U.S. Department of Labor

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

BRB No. 15-0215 BLA

PAUL R. TEMPLIN, SR. (Deceased)[1]	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP COAL COMPANY	)	
	)	DATE ISSUED: 02/29/2016
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 and Order Denying Motion for Reconsideration of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

[1] The miner died on September 23, 2013. Employer's Exhibit 24. The miner's surviving spouse is pursuing the miner's claim. Decision and Order at 3.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (12-BLA-5778) of Administrative Law Judge Drew A. Swank awarding benefits 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). This case involves a miner's subsequent claim filed on December 28, 2010.[2]

The administrative law judge initially determined that a previous administrative law judge's finding of fifteen years of coal mine employment,[3] made in the decision denying the miner's first claim, was binding in the current claim under the doctrine of collateral estoppel. Further, the administrative law judge found that the miner's coal mine employment took place either in an underground mine or in conditions substantially similar to those in an underground mine. Additionally, the administrative law judge found that the new evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on the foregoing findings, the administrative law judge found that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits. Thereafter, the administrative law judge summarily denied employer's motion for reconsideration.

[2] The miner filed three prior claims, each of which was finally denied. Director's Exhibits 1-3. The miner's most recent prior claim, filed on October 7, 2004, was denied by the district director on September 26, 2005, because the miner did not establish any element of entitlement. Director's Exhibit 3.

[3] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 5, 9. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

On appeal, employer argues that the administrative law judge erred in finding fifteen years of coal mine employment established based on the doctrine of collateral estoppel. Employer further asserts that the administrative law judge did not adequately explain his finding that the miner's aboveground coal mine employment took place in conditions substantially similar to those in an underground mine. Employer therefore contends that the administrative law judge erred in finding that the miner invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant filed a response brief in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.[5]

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).

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

Length of Coal Mine Employment

In order to invoke the Section 411(c)(4) presumption, claimant must initially establish that the miner had at least fifteen years of employment "in one or more underground coal mines," or "in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The administrative law judge noted that in the miner's first claim for benefits, filed in 1973, Administrative Law Judge W. Ralph Musgrove issued a July 6, 1988 decision denying benefits in which he determined that the miner had fifteen years of coal mine employment. Finding that "all elements of collateral estoppel are satisfied,"[6]

[5] The administrative law judge's findings that the new evidence established a totally disabling respiratory or pulmonary impairment and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309 are unchallenged. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] For collateral estoppel to apply, it must be established that: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue's determination was a critical and necessary part of the decision in the prior proceeding; 4) the prior judgment is final and valid; and 5) the party against whom collateral estoppel is asserted had a full and fair opportunity to

the administrative law judge ruled that Judge Musgrove's finding that the miner had fifteen years of coal mine employment was binding in the current claim. Decision and Order at 7.

Employer argues that the administrative law judge erred in applying collateral estoppel to find fifteen years of coal mine employment established. Employer's Brief at 6-15. Specifically, employer maintains that the previous determination of fifteen years of coal mine employment was not essential to the judgement denying benefits, and employer lacked a full and fair opportunity to litigate the issue, as it was not a party to the claim at the time of Judge Musgrove's 1988 decision.

Employer's contentions have merit. Judge Musgrove's prior finding of fifteen years of coal mine employment is not binding in this case because it was not "a critical and necessary part" of the judgment in the miner's first claim. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-138 (1999) (en banc). Judge Musgrove denied benefits because he found that the miner did not establish the existence of pneumoconiosis or that he was totally disabled by a respiratory impairment. Those findings therefore constituted the basis for the denial of benefits. The Board has found merit in the argument that "[p]rinciples of judicial economy would be violated by requiring a party to appeal or seek modification in order to challenge adverse findings within a favorable judgment." *Hughes*, 21 BLR at 1-136. Viewed from that perspective, the finding of fifteen years of coal mine employment was not essential to the judgment denying benefits. *See Hughes*, 21 BLR at 1-138 (holding that, while pneumoconiosis is an essential element of entitlement in a miner's claim, "the establishment of that element does not support, and thus is not 'essential' to, a judgment denying benefits").

Additionally, the record reflects that employer was not a party to the miner's claim when Judge Musgrove issued his decision. As employer notes, it had previously been informed that it was relieved of any liability for the payment of benefits in the miner's first claim because the 1981 amendments to the Act transferred liability to the Black Lung Disability Trust Fund. Director's Exhibit 1 at 131, 132. Accordingly, employer did not participate in the case thereafter.[7] Since employer was not a party to the litigation, it

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litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc).

[7] The Director, Office of Workers' Compensation Programs, was the respondent in the July 6, 1988 Decision and Order denying benefits, and in the Board's subsequent

did not have a full and fair opportunity to litigate the issue of the length of the miner's coal mine employment in the first claim. Moreover, related to the same element of collateral estoppel, even had employer remained a party, there would have been no need for it to appeal Judge Musgrove's length of coal mine employment finding, as the decision denying benefits would have been favorable to employer. *See Hughes*, 21 BLR at 1-136; *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-79-80 (1993). Thus, the administrative law judge erred in determining that all of the elements for the application of collateral estoppel were met. He therefore erred in finding fifteen years of coal mine employment established based upon Judge Musgrove's finding in the miner's first claim.[8]

We must therefore vacate the administrative law judge's finding of fifteen years of coal mine employment, and remand this case to the administrative law judge for further consideration of this issue. On remand, the administrative law judge must determine the length of the miner's coal mine employment, taking into account all relevant evidence.[9]

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decision affirming the denial. Director's Exhibit 1; *Templin v. Director, OWCP*, BRB No. 88-2840 BLA (Sept. 24, 1991) (unpub.).

[8] Additionally, we note that, as this claim is a subsequent claim in which a change in an applicable condition of entitlement has been established, no findings made in a prior claim are binding on any party in this claim, unless the party either failed to contest that issue, or stipulated that issue in the prior claim. 20 C.F.R. §725.309(c)(5). Because the miner's second claim, in which employer was a party, was filed prior to January 19, 2001, that claim was not subject to the rule regarding stipulations in 20 C.F.R. §725.309, *see* 20 C.F.R. §725.2(c), and in any event, employer did not stipulate to any length of coal mine employment in that claim. Director's Exhibit 2. Further, the record reflects that employer did not stipulate to any length of coal mine employment in the miner's third claim. Director's Exhibit 3. Thus, no prior finding as to the length of the miner's coal mine employment is binding in the current claim.

[9] The record contains the miner's claim forms, alleging fourteen to fifteen years, with the second claim alleging coal mine employment from October 1, 1965 through September 11, 1980. Director's Exhibits 2-3, 5. The miner also completed employment history forms, indicating coal mine employment from 1965-79 for the current claim, from October 1, 1965 through September 11, 1980 for the second claim, and from October 1965 through September 1980 for the third claim. Director's Exhibits 2, 3, 7. The administrative law judge should also consider the miner's Social Security Administration earnings records, showing coal mine employment earnings from 1973-80 and from 1965-80 for the current and third claims, respectively. Director's Exhibits 3, 11. Additionally, the administrative law judge must consider any oral or written statements made by the

In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). The administrative law judge may determine the dates and length of coal mine employment "by any credible evidence," 20 C.F.R. §725.101(a)(32)(ii), but where the beginning and ending dates of the miner's employment cannot be determined, the administrative law judge may use the formula set forth in 20 C.F.R. §725.101(a)(32)(iii).[10] *Id*.

Underground or Substantially Similar Coal Mine Employment

Employer next argues that the administrative law judge did not adequately explain his finding that the period of the miner's coal mine employment that took place aboveground was substantially similar to underground coal mine employment. Employer's Brief at 15-18; Decision and Order at 7-8. We need not resolve this issue, as employer is challenging a finding that was unnecessary. A miner who has worked

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miner, his widow, others on their behalf, or by employer, indicating that the miner started his coal mine employment on October 1, 1965 and stopped sometime in 1980, when the Valley Camp Mine No. 3 was closed. December 9, 1987 Hearing Tr. at 10-11; September 15, 2014 Hearing Tr. at 16-17; Employer's Exhibit 10 at 3, 5; Director's Exhibits 1-3, 9. The administrative law judge should also consider the widow's testimony that, for about one year after employer closed its mine, the miner returned to the site with his truck to pick up coal stored there at the tipple or in "bins," and hauled it to businesses and consumers. Hearing Tr. at 17, 29-30. While the delivery of processed coal to consumers does not constitute coal mine employment, the loading of coal at a preparation facility so that it can enter the stream of commerce is integral to the processing of coal. *See* 30 U.S.C. §802(i), as implemented by 20 C.F.R. §725.101(13); *Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780, 18 BLR 2-35, 2-39 (4th Cir. 1993). The administrative law judge should therefore address whether the record establishes that the miner performed a task integral to the loading of coal for any portion of the time that he was picking up coal at employer's mine site.

[10] In the current claim, using the miner's earnings, the district director calculated the length of the miner's coal mine employment as 15.27 years. Director's Exhibit 12. Employer, however, contends that "more specific" evidence of record demonstrates that the miner's coal mine employment began on October 1, 1965, and ended on September 11, 1980, thus falling one month short of fifteen years. Employer's Brief at 6-7. As set forth above, however, the administrative law judge is not required to adopt employer's calculation, to the extent that his finding may be based on any reasonable method.

aboveground at the site of an underground mine need not establish "substantial similarity." *Muncy*, 25 BLR at 1-29; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013). Here, employer states that the "record reflects the [miner] initially worked for Valley Camp underground but later moved outside as a tipple attendant." Employer's Brief at 17. Consistent with employer's statement, the record reflects that the miner's work "outside" was at the same underground mine site, Valley Camp Mine No. 3. Director's Exhibits 3, 5, 7, 9; Hearing Tr. at 16, 29. Further, the record reflects that the miner had no other coal mine employment apart from his work at employer's underground mine site.[11] Employer's Brief at 7; Director's Exhibit 1 (Dec. 9, 1987 Hearing Tr. at 10-11). Thus, on remand, if the administrative law judge finds at least fifteen years of coal mine employment established, claimant need not establish substantial similarity of the miner's working conditions for the aboveground work he performed at the site of employer's underground mine. *Muncy*, 25 BLR at 1-29.

Because we have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, we must vacate his finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In the interest of judicial economy, we address employer's challenge to the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption.

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

Because the administrative law judge found that invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis was invoked, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[12] 20 C.F.R. §718.305(d)(1)(i), or by establishing

[11] The miner's widow testified that, after the Valley Camp Mine No. 3 closed and the miner finished picking up the processed coal stored there, he drove a tank truck for the rest of his career, hauling raw milk from dairy farms to milk processing plants. Hearing Tr. at 11, 17, 29-30.

[12] "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

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). The administrative law judge found that employer failed to establish rebuttal by either method.

In so finding, the administrative law judge did not properly identify the rebuttal standards as specifically set forth in the regulations. After determining that the miner did not affirmatively establish the existence of pneumoconiosis by chest x-ray evidence or autopsy or biopsy evidence pursuant to 20 C.F.R. §718.202(a)(1),(2), the administrative law judge proceeded to 20 C.F.R. §718.202(a)(3) and found that the miner was totally disabled and, pursuant to 20 C.F.R. §718.305, could invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Decision and Order at 10-19. Then, under the heading "Cause of Total Disability," the administrative law judge quoted both the "substantially contributing cause" standard of 20 C.F.R. §718.204(c)(1), and the text of the former version of 20 C.F.R. §718.305, which implemented the originally-enacted Section 411(c)(4). *Id*. at 20-21. The administrative law judge then stated that employer could rebut the presumption by establishing either that the miner did not have pneumoconiosis, or that his impairment did not arise out of, or in connection with, employment in a coal mine. *Id*. at 21. Thereafter, the administrative law judge identified the rebuttal issue as whether employer could "rebut the presumption that coal workers' pneumoconiosis [was] a 'substantially contributing cause' to [the miner's] total pulmonary or respiratory disability . . . ." *Id*. at 23.

The administrative law judge noted that employer submitted the medical opinions of Drs. Basheda and Fino "to rebut the presumption that pneumoconiosis [was] a 'substantially contributing cause'" of the miner's total disability.[13] *Id*. Dr. Basheda

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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).

[13] The administrative law judge also considered, and discounted, the medical opinions of Drs. Saludes and Begley, who opined that the miner had legal pneumoconiosis, in the form of obstructive lung disease due to both smoking and coal mine dust exposure, and was totally disabled due to legal pneumoconiosis. Director's Exhibit 16; Claimant's Exhibit 2 at 2; Employer's Exhibit 4 at 28-29, 47, 59-60; Employer's Exhibit 17 at 12-13, 17-21. The record also includes the deposition of Dr. Blatt, the miner's treating pulmonologist from February 15, 2011 through July 22, 2013, who testified that the miner was totally disabled due to smoking-related chronic obstructive pulmonary disease. Employer's Exhibit 27 at 29, 45.

opined that the miner did not have clinical or legal pneumoconiosis, but had a totally disabling obstructive impairment that was due to asthma or smoking-related[14] chronic obstructive pulmonary disease (COPD). Employer's Exhibits 5, 22. Dr. Basheda excluded coal mine dust exposure as a cause of the miner's impairment, in part, because the miner's impairment developed years after he left coal mining. Employer's Exhibit 5 at 28, 30-31; Employer's Exhibit 22 at 23-26, 31. Dr. Fino opined that the miner did not have either clinical or legal pneumoconiosis. Employer's Exhibits 1, 3, 23. With respect to legal pneumoconiosis, Dr. Fino opined that, because all of the pulmonary function studies of record were invalid due to the miner's lack of effort on the studies, they were not helpful in assessing whether the miner had a ventilatory impairment. Employer's Exhibit 1 at 6; Employer's Exhibit 3 at 7; Employer's Exhibit 23 at 21, 25-26. Dr. Fino noted that a different type of test he administered, which was not effort-dependent, revealed normal lung volumes with no evidence of obstruction or restriction. Employer's Exhibit 1 at 6, 12. Dr. Fino diagnosed the miner with a disabling impairment in blood oxygen transfer, due solely to heart disease and to asthma unrelated to coal mine dust exposure. Employer's Exhibit 1 at 11-12; Employer's Exhibit 3 at 7; Employer's Exhibit 23 at 28-34.

The administrative law judge discounted Dr. Basheda's opinion because he found that its reasoning was contrary to the regulations' recognition of pneumoconiosis as a latent and progressive disease. Decision and Order at 24-26. Specifically, the administrative law judge found that "the mere fact that [the miner] did not display respiratory symptoms until two decades after he left coal mine employment is not strong evidence that [he did] not have coal dust related pneumoconiosis. Yet Dr. Basheda opines that pneumoconiosis played no part in [the miner's] respiratory impairment primarily for this very reason." *Id*. at 26. The administrative law judge discounted Dr. Fino's opinion because he found that Dr. Fino "was mistaken" that the miner's pulmonary function studies were invalid, given that Drs. Saludes, Begley, and Basheda, as well as the respiratory technician in Dr. Fino's office, indicated that the miner provided good effort on the studies. Decision and Order at 24. Because Dr. Fino failed to consider the pulmonary function studies in formulating his opinion, the administrative law judge found that Dr. Fino's opinion was not well-reasoned. *Id*.

[14] The administrative law judge found that the miner had an "extensive smoking history," smoking "at least two to three cigars per day on a fairly regular basis for approximately 40 years." Decision and Order at 10.

Employer contends that the administrative law judge erred by failing to address whether employer could disprove legal pneumoconiosis,[15] pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Further, employer contends that, to the extent the administrative law judge combined his discussion of legal pneumoconiosis and disability causation, his analysis is not affirmable because the administrative law judge failed to recognize "that the rebuttal standards impose different evidentiary thresholds upon the [e]mployer under each rebuttal test, thresholds the administrative law judge failed to address." Employer's Brief at 21. Employer also asserts that the administrative law judge did not give proper reasons for discrediting the opinions of Drs. Basheda and Fino. Employer's Brief at 25-30.

Although the administrative law judge did not consistently identify the correct rebuttal standards under the regulations, the administrative law judge permissibly discredited employer's rebuttal opinions. As we will set forth below, the administrative law judge's discussion of the evidence, and his analysis of causation subsumed consideration of whether Dr. Basheda's opinion was sufficiently reasoned and credible to establish that the miner did not have legal pneumoconiosis. Therefore, with respect to Dr. Basheda's opinion, we are not persuaded that employer was precluded from establishing rebuttal pursuant to the proper regulatory standard. Moreover, as we will also set forth, employer has no basis upon which to challenge the administrative law judge's discrediting of Dr. Fino's rebuttal opinion for failure to consider the miner's pulmonary function studies. Therefore, we will affirm the administrative law judge's decision to discount Dr. Fino's opinion.

We reject employer's argument that the administrative law judge erred in discounting Dr. Basheda's rebuttal opinion. Employer's Brief at 28-30, 37-38. The administrative law judge permissibly found that the physician's reasoning for excluding coal mine dust as a cause or aggravating factor of the miner's COPD merited less weight, in view of the regulatory recognition of pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[16] 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*,

[15] Employer states that it agrees with the administrative law judge's conclusion that "a diagnosis of clinical pneumoconiosis cannot be made." Employer's Brief at 20.

[16] Dr. Basheda reasoned that the miner's totally disabling respiratory impairment was due to asthma and/or smoke-induced chronic obstructive pulmonary disease "because of the temporal findings of his symptoms," explaining that the miner "started to develop symptoms almost two decades after leaving the coal mines, and that would be – it would be unusual for that to be related to his coal mining dust, especially when he has a

484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Hobet Mining v. Epling*, 783 F.3d 498, 503, BLR (4th Cir. 2015). Based on the administrative law judge's permissible determination that Dr. Basheda's opinion was not well-reasoned regarding whether coal mine dust exposure contributed to the miner's obstructive respiratory impairment, his opinion was not sufficiently credible to disprove the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A). Additionally, because the administrative law judge permissibly discounted Dr. Basheda's opinion as not well-reasoned on the etiology of the miner's disability, it was also not sufficiently credible to establish that no part of the miner's disabling impairment was due to pneumoconiosis, under 20 C.F.R. §718.305(d)(1)(ii). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 135 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's determination that Dr. Basheda's opinion did not assist employer in rebutting the Section 411(c)(4) presumption.

Employer also argues that the administrative law judge erred in discounting Dr. Fino's rebuttal opinion for failure to consider the miner's pulmonary function studies, because the administrative law judge did not explain why he credited the other physicians' opinions that those studies were valid and reflected the presence of a disabling obstructive impairment. Employer's Brief at 26-28. Employer, however, has not challenged the administrative law judge's finding at total disability: that the pulmonary function studies were valid and qualifying, and established that the miner was totally disabled. Decision and Order at 19; *see* n.5, *supra*. Notably, employer concedes that "[t]he evidentiary record in this case supports a conclusion the [miner] is disabled. Drs. Saludes, Fino, Basheda, Begley, and Blatt all agree the [miner] cannot return to work at his prior coal mine employment. *Either an obstructive lung condition* or an oxygenation deficit would keep the [miner] from returning to even the less strenuous work which [he] described to Dr. Fino." Employer's Brief at 31 (emphasis added). But employer ignores that the pulmonary function study results in this case were the other physicians' basis for diagnosing the miner with a disabling, obstructive lung condition. Given employer's failure to challenge the administrative law judge's finding that the pulmonary function studies were valid and established total disability, and given its concession that the miner may have had disabling obstruction, it has no basis on which to challenge the administrative law judge's discrediting of Dr. Fino's opinion. *See Dankle*

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classic history for asthma and continued to smoke long after leaving the coal mines." Employer's Exhibit 22 at 26.

v. Duquesne Light Co., 20 BLR 1-1, 1-6 (1995); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Since employer must establish both that the miner did not have legal pneumoconiosis and that no part of his total disability was caused by pneumoconiosis, the administrative law judge reasonably considered whether Dr. Fino addressed the etiology of the miner's obstructive impairment. *See* 20 C.F.R. §718.201(a)(2),(b). For the reasons set forth above, we reject employer's challenge to the administrative law judge's discounting of Dr. Fino's opinion for his failure to consider any of the miner's pulmonary function studies that detected the obstruction. Therefore, we affirm the administrative law judge's finding that the opinions of Drs. Basheda and Fino did not establish rebuttal of the Section 411(c)(4) presumption.

In sum, on remand, the administrative law judge must determine whether the miner had at least fifteen years of qualifying coal mine employment. If so, claimant will have invoked the Section 411(c)(4) presumption and, in light of our affirmance of the administrative law judge's determination that employer did not rebut the presumption, the administrative law judge may reinstate the award of benefits. If the administrative law judge does not find the Section 411(c)(4) presumption invoked, he must consider entitlement under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are 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.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge