U.S. Department of Labor

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

BRB No. 17-0200 BLA

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<tr><td>JESSEE D. COOKE

Claimant-Respondent

v.

BLUFF SPUR COAL CORPORATION

and

AMERICAN INTERNATIONAL SOUTH/CHARTIS

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 01/31/2018

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Matthew Moynihan (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor, Maia Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (15-BLA-5545) of Administrative Law Judge Drew A. Swank rendered on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on August 6, 2013.[1]

The administrative law judge credited claimant with 34.04 years of underground coal mine employment,[2] and found that the new x-ray evidence established the existence of clinical pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4]

[1] Claimant filed three previous claims, all of which were finally denied by the district director. Director's Exhibits 1-3. Claimant's most recent previous claim, filed on April 13, 2009, was denied on November 2, 2009, because the evidence did not establish any element of entitlement. Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 6, 8. 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).

[3] "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).

[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

Additionally, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in excluding a medical report submitted by employer. Employer further asserts that the administrative law judge erred in finding total disability established 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 it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's evidentiary ruling.[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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016).

Evidentiary Issue

Employer initially argues that the administrative law judge abused his discretion in excluding a medical report submitted by employer, on the grounds that the report exceeded the evidentiary limitations at 20 C.F.R. §725.414, and employer did not establish good cause for exceeding the limitations. We disagree.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). Medical evidence that exceeds those limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1). Relevant to the issue employer raises, Section 725.414 allowed employer to "obtain and submit, in support of its affirmative case . . . no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i); *McClanahan*, 25 BLR at 1-176. A

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employment and a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has 34.04 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

medical report "is a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a)(1).

The record reflects that employer submitted three medical reports in support of its affirmative case, namely, those of Drs. McSharry, Fino, and Green.[6] Administrative Law Judge's Exhibit 3 at 5 (Employer's Evidence Summary Form). Additionally, employer submitted a fourth medical report from Dr. Silman, dated September 3, 2015, which it designated as a record of claimant's medical treatment for a respiratory or pulmonary disease.[7] *Id.* at 9.

At the hearing, claimant objected that the reports of Drs. Green and Silman exceeded the evidentiary limitations. Hearing Transcript (Tr.) at 16. Employer responded that good cause existed to admit Dr. Green's August 12, 2016 medical report because claimant developed it and, as the most recent evidence, it was "extremely relevant . . . ." Tr. at 18. The administrative law judge found that employer's argument did not establish good cause, and instructed employer to select the two medical reports it wished to submit in support of its affirmative case. *Id.* Employer chose to withdraw Dr. McSharry's report and submit Dr. Green's medical report,[8] along with that of Dr. Fino. *Id.* at 21-22.

As for Dr. Silman's September 3, 2015 report, claimant objected that the report was not a treatment record but was, in fact, a medical report that claimant generated in connection with the claim, then exchanged with employer. Tr. at 23. Employer responded that "as this is . . . more recent testing . . . than has previously been submitted . . . good cause exists to bring it in . . . ." *Id.* Upon review of the proffered exhibit, the administrative law judge found that Dr. Silman's report was a medical report, not a treatment record, and informed employer that it could choose "to admit it as one of your

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[6] Employer developed and submitted the May 5, 2014 medical report of Dr. McSharry and the July 13, 2015 medical report of Dr. Fino. Claimant developed the August 12, 2016 medical report of Dr. Green, which he then disclosed to employer. *See* 20 C.F.R. §725.413(c)(requiring each party to "disclose medical information the party . . . receives by sending a complete copy to all other parties in the claim within 30 days after receipt").

[7] Notwithstanding the limitations on specific types of medical evidence, "any record of a miner's hospitalization . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

[8] Employer has not challenged the administrative law judge's ruling with respect to Dr. Green's report, or the resulting exclusion of Dr. McSharry's report. Those rulings are therefore affirmed. *See Skrack*, 6 BLR at 1-711.

two." *Id.* at 24-25. Employer chose to retain the reports of Drs. Fino and Green, and withdrew Dr. Silman's report. *Id.* at 25.

On appeal, employer does not challenge the administrative law judge's ruling that Dr. Silman's report was a medical report,[9] nor does it challenge the ruling that it failed to establish good cause by arguing that the recency of the report justified exceeding the evidentiary limitations. We therefore affirm those rulings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer instead argues that the administrative law judge erred in finding that good cause was not established because he failed to consider that, unlike claimant, employer may obtain[10] no more than two medical reports and, thus, "does not have the option of discarding an adverse medical opinion and [obtaining] another examination." Employer's Brief at 6. Employer therefore contends that the administrative law judge's ruling that it did not establish good cause to admit Dr. Silman's report is at odds with the '"concern for fairness and the need for administrative efficiency"' underlying the evidentiary limitations. *Id.* at 5-6; *quoting I.C.* [*Cable*] *v. Ky. May Coal Co.*, BRB No. 08-0128 BLA, slip op. at 5 (Oct. 6, 2008)(unpub.).[11]

We agree with the Director that employer waived this argument, having failed to raise it before the administrative law judge. Director's Brief at 2. It was employer's burden to demonstrate good cause. *McClanahan*, 25 BLR at 1-177. Because employer did not argue below that good cause existed for the reason it now asserts on appeal, it waived the argument. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003). Therefore, we decline to address it.

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[9] Employer concedes that Dr. Silman's September 3, 2015 report was a narrative medical report developed by claimant and "exchanged with employer, pursuant to the regulation regarding disclosure of all medical evidence." Employer's Brief at 5; *see* 20 C.F.R. §725.413(c).

[10] The plain language of 20 C.F.R. §725.414 limits an employer to obtaining two pulmonary evaluations of claimant, in the absence of a showing of good cause. 20 C.F.R. §725.414(a)(3)(i); *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-176-77 (2016).

[11] The quoted language originated in the Board's published decision in *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57 (2008) (en banc). In *Preston*, the Board noted the policies underlying the Department of Labor's adoption of the evidentiary limitations, and recognized that the limitations increased the importance of the administrative law judge's role as gatekeeper of the record. *Preston*, 25 BLR at 1-63.

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

Total Disability

The administrative law judge found that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), as none of the pulmonary function studies or blood gas studies was qualifying,[12] and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 11-14. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered whether the medical opinions of Drs. Johnson, Green, and Fino established total disability.

Dr. Johnson examined claimant on behalf of the Department of Labor on August 15, 2013. He interpreted claimant's pulmonary function study as reflecting a severe restrictive impairment, and opined that claimant "is totally disabled from this impairment to perform his last coal mine job of 1 year duration." Director's Exhibit 22 at 4. Dr. Johnson noted that "this assessment is based on [claimant's] severely reduced total lung capacity [values] which are below the Department of Labor standards for total disability." *Id.* Dr. Johnson further noted that it was "difficult to ascertain" the effect that claimant's myasthenia gravis[13] may have on his pulmonary function study results. *Id.*

Dr. Green examined claimant on December 3, 2015, and the resulting report was submitted by claimant. Claimant's Exhibit 3. Dr. Green interpreted claimant's pulmonary function study as reflecting a "moderate to severe degree of lung restriction,"

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[12] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[13] "Myasthenia" is defined as "muscular weakness; any constitutional anomaly of muscle." Dorland's Illustrated Medical Dictionary 1214 (32d ed. 2012). "Myasthenia gravis" is "an autoimmune disease of neuromuscular function" the characteristics of which "include muscle fatigue and exhaustion that fluctuates in severity, without sensory disturbance or atrophy." *Id.* The disease "may be restricted to one muscle group or become generalized with severe weakness and sometimes respiratory insufficiency. It may affect any muscle of the body, but especially those of the eyes, face, lips, tongue, throat, and neck." *Id.* Dr. Fino explained that myasthenia gravis "is an abnormality of the signals going from the nerves to the muscle. Therefore, if the patient is asked to forcefully and repetitively do an action, his muscles become weaker and weaker." Employer's Exhibit 1 at 8. The physicians of record agree that claimant was diagnosed with myasthenia gravis in 2005.

and opined that claimant is "totally disabled from a pulmonary capacity standpoint. He could not meet the exertional demands of his previous coal mine employment on the basis of his ventilatory insufficiency . . . ." Claimant's Exhibit 3 at 4.

Dr. Fino examined claimant on behalf of employer on July 13, 2015, and reviewed selected medical records. Employer's Exhibit 1. Dr. Fino indicated that claimant's pulmonary function studies show "[r]educed FVC and FEV1 secondary to myasthenia gravis." *Id.* at 8. Dr. Fino diagnosed "a respiratory impairment due to myasthenia," and concluded that "[f]rom a respiratory standpoint, [claimant] is disabled from returning to his last mining job or a job requiring similar effort." *Id.* at 9.

Dr. Green again examined claimant on August 12, 2016, and employer submitted the resulting medical report. Employer's Exhibit 16. Dr. Green interpreted claimant's pulmonary function study as reflecting a "moderate degree of lung restriction," and opined that claimant "is not totally disabled from a pulmonary capacity standpoint on the basis of today's spirometric measurements." *Id.* at 4. Dr. Green noted further that claimant has "significant" restriction, but "does not meet the [f]ederal guideline criteria for total pulmonary disability on today's study." *Id.*

The administrative law judge noted that claimant listed "miner operator" as his last coal mine mining job. Decision and Order at 15. After summarizing the physicians' qualifications,[14] the administrative law judge analyzed Dr. Johnson's opinion. He noted that Dr. Johnson incorrectly stated that claimant's pulmonary function study results were qualifying for total disability, but noted further that this mistake "does not completely invalidate" Dr. Johnson's opinion. Decision and Order at 18. The administrative law judge then noted that Dr. Green gave conflicting opinions, stating that claimant was totally disabled on December 3, 2015, and that he was not totally disabled on August 12, 2016. The administrative law judge noted that Dr. Green apparently based his opinions "on the test results from each particular office visit." *Id.* at 19. The administrative law judge concluded that "at most what can be derived . . . is that [c]laimant's pulmonary test results fluctuated over time." *Id.* The administrative law judge noted Dr. Fino's opinion that claimant is totally disabled. *Id.* Noting that all three doctors at "one point or another" stated that claimant is totally disabled, the administrative law judge found that the medical opinion evidence established total disability. *Id.*

[14] As summarized by the administrative law judge, Dr. Johnson is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine; Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease; and Dr. Green's qualifications are not of record. Decision and Order at 15-18.

Employer argues that the administrative law judge did not adequately explain his analysis of the medical opinions. Employer's Brief at 6-12. Employer contends that the medical opinions that diagnosed total disability are not well-reasoned and lack objective support. *Id*. Employer argues that Dr. Johnson's opinion that claimant is totally disabled was based on an "incorrect understanding" of the DOL disability standards, and the administrative law judge did not explain his reason for crediting Dr. Johnson's opinion despite this flaw. Employer's Brief at 8. Employer further asserts that the administrative law judge failed to explain how Dr. Fino's opinion established total disability, given that Dr. Fino diagnosed total disability based on a neurological disease. *Id*. at 8-9. Further, employer contends that the administrative law judge did not adequately explain why he credited Dr. Green's initial opinion that claimant is totally disabled, rather than the physician's more recent opinion that claimant is not totally disabled. *Id*. at 10-11. Employer's assertions of error have merit, in part.

We agree with employer that the administrative law judge erred in failing to render specific findings regarding whether the medical opinions of Drs. Johnson, Fino, and Green are documented and reasoned, and in failing to specifically explain why he credited Dr. Green's opinion that claimant is totally disabled rather than the physician's opinion that claimant is not totally disabled. *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, 2-275-76 (4th Cir. 1997). To the extent that the administrative law judge has failed to adequately explain the bases for his findings in accordance with the Administrative Procedure Act,[15] we must vacate his determination that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration.[16]

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[15] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[16] We reject, however, employer's argument that claimant cannot establish total disability based on medical opinion evidence when the underlying pulmonary function studies are non-qualifying. A physician may diagnose a disabling impairment even where the objective studies are non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(iv); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000). We also reject employer's argument that Dr. Fino's opinion does not support a finding of total disability because Dr. Fino attributed claimant's disabling impairment to myasthenia gravis. We note that Dr. Fino concluded, "From a respiratory standpoint this man is

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). The administrative law judge should take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, the sophistication and bases of their diagnoses, and must explain his findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). In reconsidering the medical opinions, the administrative law judge should determine the exertional requirements of claimant's usual coal mine employment as a miner operator,[17] and consider the physicians' opinions regarding total disability in light of those requirements. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 511, 15 BLR 2-201, 2-204 (4th Cir. 1991).

On remand, should the administrative law judge find that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[18] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because we have vacated the administrative law judge's finding of total disability, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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disabled from returning to his last mining job or a job requiring similar effort." Employer's Exhibit 9. Under the regulations, a miner is considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner" from performing his usual coal mine work and engaging in comparable work in the area of his residence. See 20 CFR 718.204(b)(1). The cause of a miner's respiratory or pulmonary impairment relates to the issue of total disability causation, which is addressed either at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(ii); *W. Va. CWP Fund v. Director, OWCP* [*Smith*], F.3d , No. 16-2453 (4th Cir. Jan. 26, 2018).

[17] The record contains claimant's descriptions of his job duties, and the physicians' statements of their understanding of claimant's usual coal mine work as a continuous miner operator. Director's Exhibits 7, 22; Hearing Transcript at 31-33; Claimant's Exhibit 3 at 1; Employer's Exhibits 1 at 2; 16 at 1.

[18] If claimant fails to establish total disability, an essential element of entitlement, an award of benefits is precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

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 has neither legal pneumoconiosis[19] nor clinical pneumoconiosis, 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).

After determining that claimant established the existence of clinical pneumoconiosis by chest x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that claimant is totally disabled and thus invoked the Section 411(c)(4) presumption. Then, under the heading "Cause of Total Disability," the administrative law judge quoted the "substantially contributing cause" standard under which a claimant must establish disability causation under 20 C.F.R. §718.204(c)(1) when proceeding without the benefit of the Section 411(c)(4) presumption. Additionally, the administrative law judge stated that employer could rebut the presumption by establishing either that claimant does not have pneumoconiosis, or that his disability does not arise out of coal mine employment. The administrative law judge then stated that, "[a]s the issue of whether [claimant] ha[s] coal workers' pneumoconiosis was determined . . . the single issue to be determined is whether [c]laimant's total disability arose from his coal workers' pneumoconiosis due to his past coal mine employment." Decision and Order at 20.

Because Dr. Fino did not diagnose claimant with clinical pneumoconiosis, contrary to the administrative law judge's finding that claimant established clinical pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1), the administrative law judge discredited Dr. Fino's opinion that claimant's total disability is due solely to myasthenia gravis. The administrative law judge further found that Dr. Fino's opinion was not persuasive because Dr. Fino did not cite medical literature to support his opinion. The administrative law judge therefore found that employer failed to

[19] "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).

rebut the presumption that "coal workers' pneumoconiosis is a substantially contributing cause" of claimant's total disability.[20] Decision and Order at 22.

We agree with employer that the administrative law judge erred in failing to properly address whether employer disproved the existence of pneumoconiosis before determining whether employer disproved the presumed fact of disability causation. Before considering whether employer has established that no part of claimant's total respiratory disability is caused by pneumoconiosis, an administrative law judge must first determine whether employer has established that claimant does not suffer from legal pneumoconiosis and clinical pneumoconiosis, as defined in 20 C.F.R. §718.201(a)(2), (b). *See* 20 C.F.R. §718.305(d)(1)(i); *Griffith v. Terry Eagle Coal Co.* BLR , BRB No. 16-0587 BLA (Sept. 6, 2017)(pub.). Here, the administrative law judge failed to make a proper finding on the existence of clinical pneumoconiosis, with the burden of proof on employer to disprove the disease.[21] Further, the administrative law judge should have determined whether employer established that claimant does not have legal pneumoconiosis, by establishing that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

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[20] The administrative law judge also considered, and discounted, the opinions of Drs. Johnson and Green, but noted that they did not support employer's rebuttal burden. Decision and Order at 22-23.

[21] Moreover, we agree with employer that the administrative law judge did not properly analyze the evidence regarding clinical pneumoconiosis. At Section 718.202(a)(1), the administrative law judge summarized ten readings of five x-rays (six positive and four negative readings), summarized the readers' radiological qualifications, and found that the "totality of the evidence" established clinical pneumoconiosis because a "majority of the readings were positive . . . ." Decision and Order at 10. The administrative law judge erred in relying on a mere count of the positive readings, and failed to explain how he considered the individual x-rays and factored in the differences in the physicians' radiological qualifications. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992) (holding that it is error for an administrative law judge to rely on a head count of the physicians providing assessments, rather than on a qualitative analysis of their opinions); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 25 BLR 2-779 (4th Cir. 2016). As employer notes, one of the positive readings the administrative law judge credited was from a physician whose radiological qualifications are unknown. Decision and Order at 10; Claimant's Exhibit 1. Further, the administrative law judge did not consider the other evidence of record, including the digital x-ray and medical opinion evidence regarding the existence of clinical pneumoconiosis in his rebuttal analysis.

Therefore, we vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. If, on remand, claimant again invokes the Section 411(c)(4) presumption, the administrative law judge is instructed to begin his rebuttal analysis by considering whether employer disproved the existence of legal pneumoconiosis by establishing that claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b); 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). Similarly, the administrative law judge must determine whether employer has established that claimant does not have clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich,* 25 BLR at 1-159.

If the administrative law judge finds that employer has met its burden to disprove the existence of both legal and clinical pneumoconiosis by a preponderance of the evidence, 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. However, if employer fails to establish that claimant has neither legal nor clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must then determine whether employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) by establishing that "no part of [claimant's] total disability was caused by pneumoconiosis as defined in [Section] 718.201." 20 C.F.R. §718.305(d)(1)(ii); *Minich*, 25 BLR at 1-159.

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

JONATHAN ROLFE
Administrative Appeals Judge