U.S. Department of Labor

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

BRB No. 15-0321 BLA

ROBERT LEE HYLTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN/CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 01/30/2017
CONSOL ENERGY INCORPORATED	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (Maia Fisher, Associate Solicitor of Labor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-5773) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012). This case involves a subsequent claim filed on November 4, 2010.[1] Director's Exhibit 3.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with 15.23 years of qualifying coal mine employment,[3] 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 that he is totally disabled due to pneumoconiosis.[4] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment and, thus, erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant has not responded to employer's appeal. The Director, Office of Workers'

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[1] Claimant's first claim for benefits, filed on September 27, 1990, was denied on March 25, 1991, for failure to establish any of the elements of entitlement. Decision and Order at 2, 16; Director's Exhibits 1, 3.

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

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Decision and Order at 30; Director's Exhibits 1-4. Accordingly, the Board will apply the law 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] Because the new 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 found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

Compensation Programs (the Director), has filed a limited response. The Director asserts that even without the benefit of the Section 411(c)(4) presumption, claimant can affirmatively establish entitlement to benefits. *See* 20 C.F.R. Part 718. In its reply brief, employer urges the Board to reject the Director's contention.[5] Employer's Reply Brief at 3-4.

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 Qualifying Coal Mine Employment

Employer challenges the administrative law judge's finding that claimant worked for at least fifteen years in qualifying coal mine employment, asserting that the administrative law judge did not apply a reasonable method of calculation.[6] The administrative law judge considered claimant's Employment History Form, CM-911a,[7] his Social Security earnings records, and his testimony.[8] Decision and Order at 3;

[5] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b) and, therefore, established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge noted that employer stipulated to seven years of underground coal mine employment with Itmann Coal. Decision and Order at 6.

[7] The administrative law judge noted that claimant's Employment History Form, CM-911a, lists employment with Mercer Welding from 1968 to 1971; Owens Manufacturing from 1971 to 1973; Amigo Smokeless Coal (Amigo) from 1976 to 1978; Itmann Coal from 1973 to 1989; Burk Creek Coal from 1980 to 1987; LoBoy Trucking (also doing business as Rocke Coal, Dry Fork Coal, and Tazewell Energy) from 1988 to 1992; and Noseman Branch Mining from 1992 to 1993. Decision and Order at 6; Director's Exhibit 4.

[8] The administrative law judge noted that while claimant testified that he worked for twenty-four years in coal mine employment, with all but nine months of his employment being underground, he acknowledged that some of his years of employment might have been partial years. Decision and Order at 3; Hearing Tr. at 19-20.

Hearing Tr. at 19-20. Noting that claimant's Social Security earnings records are "mostly consistent" with claimant's employment summary, the administrative law judge found them to be the most accurate evidence regarding the dates of claimant's coal mine employment. Decision and Order at 6. Using claimant's yearly income from the Social Security earnings records, the administrative law judge calculated the length of claimant's coal mine employment based on the average "yearly" earnings for miners for 125 days, as reported by the Bureau of Labor Statistics (BLS) in Exhibit 610.[9] Thus, the administrative law judge divided claimant's reported yearly earnings in underground coal mine employment for each year by the industry average "yearly" earnings for 125 days, and added each proportional amount together to conclude that claimant worked a total of 16.51 years in coal mine employment from 1973 to 1993. Decision and Order at 7. Then, based on claimant's testimony that he worked above ground at Amigo Smokeless Coal (Amigo), a coal preparation plant, the administrative law judge subtracted the 1.28 years claimant worked at Amigo to find that claimant established 15.23 years of qualifying coal mine employment. Decision and Order at 7-8.

We agree with employer that the administrative law judge's method of calculating claimant's years of underground coal mine employment cannot be upheld. Under the regulations and the relevant case law, claimant bears the burden of establishing the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). Because the Act does not provide specific guidelines for calculating the time spent in coal mine employment, the administrative law judge is granted broad discretion in deciding this issue, and his or her determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

To credit claimant with a year of coal mine employment, the administrative law judge must first determine whether claimant was engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Clark v. Barnwell Coal Co.,* 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, then the administrative law judge must determine whether claimant worked as a miner for at least 125 working days within that one year period. 20 C.F.R. §725.101(a)(32). Proof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish the

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[9] The Bureau of Labor Statistics' average coal mine earnings table is located at Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm.

threshold one year of coal mine employment. *See Clark*, 22 BLR at 1-281. Here, the administrative law judge did not conduct the threshold inquiry of whether claimant established a calendar year of coal mine employment prior to determining if claimant worked as a miner for at least 125 days within that year. Further, the regulations provide that, if the beginning and ending dates of the miner's employment cannot be ascertained, the administrative law judge may, in his or her 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 BLS at Exhibit 610. 20 C.F.R. §725.101(a)(32)(iii). In the instant case, as employer asserts, the administrative law judge's failure to conduct the threshold inquiry of whether claimant established a calendar year of employment prior to determining if claimant worked at least 125 days, together with her use of the incorrect column at Exhibit 610, resulted in claimant being credited with 365 days of employment if his income exceeded the industry average for just 125 days of work.[10] *See Clark,* 22 BLR at 1-281. Thus, the method employed by the administrative law judge in determining claimant's length of coal mine employment is not reasonable. *See Clark,* 22 BLR at 1-281; *Tackett v. Director, OWCP,* 12 BLR 1-11, 1-13 (1988); *Dawson v. Old Ben Coal Co.,*11 BLR 1-58, 1-60 (1988); *Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162, 1-165 (1989). Because we find that the method employed by the administrative law judge is not reasonable, we vacate her finding of 15.23 years of qualifying coal mine employment. As the administrative law judge's finding of at least fifteen years of qualifying coal mine employment affects the applicability of Section 411(c)(4), we also vacate her findings that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis thereunder, and that employer failed to establish rebuttal. We, therefore, remand this case for further findings regarding the length of claimant's qualifying coal mine employment.

On remand, however, the administrative law judge is not required to use the "daily" wage column at Exhibit 610, described at 20 C.F.R. §725.101(a)(32)(iii). Rather, the use of Exhibit 610 is discretionary, if the administrative law judge finds that the record does not contain sufficient evidence of the beginning and ending dates of claimant's employment. Here, as employer contends, documentary evidence of claimant's coal mine work history exists for some periods of his employment, that could

[10] The table at Exhibit 610 of the *BLBA Procedure Manual*, entitled *Average Earnings of Employees in Coal Mining*, contains three columns. The first column is the calendar year. The second column, "yearly" figures, relied on by the administrative law judge, are not based on a one-year employment period, but represent only 125 days of earnings. The third "daily" column contains the information specified in 20 C.F.R. §725.101(a)(32)(iii).

provide the basis for computing the fractional years of that employment.[11] The preference for the use of direct evidence, where possible, is consistent with 20 C.F.R. §725.101(a)(32)(ii), which provides that the dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, employment history forms, Social Security earnings records, coworker affidavits, and sworn testimony. *Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA (Oct. 5, 2016). Any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *Muncy*, 25 BLR at 1-27; *Vickery,* 8 BLR at 1-432.

In light of our determination to remand, and as claimant is not represented by an attorney, we note that, in determining the length of claimant's coal mine employment, the administrative law judge should also consider any documentary evidence or testimony which could establish additional periods of coal mine employment. Specifically, the administrative law judge should reconsider whether claimant's work as a welder with Mercer Welding or Owens Manufacturing, or his work as a mechanic with Amigo Smokeless Coal Company, constituted qualifying coal mine employment, taking into account the requirements of 20 CFR. §§725.101(a)(19), 725.202, and 718.305. Under the Act and the regulations, a miner is defined as any individual who works, or has worked, in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal. 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202. The definition also includes any individual who works, or has worked, in coal mine construction or maintenance in or around a coal mine or coal preparation facility.[12]

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[11] Moreover, as employer asserts, in some instances the documentary evidence conflicts with the periods of coal mine employment calculated by the administrative law judge. For example, claimant's Social Security earnings records document employment with Itmann Coal for only three quarters in 1973 and three quarters in 1974. Employer also points to a memorandum from a Department of Labor claims examiner stating that claimant was employed for less than one year by Noseman Branch Mining, Dry Fork, and LoBoy Trucking, and specifying that claimant's employment with LoBoy Trucking was from October of 1990 to June 15, 1991. Further employer notes that the record contains a letter from the president of Tazwell Energy, documenting claimant's employment from January 16, 1992 to August 31, 1992. In addition, the record contains paystubs reflecting claimant's coal mine employment earnings with LoBoy Trucking, Dry Fork Coal, and Rocke Coal in 1990 and 1991.

[12] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held that duties that meet situs and function requirements constitute the work of a miner, as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41, 14 BLR 2-139, 2-143 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73, 9 BLR 2-58, 2-64-66 (4th Cir.

Id. Moreover, the duties of a welder, mechanic or maintenance worker may, depending upon the circumstances under which the duties are performed, constitute the work of a miner. *See Consolidation Coal Co. v. McGrath*, 866 F.2d 1004, 12 BLR 2-152 (8th Cir. 1989) (welder/mechanic is a miner); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992) (en banc) (work repairing mining equipment is the work of a miner); *Jones v. Director, OWCP*, 7 BLR 1-279 (1984) (welder/mechanic at a tipple is a miner). Here, the record contains evidence not considered by the administrative law judge that should have been examined in determining the length of claimant's coal mine employment for purposes of qualifying for the rebuttable presumption.

Relevant to his work as a welder, on the CM-911a employment history forms submitted with his prior and current claims, claimant indicated that Mercer Welding rebuilt mining equipment, and that Owens Manufacturing made belts for mines. Director's Exhibit 1, 4. At the hearing, claimant testified that he did "quite a bit" of welding in the mines, welding "bit lugs and stuff messed up on a miner [machine]." Hearing Tr. at 24-25. Claimant further stated that his welding was performed underground, both when the mine was in operation, and "on the down shift." *Id.*

Relevant to claimant's work as a mechanic with Amigo, a coal preparation plant, in calculating the length of claimant's coal mine employment, the administrative law judge subtracted the time claimant spent working at Amigo, because she found that claimant's testimony, and the documentary evidence of record, established that this work was not performed underground. Decision and Order at 7-8, Hearing Tr. at 19-20, 23; Director's Exhibit 8. However, there is no requirement that a miner's work be performed underground. Rather, the issue is whether claimant's duties as a mechanic in a coal preparation plant met the definition of coal preparation under 20 C.F.R. §725.101(a)(13), and the resolution of this issue depends on whether the coal that claimant encountered had entered the stream of commerce.[13] *Norfolk and Western Ry. Co. v. Roberson*, 918

1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 937, 9 BLR 2-52, 2-55-57 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. *Krushansky*, 923 F.2d at 41, 14 BLR at 2-143. Under the function requirement, the miner must have been employed in the extraction or preparation of coal. *Id.*

[13] The Fourth Circuit has explained that "traditionally[,] the tipple marks the demarcation point between the mining and the marketing of coal, . . . [and] [w]hen coal leaves the tipple, [the] extraction and preparation [processes] are complete and [the coal has entered] the stream of commerce." *Collins*, 795 F.2d at 372, 9 BLR at 2-65, *citing Eplion*, 794 F.2d at 937, 9 BLR at 2-57. There is no requirement that the preparation itself be at the tipple, however; only that the preparation process cannot yet be complete.

F.2d 1144, 1150, 14 BLR 2-106, 2-112-113 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991). If, on remand, the administrative law judge determines that claimant's work at Amigo constituted the work of a miner, she must make a specific finding as to whether claimant worked in surface conditions that were substantially similar to conditions in an underground mine, as defined in 20 C.F.R. §718.305(b)(2). The administrative law judge must then combine claimant's years of underground coal mine employment, as determined by any reasonable method, with any periods of qualifying surface mine employment, to determine whether claimant has established at least fifteen years of qualifying coal mine employment, thereby establishing invocation of the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer 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. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[14] 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 §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.

Legal Pneumoconiosis

Sexton v. Mathews, 538 F.2d 88 (4th Cir. 1976) (shoveling coal from tipple into lorry constitutes coal preparation). Relevant to his work at Amigo, claimant testified that he performed maintenance in the preparation plant, "where they load the cars." Hearing Tr. at 23. In its brief, employer described claimant's work at Amigo as involving "mechanic work at a tipple." Employer's Brief at 11.

[14] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Basheda and Fino.[15] Dr. Basheda opined that claimant suffers from tobacco-induced COPD, with an asthmatic component, that is unrelated to coal mine dust exposure. Employer's Exhibits 6, 7. Dr. Fino opined that claimant does not have legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD)/emphysema, that is due to smoking and is unrelated to coal mine dust exposure. Director's Exhibit 30; Employer's Exhibit 8. Dr. Fino stated that claimant may have some degree of emphysema due to coal mine dust exposure, but that the degree of contribution was not "clinically significant." Director's Exhibit 30 at 10-11. The administrative law judge discredited the opinions of Drs. Basheda and Fino because she found them to be poorly reasoned and inadequately explained. Decision and Order at 31-33. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Basheda because he did not "rule out" coal mine dust exposure as a cause of claimant's impairment. Employer's Brief at 19, *citing* Decision and Order at 33. Employer asserts that it is only required to demonstrate that claimant does not suffer from a chronic dust disease of the lungs that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Employer's Brief at 19.

The administrative law judge correctly stated that, in order to rebut the presumption, employer must establish that claimant "does not or did not have pneumoconiosis, as defined in [20 C.F.R.] § 718.201 . . . ." Decision and Order at 30, *referencing* 20 C.F.R. §718.305(d)(1)(i). Contrary to employer's assertion, while the administrative law judge inartfully concluded that Dr. Basheda "cannot rule out coal mine dust exposure as a cause of [c]laimant's emphysema," the administrative law judge did not find Dr. Basheda's opinion insufficient to disprove the existence of legal pneumoconiosis on that basis.[16] Decision and Order at 33. Rather, she found that Dr.

[15] The administrative law judge also considered the opinions of Drs. Rasmussen and Porterfield. The administrative law judge found that Dr. Rasmussen's opinion, that claimant suffers from legal pneumoconiosis, in the form of severe obstructive airways disease that is due to both smoking and coal mine dust exposure, is well-reasoned and adequately documented. Decision and Order at 30-31; Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge correctly noted that Dr. Porterfield diagnosed emphysema, but did not address its etiology. Decision and Order at 31; Director's Exhibit 32; Claimant's Exhibit 7.

[16] There is merit, however, to employer's contention that, in combining her discussion of legal pneumoconiosis and disability causation, the administrative law judge

Basheda's opinion on the existence of legal pneumoconiosis was not credible, taking into consideration the rationale he provided for why claimant does not have legal pneumoconiosis. Decision and Order at 32-33. As summarized by the administrative law judge, Dr. Basheda attributed claimant's obstructive impairment to tobacco abuse, with an asthmatic component, and not to coal mine dust exposure based, in part, on his opinion that, statistically, cigarette smokers experience a greater loss of lung function than coal miners. Decision and Order at 32; Employer's Exhibit 6 at 24. The administrative law judge permissibly questioned Dr. Basheda's opinion, regarding the cause of claimant's obstructive impairment, because he failed to adequately explain why claimant's years of coal mine dust exposure did not contribute, along with claimant's cigarette smoking, to his obstructive impairment or asthmatic symptoms. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order 31-32. As the administrative law judge provided a valid basis for discrediting Dr. Basheda's opinion, this finding is affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

We find merit, however, in employer's contention that the administrative law judge erred in her consideration of Dr. Fino's opinion. The administrative law judge found that "Dr. Fino conceded that [c]laimant has 'some degree of emphysema due to coal mine dust,' therefore conceding that [c]laimant has some degree of legal pneumoconiosis." Decision and Order at 31. The administrative law judge concluded that, therefore, Dr. Fino's opinion "fails to rebut the presumption that [c]laimant has pneumoconiosis . . . ." Decision and Order at 32.

As employer correctly asserts, while Dr. Fino acknowledged that claimant's obstructive impairment may be due, in part, to coal mine dust exposure, he specifically

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failed to consistently identify the correct rebuttal standards under the regulations. Decision and Order at 30-33. The administrative law judge should have first addressed whether employer disproved the existence of legal pneumoconiosis by establishing that claimant's chronic obstructive pulmonary disease (COPD) was not significantly related to, or substantially aggravated by, coal dust exposure. The administrative law judge should then have separately considered whether employer established that "no part of [claimant's] respiratory or pulmonary disability was caused by pneumoconiosis as defined at 20 C.F.R. §718.201." 20 C.F.R. §718.305; *see Minich v. Keystone Coal Mining Corp.*, BRB No. 13-0544 BLA, slip op. at 10-11 (April 21, 2015) (Boggs, J., concurring and dissenting).

stated that the degree of obstruction related to coal mine dust is *not clinically significant*.[17] Director's Exhibit 30 at 10-11 (emphasis added). Thus, substantial evidence does not support the administrative law judge's conclusion that Dr. Fino's opinion is tantamount to a concession that claimant suffers from legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207-208; 22 BLR 2-162, 20168 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997).

The administrative law judge additionally discounted Dr. Fino's opinion as inadequately explained and contrary to the regulations. Decision and Order at 31. Specifically, the administrative law judge found that, in relying on the variability of claimant's response to bronchodilators to conclude that his obstructive impairment is unrelated to coal mine dust exposure, Dr. Fino failed to explain why the fixed, irreversible portion of claimant's pulmonary impairment was not due, in part, to coal mine dust exposure. Decision and Order at 31, *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). However, in his deposition, Dr. Fino addressed the fixed portion of claimant's impairment and explained, with reference to the medical literature, why he believed it was not due to coal mine dust exposure. Employer's Exhibit 8 at 15-20.

Further, while Dr. Fino opined that very few miners experience a significant loss in FEV1 and that coal mine dust-induced emphysema correlates with the degree of dust burden seen on x-ray, contrary to the administrative law judge's characterization, he did not state that coal mine dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant. Decision and Order at 31. In light of these factors, the administrative law judge has not explained her finding that Dr. Fino's opinion contradicts the scientific premise underlying the regulations, as set forth in the preamble, that coal dust-induced emphysema and cigarette smoke-induced emphysema occur through similar mechanisms.[18] Decision and Order at 31, *citing* 65

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[17] Dr. Fino attributed claimant's obstructive impairment to emphysema, due to cigarette smoking. Director's Exhibit 30; Employer's Exhibit 8. In acknowledging that he could not exclude claimant's coal mine dust exposure as having contributed to his impairment, Dr. Fino repeatedly stated that the amount of obstruction related to coal mine dust is not clinically significant. Director's Exhibit 30 at 10-11; Employer's Exhibit 8 at 17, 29.

[18] We note further that "similar" is not the same as "identical." Moreover, although the Department of Labor found that the scientific evidence, that coal dust-induced emphysema and cigarette smoke-induced emphysema occur through similar mechanisms, supported the regulatory change, it did not premise the regulatory change on this concept. *See* 65 Fed. Reg. 79.939-43 (Dec. 20, 2000).

Fed. Reg. 79.939-43 (Dec. 20, 2000). Accordingly, we must vacate the administrative law judge's finding that employer failed to rebut the presumption by disproving the existence of legal pneumoconiosis, and remand this case for further consideration. While the administrative law judge is not required to accept evidence that she properly determines is not credible, on remand the administrative law judge must consider the entirety of Dr. Fino's opinion, and explain her findings. *See* Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz,* 12 BLR at 1-165.

Clinical Pneumoconiosis

Employer also argues that the administrative law judge failed to consider all relevant evidence in finding that it failed to disprove the existence of clinical pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered eleven interpretations of three analog x-rays taken on May 24, 2011, September 26, 2011, and April 9, 2012.[19] Decision and Order at 18-21. In evaluating this evidence, the administrative law judge properly accorded greater weight to the interpretations by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 20. Based on the equal number of positive and negative readings of each x-ray by equally qualified readers, the administrative law judge found that the x-ray evidence is in equipoise and, therefore, is insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis.[20] Decision and Order at 21.

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[19] The administrative law judge also considered four interpretations dating from 2011 to 2013, of a digital x-ray taken on October 20, 2011, that were submitted as other medical evidence pursuant to 20 C.F.R. §718.107(a). *See* Black Lung Benefits Act Bulletin Nos. 14-08, 14-11 (providing that in claims, such as this one, filed before May 19, 2014, digital x-ray readings made before May 19, 2014 are evaluated under 20 C.F.R. § 718.107); Decision and Order at 21-23; Director's Exhibits 30, 35; Claimant's Exhibit 4; Employer's Exhibit 1. However, the administrative law judge accorded little weight to these readings, because the record contains no evidence establishing that the digital x-rays are medically acceptable or relevant pursuant to 20 C.F.R. §718.107(b). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order at 22-23. As employer does not challenge this finding, it is affirmed. *Skrack*, 6 BLR at 1-711.

[20] Because this finding is not challenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

Employer also submitted the opinions of Drs. Basheda and Fino in support of its burden to disprove the existence of clinical pneumoconiosis. Drs. Basheda and Fino opined that claimant does not suffer from clinical pneumoconiosis. Employer's Exhibits 1-3. The administrative law judge found their opinions not to be credible, however, based on her conclusion that the x-ray evidence that Drs. Basheda and Fino relied upon as preponderantly negative for clinical pneumoconiosis, was instead inconclusive for the existence of the disease. Decision and Order at 30. Thus, the administrative law judge found that employer did not rebut the presumed existence of clinical pneumoconiosis.

Employer contends that the administrative law judge erred in failing to consider the report of a high-resolution computed tomography (CT) scan, taken on October 21, 2009, prior to concluding that employer failed to disprove the existence of clinical pneumoconiosis.[21] Employer's Brief at 22-25; Director's Exhibit 32 at 32, 46. We agree. While the administrative law judge referenced the CT scan in her discussion of the medical opinions, she did not address the results of this CT scan, or consider it together with the other evidence relevant to the existence of clinical pneumoconiosis.[22] Director's Exhibit 32; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Because the administrative law judge failed to weigh all of the evidence relevant to whether claimant has clinical pneumoconiosis, we must vacate her determination that employer failed to disprove the existence of clinical pneumoconiosis and vacate her rejection of the opinions of Drs. Basheda and Fino pursuant to 20 C.F.R. §718.202(a)(4). *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 25 BLR 2-779 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact-finder's failure to discuss relevant evidence requires remand). On remand, the administrative law judge must consider whether the party submitting the CT scan evidence has demonstrated that it is medically acceptable and relevant to establishing or refuting entitlement to benefits, pursuant to 20 C.F.R.

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[21] The October 21, 2009 computed tomography (CT) scan was performed at the request of Dr. Porterfield, claimant's treating physician. Director's Exhibit 32. While the copy of the radiologist's report contained in the record is difficult to read, Dr. Porterfield recorded the radiologist's impressions in his October 29, 2009 treatment note, stating: "He had a [high resolution] CT scan and it showed COPD with emphysema, negative for fibrosis. He had a hiatal hernia and non-obstructing right renal stone and dense coronary artery calcifications of the LAD but other than this it was ok." *Id.*

[22] Dr. Basheda noted that the record contains conflicting positive and negative x-ray interpretations but stated that, based on the sensitivity of the CT scan, he could clearly say that there was no radiographic evidence of simple pneumoconiosis. Employer's Exhibit 7 at 12-13. Dr. Fino similarly stated that the CT scan corroborated his opinion that the x-rays did not reflect the presence of clinical pneumoconiosis. Employer's Exhibit 8 at 13.

§718.107. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132-33 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc). If so, the administrative law judge must determine whether the CT scan evidence is positive, negative, or inconclusive for the existence of pneumoconiosis and then determine the weight to accord the CT scan evidence overall. *See Marra*, 7 BLR at 1-218-219. The administrative law judge should then weigh the CT scan evidence, together with the x-ray and medical opinion evidence, to determine whether employer disproved the existence of clinical pneumoconiosis.

In sum, on remand, the administrative law judge must determine whether claimant had at least fifteen years of qualifying coal mine employment. If so, claimant will have invoked the Section 411(c)(4) presumption, and the administrative law judge must consider and weigh all relevant evidence to determine whether it is sufficient for employer to establish rebuttal of the presumption. If the administrative law judge does not find the Section 411(c)(4) presumption invoked, she must consider entitlement under 20 C.F.R. Part 718.[23]

[23] Under the facts of this case, we decline to hold, as the Director suggests, that the administrative law judge's findings necessarily establish claimant's entitlement to benefits, regardless of whether the Section 411(c)(4) presumption is invoked. As claimant has the burden to establish the elements of entitlement under 20 C.F.R. Part 718, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc), if reached, the administrative law judge must reweigh all the evidence and make determinations regarding all factual matters, including the nature of claimant's usual coal mine employment, and the credibility of the medical evidence. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993). The Board cannot make findings of fact or reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Further, relevant to claimant's entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge must consider employer's arguments regarding the credibility of Dr. Rasmussen's opinion that claimant has clinical and legal pneumoconiosis.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge