U.S. Department of Labor

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

BRB No. 15-0146 BLA

PERRY MARTINELLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EMERALD COAL RESOURCES LP	)	
	)	DATE ISSUED: 01/21/2016
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

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

Rita Roppolo (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: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

GILLIGAN, Administrative Appeals Judge:

Employer appeals the Decision and Order (2013-BLA-05352) of Administrative Law Judge Drew A. Swank awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 18, 2012.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with twenty-seven years of qualifying coal mine employment, and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not 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), has filed a response, arguing that the award of benefits should be vacated, and that the case should be remanded for reconsideration of the evidence relevant to whether employer has rebutted the Section 411(c)(4) presumption.[2]

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,

[1] 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[3] 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

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Employer's Brief at 6-22.

Relevant to total disability, the administrative law judge considered the opinions of Drs. Celko, Rasmussen, Houser, Fino, and Bellotte. Dr. Celko, who examined claimant on behalf of the Department of Labor, noted that claimant was last employed as a longwall utility man, shearer operator, and shield man.[4] Dr. Celko diagnosed severe obstructive lung disease with a diffusing capacity impairment and concluded that claimant is "disabled from a pulmonary standpoint from returning to the rigors of his job on the long wall." Director's Exhibit 11.

Dr. Rasmussen examined claimant and noted that claimant's last job was a shearer operator.[5] Dr. Rasmussen diagnosed a moderate irreversible obstructive impairment, and concluded that claimant does not retain the pulmonary capacity to perform his regular coal mine employment. Director's Exhibit 14.

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

[4] Dr. Celko noted that claimant worked ten to twelve hours per day, six days a week, until he retired. Dr. Celko further noted that claimant's duties involved "significant heavy labor and much very heavy labor on a daily basis" including lifting forty-five to fifty pound crib blocks and fifty pound rock dust bags, walking along with the machine, moving the belt, chains, structure, monorail, and cable, and changing the bits on the shearer. Director's Exhibit 11.

[5] Dr. Rasmussen noted that claimant's job required him to walk back and forth across the 1000-foot face and do heavy lifting of various parts, including chains and parts of the shear machine. Dr. Rasmussen characterized claimant's job as requiring heavy and very heavy manual labor. Director's Exhibit 14.

Dr. Houser reviewed the medical evidence and noted that claimant last worked as a laborer, longwall utility man, shearer operator, and shield man.[6] Claimant's Exhibit 4. Dr. Houser diagnosed moderately severe chronic obstructive pulmonary disease (COPD) and chronic bronchitis, and concluded that "solely from a respiratory standpoint, [claimant] is unable to perform his last [coal mine employment]." Claimant's Exhibit 4.

Dr. Fino examined claimant and reviewed the medical evidence of record, and noted that claimant last worked as a shearer operator on the longwall.[7] Based on the testing he administered, Dr. Fino reported a moderate obstructive impairment on pulmonary function study with no response to bronchodilator, reduced diffusion capacity, and normal blood gas study results. Based on the evidence overall, Dr. Fino diagnosed moderate pulmonary emphysema and chronic obstructive bronchitis. Initially, in his medical report, Dr. Fino concluded that claimant "does have a disabling respiratory impairment." Director's Exhibit 13 at 8. Later, when deposed, Dr. Fino stated that he had reviewed Dr. Rasmussen's report, and noted that the job description he recorded was "a lot different."[8] Employer's Exhibit 15 at 11. When asked what kind of labor claimant could perform with the type of pulmonary impairment he has, Dr. Fino stated, "Light labor he can do 100 percent of the time. Moderate labor, which I pretty much say is having to lift up to 50 pounds, he could do . . . 40 to 50 percent of the day. Heavy labor, which is up around 100 pounds, he can probably do bursts of heavy labor and bursts of very heavy labor."[9] Employer's Exhibit 15 at 21-32.

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[6] Dr. Houser noted that claimant's last work, which he performed ten to twelve hours a day, six days a week, required him to lift "45-pound crib block, cement blocks, 50-pound bags of rock dust and [c]ables." Claimant's Exhibit 4.

[7] Dr. Fino noted that "[t]here was heavy labor involved in his last job, and [claimant] said that 50% of the job involved very heavy labor and 50% of the job was moderate labor. The hardest part of the job was changing the bits on the cutting machine, and the heaviest part of the job was moving belt structures." Director's Exhibit 13 at 2.

[8] Dr. Fino stated that Dr. Rasmussen reported that in his last job as a shearer operator on the longwall, claimant "walked back and forth across the 1,000 foot face. He was cutting the top on one trip and cutting the bottom on the next trip. He did heavy lifting of various parts, including chains and heavy parts of the shear. He did heavy and very heavy manual labor." Employer's Exhibit 15 at 12.

[9] Dr. Fino explained that a "burst" would be having to move a piece of machinery or cable "three or four or five times a day, and it took a couple of minutes to do." Employer's Exhibit 15 at 32.

Finally, Dr. Bellotte examined claimant and reviewed the available medical evidence, including the reports of Drs. Celko and Rasmussen, and noted that claimant's last work was as a "shield man" and before that he was a "shear operator."[10] Employer's Exhibit 10 at 9. Based on his own test results, Dr. Bellotte diagnosed a moderate reversible obstructive ventilatory impairment that was responsive to bronchodilators, normal diffusing capacity, and normal lung volumes. Dr. Bellotte noted that his pulmonary function study results were similar to those of Dr. Rasmussen in several respects. Dr. Bellotte further noted that, in September 2012, Dr. Rasmussen had performed cardiopulmonary exercise testing that reflected an oxygen consumption of 16.7 mL/kg/min, which Dr. Bellotte characterized as equal to "1.8 l/min." or "7 METs (metabolic equivalents)." Employer's Exhibit 10 at 11. Referencing a table published in the American Review of Respiratory Disease, Dr. Bellotte stated that general heavy labor requires 15.8 mL/kg/min, or 4.5 METs, and that claimant's test values "exceed each of these values." *Id*. In his medical report, based on his review of the file, and the results of his examination and testing, Dr. Bellotte concluded that "claimant has pulmonary impairment which impairment [sic] did not arise out of his coal mine employment. He is totally and permanently disabled to such an extent that he would be unable to perform his regular coal mining job or work requiring similar effort. . . . If he were 80 pounds lighter than he is now, and his [a]sthma was treated, and he quit smoking, he would retain the pulmonary capacity to perform his last coal mine work." *Id.* at 11-12. Subsequently, in depositions taken on July 13, 2013 and August 6, 2014, Dr. Bellotte reiterated that, based on the oxygen consumption of 7 METs reflected by Dr. Rasmussen's testing, claimant could perform heavy labor. Employer's Exhibit 14 at 24-25; Employer's Exhibit 19 at 9. Dr. Bellotte concluded that, therefore, from a pulmonary standpoint, claimant could return to his usual coal mine work. Employer's Exhibit 14 at 30; Employer's Exhibit 19 at 11.

Before addressing whether the medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge correctly noted that the exertional requirements of claimant's usual coal mine work provide the basis for comparison for the physicians' opinions regarding total disability. Decision and Order at 16. The administrative law judge summarized the job descriptions reported by each physician, and found that all five physicians "understood that Claimant's last coal mining job was as a longwall or shear operator and knew that it required heavy or very heavy labor for a substantial portion of the workday." Decision and Order at 19.

[10] Dr. Bellotte noted that Drs. Celko and Rasmussen characterized claimant's last employment as "heavy labor" or "heavy work," respectively. Employer's Exhibit 10 at 5, 6.

Weighing the medical opinions, the administrative law judge found that the opinions of Drs. Celko and Rasmussen, that claimant could not return to his usual coal mine work, were entitled to the greatest weight, "due to flaws in the other physicians' opinions." Decision and Order at 20. Specifically, the administrative law judge accorded less weight to the opinion of Dr. Houser because he did not examine claimant. Decision and Order at 20. The administrative law judge also accorded less weight to Dr. Fino's opinion, in part, because he "seemingly changed his position," first opining that claimant has a disabling respiratory impairment, and later testifying that claimant could perform light labor without difficulty, moderate labor up to 50% of the workday, and heavy labor in "bursts." Decision and Order at 20, *citing* Employer's Exhibit 15. The administrative law judge further found, however, that even Dr. Fino's revised opinion demonstrated that claimant could not perform his usual coal mine work, which required him "to perform heavy labor for much more than an occasional burst." Decision and Order at 20. Thus, to the extent Dr. Fino opined that claimant could perform his usual coal mine work, the administrative law judge gave little weight to Dr. Fino's opinion. *Id.*

Finally, the administrative law judge discredited Dr. Bellotte's opinion as equivocal. The administrative law judge found that while Dr. Bellotte originally stated, in his report, that claimant suffers from a totally disabling respiratory impairment, he later testified that claimant could perform his usual coal mine work from a pulmonary standpoint. Decision and Order at 20.

In conclusion, the administrative law judge found that "based on the totality of the evidence . . . claimant has proven his inability to perform his last coal mining job . . . due to a pulmonary or respiratory impairment" pursuant to 20 C.F.R. §718.204(b)(2)(iv), Decision and Order at 19, and thus has invoked the presumption at 20 C.F.R. §718.305. Decision and Order at 20.

Employer initially contends that the administrative law judge failed to make a finding regarding the level of exertion necessary to perform the duties of a longwall shear operator. Employer's Brief at 8-9, 13. Employer asserts that the administrative law judge instead "relied upon the physicians' subjective understanding of the job requirements without assessing the correctness of their understanding." Employer's Brief at 9.

Employer's contention lacks merit. As the administrative law judge found, on the description of coal mine work submitted with his claim form, claimant indicated that he worked as a shearer operator from 1996 until he stopped work in 2003.[11] Claimant

[11] The employment records provided by employer break down claimant's jobs more specifically, noting that claimant was a Longwall Shear Operator from October

indicated that he walked by the machine and cut the coal, changed bits on the machine, carried parts to the face, and installed and removed hoses. Claimant further indicated that the work required sitting for two hours, standing for eight hours, lifting 50-100 pounds "all day," lifting 180 pounds variably, carrying 50-100 pounds various times for various distances, and carrying a 25-30 pound tool belt "all day." Director's Exhibit 4.

At the hearing, claimant confirmed that his last job in the mines was as a "longwall shear operator," and explained that "the longwall is sort of a large machine and it has shields, a pan line and a shearing machine." Hearing Tr. at 19. He testified that the machine was operated by remote control, and he walked beside the machine, along the face, for 1000 feet per cut, for up to eight to ten cuts a day. Hearing Tr. at 20-21. Claimant explained that, in addition, he had to prepare for mining:

> We'd have to take out the structure, the monorails that keep the cables advancing and take out anything that has to be taken out before the roof would fall. During longwall moves, we did a lot of other heavy work, carrying posts, setting cribs, taking out -- we'd have to tear the whole machine down and take it from one area that was mined to the new area where we were going to start mining again, and a lot of heavy work there, too.

Hearing Tr. at 20.

As the Director correctly notes, the administrative law judge specifically found that all of the physicians "understood that Claimant's last coal mining job was as a longwall or shear operator and knew that it required heavy or very heavy labor for a substantial portion of the workday." Decision and Order at 19; Director's Brief at 3. Moreover, a review of the record reflects that the job descriptions provided by claimant in support of his claim comport with the descriptions of his work that he provided to the physicians. We therefore reject employer's argument that the administrative law judge did not adequately consider whether the physicians accurately understood the exertional requirements of claimant's usual coal mine work. Employer's Brief at 8-13.

Employer argues further that the administrative law judge erred by discrediting the opinions of Drs. Fino and Bellotte, in finding that claimant is totally disabled. Employer

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1996 through October 2002, and worked as a Longwall Shield Operator from October 2002 until he stopped work. Director's Exhibit 5. Claimant testified that the "longwall shear" and the "longwall shield" were part of the same machine. Hearing Tr. at 19.

specifically contends that the administrative law judge erred in finding Dr. Fino's opinion to be equivocal, as Dr. Fino explained that his review of additional evidence led him to revise his original conclusion that claimant is totally disabled from performing his usual coal mine work from a respiratory standpoint.[12] Employer's Brief at 17-18; Employer's Reply Brief 5. As the Director asserts, however, the administrative law judge specifically found that even Dr. Fino's revised opinion, that claimant could perform moderate labor up to 50% of his workday but could perform heavy labor only in "bursts," supported the conclusion that claimant could not return to his usual coal mine work, which required that he "perform heavy labor for much more than just an occasional 'burst.'" Decision and Order at 20. Thus, the administrative law judge's error, if any, in characterizing Dr. Fino's opinion as "equivocal" on the issue of disability, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also asserts that the administrative law judge erred in his consideration of Dr. Bellotte's opinion. The administrative law judge discredited Dr. Bellotte's opinion as equivocal, finding that while Dr. Bellotte concluded in his report that claimant had a totally disabling respiratory impairment, Dr. Bellotte later testified that claimant was not totally disabled. Decision and Order at 20. Employer asserts that the administrative law judge misinterpreted Dr. Bellotte's initial report, asserting that Dr. Bellotte "never declared the Claimant disabled from a pulmonary standpoint." Employer's Brief at 19. Employer further asserts that, during his deposition, Dr. Bellotte explained that he had not changed his opinion from his initial report; rather, employer contends, Dr. Bellotte clarified that he had always maintained that the results of the treadmill exercise study, performed by Dr. Rasmussen, reflected that claimant retains the respiratory capacity to perform heavy manual labor. Employer's Brief at 20-21, *referencing* Employer's Exhibit 19 at 11.

[12] Dr. Fino testified that, subsequent to his report, he reviewed the report of Dr. Rasmussen, which he stated reflected a job description that was "more than a little different" and "definitely" reflected less of an exertional load than the job description claimant provided to him. Employer's Exhibit 15 at 11-12, 21. However, the basis for Dr. Fino's conclusion is unclear. In his report, Dr. Fino recorded that "[t]here was heavy labor involved in [claimant's] last job [as a shearer operator], and he said that 50% of the job involved very heavy labor and 50% of the job was moderate labor. The patient said that the hardest part of the job was changing bits on the cutting machine, and the heaviest part of the job was moving belt structures." Director's Exhibit 13 at 2. Dr. Rasmussen recorded that, as a shear operator, claimant's job duties included "heavy lifting of various parts including chains and various parts of the shear. All of his work was at the face and he did heavy and very heavy manual labor." Director's Exhibit 14 at 2.

Employer's contention has merit. Portions of Dr. Bellotte's initial report are unclear, and, as the Director asserts, could be interpreted as concluding that claimant is totally disabled from a respiratory standpoint.[13] Director's Brief at 2. However, Dr. Bellotte corrected that impression during his August 6, 2014 deposition.[14] Employer's Exhibit 19 at 8, 11. More importantly, in his written report, and in both his July 31, 2013 and August 6, 2014 depositions, Dr. Bellotte consistently, and repeatedly, explained that Dr. Rasmussen's 2012 cardiopulmonary exercise testing reflected that claimant had an oxygen consumption equivalent to 7 METs, and that heavy labor required only 4.5 METs. Employer's Exhibit 10 at 11; Employer's Exhibit 14 at 24-25; Employer's Exhibit 19 at 9-11. Dr. Bellotte concluded that, based on claimant's test results, claimant retains the pulmonary capacity to return to his usual coal mine work. Employer's Exhibit 14 at 30; Employer's Exhibit 19 at 9-11.

In contrast to Dr. Bellotte's conclusion, Dr. Rasmussen opined that the studies he performed, including his cardiopulmonary exercise testing, or incremental treadmill exercise study, indicated that claimant "does not retain the pulmonary capacity to perform his regular coal mine employment." Director's Exhibit 14 at 3. Dr. Rasmussen testified that while claimant's work as a shear operator would have required "25 to 30 milliliters per kilo per minute," claimant's "oxygen uptake was 16.5 milliliters per kilo" which was "considerably less than his regular job would require." Employer's Exhibit 8 at 18. Dr. Rasmussen indicated that claimant's test results indicated he could perform only "fairly moderate exercise." *Id*.

The administrative law judge's sole reason for discrediting Dr. Bellotte's disability opinion was that he found it to be equivocal. However, the administrative law judge's determination does not reflect that he considered the entirety of Dr. Bellotte's report and deposition testimony, as discussed above. Further, the record reflects an unresolved conflict in medical opinion between Drs. Bellotte and Rasmussen, regarding the

[13] The record reflects that both Drs. Houser and Rasmussen understood Dr. Bellotte to be diagnosing total respiratory disability. Claimant's Exhibit 4 at 5; Claimant's Exhibit 7 at 2.

[14] Dr. Bellotte stated that, at the time of his examination, he did not find claimant to have a disabling respiratory impairment, and that Dr. Houser had wrongly interpreted his report as saying otherwise. Employer's Exhibit 19 at 8-9, 11. Dr. Bellotte clarified that while claimant could return to his usual coal mine work in his current state, if claimant were able to lose weight and underwent reconditioning, he would be able to do even higher capacity work. Employer's Exhibit 14 at 30-31; Employer's Exhibit 19 at 11.

significance of Dr. Rasmussen's exercise test results. Finally, while the administrative law judge concluded that the opinions of Drs. Rasmussen and Celko were entitled to "the greatest weight due to flaws with the other physicians' opinions," he did not determine whether the opinions of Drs. Rasmussen and Celko were reasoned and documented, or otherwise explain what weight he accorded their opinions. In light of the above-referenced errors, we hold that the administrative law judge's decision does not comply with the Administrative Procedure Act (APA), which requires the administrative law judge to consider all relevant evidence in the record, and to set forth his "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration.[15]

On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In so doing, the administrative law judge must resolve the conflicts among the opinions, and explain his findings in accordance with the APA. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Wojtowicz*, 12 BLR at 1-165. If the administrative law judge finds that the medical opinion evidence establishes total disability, he must weigh all of the relevant evidence together to determine whether claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

Because we have vacated the administrative law judge's finding that the evidence established total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). If, on remand, the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

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

[15] The administrative law judge should also reconsider Dr. Houser's medical opinion. As the Director correctly asserts, the fact that Dr. Houser did not examine claimant is not, by itself, a valid basis for discrediting his opinion. Director's Brief at 3, *citing Worthington v. U.S. Steel Corp.*, 7 BLR 1-522, 1-523-24 (1984).

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. The Department of Labor's (DOL's) regulations provide that if claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by establishing that claimant does not have either legal or clinical pneumoconiosis,[16] 20 C.F.R. §718.305(d)(1)(i), or 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). The administrative law judge found that employer failed to establish rebuttal by each method.

Employer initially contends that the administrative law judge improperly restricted employer to the two methods of rebuttal provided to the Secretary of Labor at 30 U.S.C. §921(c)(4). Employer's Brief at 24-27. Employer's contention is identical to the one that the United States Court of Appeals for the Fourth Circuit rejected in *West Virginia CWP Fund v. Bender*, 782 F.3d 129, 138-43, BLR (4th Cir. 2015), and we reject it here for the reasons set forth in that decision.

Employer also asserts that the administrative law judge erred in applying the "no part," or the "rule out," standard on rebuttal when addressing disability causation, and argues that the implementing regulation at 20 C.F.R. §718.305 is invalid because it conflicts with the statute. Employer's Brief at 25-27. The Board, however, has addressed and rejected these arguments in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting), as has the Fourth Circuit. *Bender*, 782 F.3d at 137-43. For the reasons set forth in *Minich* and *Bender*, we reject employer's contentions in this case.

We next address employer's contention that the administrative law judge erred in finding that it did not establish rebuttal of the Section 411(c)(4) presumption.

[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).

Employer's Brief at 27-38. Having found that a "diagnosis of legal coal workers' pneumoconiosis . . . [was] established by the successful invocation of the presumption contained at 20 C.F.R. §718.305," the administrative law judge did not address whether employer rebutted the presumption by disproving the existence of either clinical or legal pneumoconiosis.[17] Decision and Order at 20, 22. Rather, the administrative law judge next considered whether employer was able to establish rebuttal at 20 C.F.R. §718.305(d)(1)(ii), noting that the single issue to be determined was whether claimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment. Decision and Order at 22-23. In adjudicating the issue, the administrative law judge reviewed the medical opinions of Drs. Celko, Rasmussen, Houser, Fino, and Bellotte. Decision and Order at 23-27. Drs. Celko, Rasmussen, and Houser opined that claimant's disabling respiratory impairment is due, in part, to legal pneumoconiosis, in the form of COPD due to coal mine dust exposure and cigarette smoking.[18] In contrast, Dr. Fino[19] initially diagnosed legal pneumoconiosis, but after reviewing additional

[17] With respect to the issue of clinical pneumoconiosis, the administrative law judge found that claimant failed to establish the existence of clinical pneumoconiosis through x-ray, autopsy, or biopsy evidence, pursuant to 20 C.F.R. §718.202(a)(1), (2). Decision and Order at 11-12. However, the administrative law did not determine whether the medical opinion evidence established the existence of clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 11-12. Moreover, the administrative law judge erred in placing the burden of proof on claimant to establish the existence of pneumoconiosis before determining whether claimant was entitled to the presumption of pneumoconiosis at Section 411(c)(4).

[18] Dr. Celko examined claimant on February 22, 2011, and was deposed on March 1, 2013. Dr. Celko diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD)/centrilobular emphysema due to both cigarette smoking and coal mine dust exposure. Director's Exhibit 11; Employer's Exhibit 7 at 26. Dr. Rasmussen examined claimant on September 10, 2012, and was deposed on January 21, 2013. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of COPD caused by coal mine dust exposure and smoking. Director's Exhibit 14; Claimant's Exhibit 7; Employer's Exhibit 8 at 27. Finally, Dr. Houser reviewed the medical records in a report dated June 14, 2013, and was deposed on September 27, 2013. Dr. Houser diagnosed legal pneumoconiosis, opining that claimant's COPD and chronic bronchitis are due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 4; Claimant's Exhibit 6 at 24.

[19] Dr. Fino examined claimant on September 6, 2012, and was deposed on August 13, 2013. Director's Exhibit 13; Employer's Exhibit 15.

evidence, concluded that claimant does not have clinical or legal pneumoconiosis, and that his respiratory impairment is primarily due to cigarette smoking. Director's Exhibit 13; Employer's Exhibit 15 at 24-25. While Dr. Fino conceded that coal mine dust exposure contributed to claimant's impairment, he stated that the degree of contribution was not "clinically significant." Employer's Exhibit 15 at 24-25. Dr. Bellotte[20] initially opined that claimant does not have clinical or legal pneumoconiosis, or any chronic dust disease of the lung that has been caused, contributed to, or substantially aggravated by coal mine dust exposure, and that, therefore, his pulmonary impairment was not caused in whole, or in part, by pneumoconiosis. Employer's Exhibit 10 at 11-12. Dr. Bellotte subsequently testified that claimant has COPD with emphysema, related to cigarette smoking and asthma, Employer's Exhibit 14 at 26, 31, but has "no dust disease that's contributed in any significant fashion to cause him to have a disability." Employer's Exhibit 19 at 13.

The administrative law judge determined that for the presumption at 20 C.F.R. §718.305 to be rebutted, employer must "demonstrate[] that Claimant's respiratory impairment did not 'arise out of, or in connection with' coal mine employment," not that claimant's coal dust exposure is "clinically significant." Decision and Order at 22-23. He therefore concluded that Dr. Fino's opinion was entitled to little weight. Decision and Order at 23.

The administrative law judge found that Dr. Bellotte's opinion suffered from a similar flaw, in that Dr. Bellotte initially stated that coal mine dust exposure played no role in claimant's impairment, but subsequently testified that coal mine dust exposure did not contribute "in any significant fashion." Decision and Order at 24. Finding that Dr. Bellotte's opinion was both equivocal in several respects, and "suggest[ed] that a small part of [c]laimant's respiratory or pulmonary impairment may have arisen in connection with coal mine employment," the administrative law judge concluded that the probative value of Dr. Bellotte's opinion was reduced. Decision and Order at 24-25. Therefore, the administrative law judge found that employer "failed to rebut the presumption that Claimant's pneumoconiosis arose, at least in part, out of coal mine employment." Decision and Order at 27.

Initially, we agree with employer, and the Director, that the administrative law judge erred in failing to address whether employer has rebutted the presumption by disproving the existence of both legal and clinical pneumoconiosis, at 20 C.F.R. §718.305(d)(1)(i). We further hold that, in evaluating the evidence at 20 C.F.R.

[20] Dr. Bellotte examined claimant on May 16, 2013, and was deposed on July 31, 2013 and August 6, 2014. Employer's Exhibits 10, 14, 19.

§718.305(d)(1)(ii), the administrative law judge applied an incorrect rebuttal standard, as he required employer to rule out *coal dust exposure*, rather than *pneumoconiosis*, as a contributing cause of claimant's disabling respiratory impairment. *Minich*, BRB No. 13-0544 BLA, slip op. at 10; Decision and Order at 17. As Drs. Fino and Bellotte both opined that claimant did not have clinical pneumoconiosis and that the minimal contribution from coal mine dust exposure to claimant's disabling respiratory impairment was insufficient to constitute legal pneumoconiosis, their opinions, if found to be credible by the administrative law judge, would meet employer's burden under both methods of rebuttal at 20 C.F.R. §718.305(d)(1). *Id.* Accordingly, we must vacate the administrative law judge's finding that employer failed to establish rebuttal of the presumption, and remand this case for further consideration.

The administrative law judge additionally discounted the opinions of Drs. Fino and Bellotte as equivocal. Decision and Order 23-24. Specifically, the administrative law judge discredited Dr. Fino's opinion, because he initially diagnosed legal pneumoconiosis, but later recanted that opinion. *Id.* We note, however, that in his deposition, Dr. Fino explained that while he initially diagnosed legal pneumoconiosis based on the information that was provided to him at the time, review of additional information regarding claimant's smoking history caused him to revise his opinion and to conclude that coal mine dust exposure was not a clinically significant contributing factor to claimant's respiratory impairment. We further note that, contrary the administrative law judges characterization, Dr. Bellotte did not initially opine that claimant suffers from a disabling respiratory impairment due, in part, to back pain, but later opine that claimant's back pain did not contribute to his respiratory impairment. Decision and Order at 24; Employer's Brief at 33. Rather, Dr. Bellotte clarified in his deposition that it was never his opinion that claimant had a disabling respiratory impairment, from any cause. Employer's Exhibit 19 at 8, 11. Dr. Bellotte explained that while claimant retained the pulmonary capacity to perform his usual coal mine work, he was disabled by multiple other factors, including his back condition. As Drs. Fino and Bellotte did not simply change their opinions, but revised, or clarified, their opinions after reviewing additional evidence, the administrative law judge's characterization of their opinions as equivocal is not supported by substantial evidence. *See Soubik v. Director, OWCP*, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Mancia v. Director, OWCP*, 130 F.3d 579, 584, 21 BLR 2-215, 2-234 (3d Cir. 1997). On remand, the administrative law judge should reconsider their opinions. The administrative law judge should also consider, on remand, whether Dr. Bellotte's testimony that claimant "does not have legal pneumoconiosis. He has no dust disease that's contributed in any significant fashion to cause him to have a disability" represents a departure from his earlier opinion, or, as employer asserts, is simply a clarification of his opinion that claimant does not have legal pneumoconiosis, and that his disability is not caused by pneumoconiosis. Decision and Order at 24, *citing* Employer's Exhibits 10, 14; Employer's Brief at 33-34.

Finally, we note that the administrative law judge found that the opinions of claimant's physicians, Drs. Celko, Rasmussen, and Houser, did not weigh against the rebuttal opinions of employer's experts because each suffered from the same fundamental flaw. Decision and Order at 25-27. Specifically, the administrative law judge noted that, in attributing claimant's impairment to both coal mine dust exposure and cigarette smoking, Drs. Celko, Rasmussen, and Houser each opined that they were unable to distinguish between coal mine dust exposure and smoking as possible causes. The administrative law judge concluded that because, at best, the opinions of Drs. Celko, Rasmussen, and Houser established that it is impossible to know whether smoking, coal dust, or both, caused claimant's impairment, their opinions were just as flawed as those offered by employer. Decision and Order at 25-27. As the Director correctly asserts, however, the administrative law judge's reason for discrediting the opinions of Drs. Celko, Rasmussen, and Houser is not valid. Director's Brief at 4-5. Contrary to the administrative law judge's finding, the fact that a doctor cannot distinguish between the effects of smoking and coal mine dust exposure as a contributing cause of a miner's pulmonary impairment does not, *by itself*, render unreasoned a physician's identification of coal mine dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 20 C.F.R. §718.201(a)(2); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Drs. Celko, Rasmussen, and Houser unequivocally opined that coal mine dust exposure was a "predominant," "significant," or "substantial" cause of claimant's disabling impairment. The administrative law judge erred in discrediting their opinions without considering the documentation underlying them and the totality of their reasoning. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Director's Exhibits 11, 13; Claimant's Exhibit 4.

On remand, if the administrative law judge again finds invocation of the Section 411(c)(4) presumption established, he must consider and weigh all relevant evidence to determine whether it is sufficient for employer to establish rebuttal of the presumption. In *Minich* the Board described the proper framework for the consideration of rebuttal:

> The administrative law judge should begin his analysis at [20 C.F.R. §] 718.305(d)(1)(i)(A) by considering all relevant and credible evidence to determine whether employer has proved that claimant does not have legal pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2). Even if legal pneumoconiosis is found to be present, the administrative law judge must determine whether employer has disproved the existence of clinical pneumoconiosis arising out of coal mine employment at [20 C.F.R. §] 718.305(d)(1)(i)(B), as both of these determinations are important to satisfy the statutory mandate to consider all relevant evidence pursuant to 30 U.S.C. §923(b), and to provide a framework for the analysis of the

> credibility of the medical opinions at [20 C.F.R. §] 718.305(d)(1)(ii)," the second rebuttal prong.

Minich, BRB No. 13-0544 BLA, slip op. at 10-11. The Board further stated that where, as in this case, the administrative law judge performed an incomplete evaluation of the evidence relevant to the existence of clinical pneumoconiosis, with the burden of proof on claimant, "on remand, the administrative law judge must address and weigh all evidence relevant to the issue, including the medical opinion evidence, with the burden on employer." *Minich*, BRB No. 13-0544 BLA, slip op. at 11. Finally, the Board held that:

> If employer proves that claimant does not have legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at [20 C.F.R. §] 718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption at [20 C.F.R. §] 718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at [20 C.F.R. §] 718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis.

Minich, BRB No. 13-0544 BLA, slip op. at 10-11; *see also Bender*, 782 F.3d at 143-44.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

RYAN GILLIGAN
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determinations to vacate the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and his concomitant finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

However, I respectfully dissent from the majority's determination that, before addressing whether the medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge adequately considered whether the physicians accurately understood the exertional requirements of claimant's usual coal mine work. On the contrary, the administrative law judge failed to make a specific finding regarding the level of exertion necessary to perform the duties of a longwall shear operator, a necessary pre-requisite to properly weighing the physicians' opinions. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988). Moreover, although the administrative law judge noted the existence of claimant's testimony regarding his coal mine employment, the administrative law judge did not assess the evidence provided by claimant, and cited only to the medical opinions in support of his very general statement

that "Claimant's last coal mining job consisted primarily of heavy or very heavy labor." Decision and Order at 20, *citing* Director's Exhibits 11, 13, 14; Claimant's Exhibit 4.

Because the frequency, duration, and level of exertion required for different portions of claimant's job are material in determining the credibility of the medical opinion evidence, I would remand this case to the administrative law judge to perform the necessary analysis of the exertional requirements of a longwall shear operator, based on the totality of the evidence, and assess the medical opinions in light of his conclusions. *See Gonzales v. Director,* OWCP, 869 F.2d 776, 779, 12 BLR 2-192, 2-197 (3d Cir. 1989); *Scott v. Mason Coal Co.*, 14 BLR 1-37, 1-41 (1990) (en banc recon.); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc). I concur in all other respects with the majority's opinion.

JUDITH S. BOGGS
Administrative Appeals Judge