also found that the June 26, 2009 x-ray was positive for pneumoconiosis, because it was read as positive by both Dr. Alexander and Dr. Miller, and by Dr. Baker, a B reader, while only Drs. Wheeler and Scott, dually-qualified radiologists, read it as negative for pneumoconiosis. Decision and Order at 4; Director's Exhibits 18, 23, 24, 26; Claimant's Exhibit 7. The administrative law judge found that the February 9, 2010 x-ray did not establish either the existence, or absence, of pneumoconiosis, because it was respectively read as both positive and negative for pneumoconiosis by Drs. Miller and Meyer, dually-qualified radiologists. Decision and Order at 4; Claimant's Exhibit 1; Employer's Exhibit 7.

Initially, we reject employer's contention that the administrative law judge erred in merely relying on the numerical superiority of the x-ray readings to evaluate the x-ray evidence. Employer's Brief at 14-15. Contrary to employer's contention, the administrative law judge discussed, not only the readings of the films, but also the radiological qualifications of the doctors who provided the readings. The administrative law judge therefore properly considered both the quality and the quantity of the x-ray readings, in determining that the x-ray evidence established the existence of clinical pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992).

However, as employer correctly contends, in finding that the May 13, 2009 x-ray was positive for pneumoconiosis based on Dr. Alexander's reading, the administrative law judge erred in failing to consider the fact that the x-ray was also read as negative for pneumoconiosis by Dr. Wheeler, a dually-qualified radiologist. Employer's Exhibit 2.

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emphysema throughout. There is no micronodularity." Employer's Exhibit 3 at 4. However, there is no indication whether this description was provided by Dr. Rosenberg or whether it was based on Dr. Halbert's reading of the x-ray film. *See* Employer's Exhibits 3, 4.

Even if the administrative law judge considered Dr. Wheeler's negative reading along with Dr. Alexander's positive reading, the May 13, 2009 x-ray, like the February 9, 2010 x-ray, would be in equipoise on the issue of clinical pneumoconiosis. Thus, as the administrative law judge properly found that the only remaining x-rays, the June 26, 2009 x-ray and the January 19, 2011 x-ray, were positive for pneumoconiosis, his finding that the weight of the x-ray evidence was positive for clinical pneumoconiosis is affirmable. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *see generally Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984) (error which does not affect the disposition of a case is harmless). Consequently, because substantial evidence supports the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis, this finding is affirmed.

Moreover, as employer has not otherwise challenged the administrative law judge's finding that the weight of the evidence, including the digital x-rays, treatment records and medical opinions, established the existence of clinical pneumoconiosis, it is affirmed as unchallenged on appeal. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). In light of the administrative law judge's finding that the relevant evidence established the existence of clinical pneumoconiosis, we hold that employer has failed to establish rebuttal of the presumption. 30 U.S.C. §921(c)(4) (2012); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Further, employer's failure to disprove the existence of clinical pneumoconiosis precludes a finding that the presumption at amended Section 411(c)(4) is rebutted on the grounds that employer has disproved the existence of pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67. Therefore, we need not address employer's contention that the administrative law judge erred in finding the existence of legal pneumoconiosis established. *See Larioni*, 6 BLR at 1-1278.

Next employer contends that the evidence establishes that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*;Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge found that the opinions of Drs. Fino and Rosenberg, which state that claimant's total respiratory disability was due to smoking and not due to his coal dust exposure, were entitled to little weight.[14] *Id*. In challenging this finding, employer argues that the administrative law judge provided an impermissible rationale for discrediting the opinions of Drs. Fino and Rosenberg.

[14] The record also contains the contrary opinions of Drs. Baker, Campbell and Habre, who attributed claimant's total respiratory disability to both smoking and coal mine employment. Director's Exhibit 18; Claimant's Exhibits 4 and 5.

Contrary to employer's contention, however, the administrative law judge provided rational bases for according little weight to the opinions of Drs. Fino and Rosenberg. The administrative law judge determined that the reliance of Dr. Fino and Dr. Rosenberg on claimant's diminished FEV_1/FVC ratio to exclude pneumoconiosis as a cause of claimant's total disability is flawed, because it is contrary to the regulations. Decision and Order at 14.

In the preamble to the amended regulations, the DOL stated:

> Epidemiological studies have shown that coal miners have an increased risk of developing COPD. COPD may be detected from decrements in certain measures of lung function, *especially FEV_1 and the ratio of FEV_1/FVC.* Decrements in lung function *associated with exposure to coal mine dust* are severe enough to be disabling . . . whether or not pneumoconiosis is also present.

65 Fed. Reg. 79,943 (Dec. 20, 2000) (emphasis added). Therefore, the administrative law judge rationally found that the opinions of Drs. Fino and Rosenberg, that claimant's FEV_1/FVC ratio and reduction in diffusing capacity rule out coal dust exposure as a cause of his COPD/emphysema, are entitled to little weight. *See Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7; 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). Moreover, the administrative law judge rationally discounted the opinion of Dr. Rosenberg because he did not diagnose the existence of clinical or legal pneumoconiosis, contrary to the administrative law judge's findings. *See Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995).

The administrative law judge provided proper bases for according less weight to the opinions of Drs. Fino and Rosenberg, the only opinions supportive of employer's burden on rebuttal to establish that claimant's totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the presumption at amended Section 411(c)(4) by showing that claimant's totally disabling respiratory impairment was not due to his coal mine employment.[15] 30 U.S.C. §921(c)(4) (2012); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 14, 16.

[15] Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Fino and Rosenberg, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Accordingly, the administrative law judge's award of benefits is affirmed. However, we vacate the administrative law judge's designation of employer as the responsible operator, and remand the case for further consideration of the responsible operator issue consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge