U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0021 BLA
and 18-0023 BLA

BETTY SUE HAYNES (o/b/o and Widow of ALBERT L. HAYNES) Claimant-Respondent v. GOOD COAL COMPANY, INCORPORATED and AMERICAN INTERNATIONAL SOUTH/CHARTIS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/18/2019 DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Incorporated), Barbourville, Kentucky, for claimant.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2012-BLA-05747 and 2012-BLA-05843) of Administrative Law Judge Daniel F. Solomon rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on May 9, 2011 and a survivor's claim filed on July 27, 2011.[1] This case is before the Board for the second time.

In the initial decision in the miner's claim, Administrative Law Judge Christine L. Kirby credited the miner with twenty-four years of underground coal mine employment, based on the parties' stipulation, but found that the new evidence did not establish total disability at 20 C.F.R. §718.204(b)(2). Judge Kirby therefore found that claimant did not establish a change in the applicable condition of entitlement at 20 C.F.R. §725.309,[2] and was not entitled to the presumption of total disability due to pneumoconiosis at Section

[1] Claimant is the widow of the miner, who died on June 5, 2011, while his second claim was pending. Director's Exhibits 9, 25. The miner filed his prior claim on September 27, 2004, which was denied by the district director on April 20, 2005, because he did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant is pursuing the miner's claim on behalf of his estate, as well as her survivor's claim. Director's Exhibit 19.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the miner's initial claim was denied for failure to establish total disability, claimant is required to establish this element in order for the miner's subsequent claim to be considered on the merits.

411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Consequently, Judge Kirby denied benefits in the miner's claim.

On appeal, the Board affirmed, as unchallenged, Judge Kirby's findings that the miner had twenty-four years of qualifying coal mine employment and that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). The Board vacated, however, her finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) or a change in the applicable condition of entitlement. Accordingly, the Board remanded the case for the administrative law judge to reconsider whether claimant established total disability, and thus invoked the Section 411(c)(4) presumption and established a change in the applicable condition of entitlement.

In the survivor's claim, the Board affirmed, as unchallenged, Judge Kirby's findings that claimant did not establish that the miner had pneumoconiosis at 20 C.F.R. §718.202(a) or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(b). The Board instructed Judge Kirby that if she determined that claimant is not entitled to the Section 411(c)(4) presumption on remand, she may reinstate her denial of benefits in the survivor's claim. The Board further instructed Judge Kirby that if she awarded benefits in the miner's claim, claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4] *Haynes v. Good Coal Co*., BRB Nos. 16-0069 BLA and 16-0070 BLA (Nov. 29, 2016) (unpub.).

On remand, due to Judge Kirby's unavailability, the case was reassigned, without objection, to Administrative Law Judge Daniel F. Solomon (the administrative law judge). In a Decision and Order on Remand, the administrative law judge found that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing invocation of the Section 411(c)(4) presumption and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption and awarded benefits. Having awarded

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

[4] Under Section 422(*l*), a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-200 (2010).

benefits in the miner's claim, the administrative law judge determined that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(*l*).

In the present appeal in the miner's claim, employer argues that the administrative law judge erred in finding that claimant established total disability by the medical opinion evidence and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption, and in awarding survivor's benefits pursuant to Section 422(*l*). Claimant responds in support of the award of benefits in both claims. The Director, Office of Workers' Compensation Programs, did not file a response brief in either appeal.[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.[6] 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).

[5] On July 17, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge, based on the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. The Director, Office of Workers' Compensation Programs (the Director), responds that employer forfeited this argument by failing to raise it in its opening brief. Employer filed a reply brief in support of its position. We agree with the Director. Because employer first raised its Appointments Clause argument seven months after filing its opening brief in support of its petition for review, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Island Creek Coal Co. v. Wilkerson*, F.3d , No. 18-3147, 2018 WL 6301617 (6th Cir. Dec. 3, 2018) (any challenge to a district court or administrative decision must be raised in the opening brief); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

Miner's Claim

Invocation of the Section 411(c)(4) Presumption – Total Disability

In the absence of contrary probative evidence, a miner's total disability is established by pulmonary function studies, arterial blood-gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). If the administrative law judge finds that total disability has been established by one or more types of evidence, he must weigh the evidence supportive of a finding of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Acknowledging that Judge Kirby determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), findings which the Board affirmed, the administrative law judge considered whether the medical opinions establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 5-13. The administrative law judge determined that the miner's usual coal mine employment required moderate physical exertion[7] and reviewed the opinions of Drs. Day, Lee, Broudy, and Westerfield. Decision and Order on Remand at 7-10; Director's Exhibit 10; Claimant's Exhibits 1, 2, 5, 8, 9; Employer's Exhibits 1, 2, 9, 10.

Dr. Day, the miner's family physician, ordered home oxygen for the miner in 2010, noting that the miner complained of "smothering" and "shortness of breath." Director's Exhibit 26. Dr. Day concluded that the miner was totally disabled from working due to his lung cancer with marked scarring in the lung, and that while the miner was chronically ill from other problems, his "lung problem certainly disabled him well prior to his death." Claimant's Exhibits 2, 9. Dr. Lee, the oncologist who treated the miner for his lung cancer for one year prior to his death in 2011, described the miner's condition at hospice care in 2011 as "quite poor," and opined that the miner was disabled due to his pulmonary disease, and was unable to travel outside of his house. Claimant's Exhibits 1, 5, 8. Dr. Broudy

[7] The administrative law judge considered the testimony of the miner and claimant, and the miner's employment history forms, noting that the miner operated equipment prior to becoming a foreman in 1978. Taking judicial notice of the *Dictionary of Occupational Titles*, the administrative law judge determined that the miner's usual coal mine work required moderate physical exertion. Decision and Order on Remand at 6-7, 11; Director's Exhibit 1; Hearing Transcript at 10-11. This finding is affirmed, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

performed a records review on March 6, 2013 and diagnosed moderate restriction based on the miner's 2010 pulmonary function study. Employer's Exhibits 1, 9 at 16, 19. During his deposition, Dr. Broudy testified that the miner's lung function started to decline "sometime after 2004," and that prior to his death, the miner was "disabled by lung cancer that involved his lungs and other parts of his body." Employer's Exhibit 9 at 16, 19. Dr. Westerfield performed a records review on March 18, 2013, and found a decline in the miner's pulmonary function between 2004 and 2010, and subsequently testified that at the time of the 2010 pulmonary function study, the miner was disabled from a pulmonary standpoint with respect to his ability to perform his work as a miner. Employer's Exhibit 10 at 18.

Considering the exertional requirements of the miner's job, the physicians' opinions, and the miner's treatment records,[8] the administrative law judge credited all four opinions to find that the medical opinion evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 14. Employer contends that the administrative law judge erred in crediting the medical opinions, as no physician, including its medical experts, provided a sufficiently reasoned opinion to support a finding of a totally disabling respiratory impairment. Employer's Brief at 12-21 (unpaginated).

Contrary to employer's assertions, we see no error in the administrative law judge's finding that the miner suffered from a totally disabling respiratory impairment prior to his death. The administrative law judge considered that Drs. Day, Lee, Broudy, and Westerfield all indicated that the miner's pulmonary function declined to the point that he was totally disabled. Decision and Order at 13. The administrative law judge accurately determined that the doctors' opinions were supported by claimant's testimony, and Dr. Day's report noting that the miner was prescribed oxygen four months before his death because he was experiencing "smothering" and "shortness of breath," and was unable to leave his home. Decision and Order at 12; Hearing Transcript at 14, 17; Director's Exhibit 26; Claimant's Exhibit 5. Noting that the miner's coal mine work required him to perform medium labor, the administrative law judge rationally determined that the evidence supports a finding that the miner's respiratory impairment prevented him from performing his last coal mine job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000); *Poole v. Freeman Mining Co*, 897 F.2d 888, 894 (7th Cir. 1990) (a medical opinion may support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is unable to do his last coal mine

[8] The record contains the miner's treatment and hospital records from 2009 through 2011 regarding treatment for lung cancer and a brain tumor. Director's Exhibits 12, 26, 27, 28, 29.

job); *see also Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (Table), 1996 WL 13850, at *2 (4th Cir. Jan. 12, 1996) (holding that the inquiry at total disability is the existence of respiratory impairment, not its etiology, and finding that where a miner died of respiratory insufficiency due to metastatic lung cancer "[t]here is no conceivable way to find that this miner did not have a totally disabling respiratory condition"). We therefore affirm the administrative law judge's finding that claimant established the miner's total disability at 20 C.F.R. §718.204(b)(2)(iv).[9] We further affirm the administrative law judge's conclusion that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

In light of our affirmance of the findings that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[10] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal under either method.

[9] Consequently, we decline to address employer's argument that the administrative law judge improperly credited the opinions of Drs. Day and Lee on the basis of their status as treating physicians. Employer's Brief at 12-17 (unpaginated).

[10] Clinical pneumoconiosis is defined as "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

In finding that employer failed to disprove clinical pneumoconiosis, the administrative law judge considered four interpretations of two analog x-rays dated June 29, 2009 and March 26, 2010, as well as two digital x-rays dated July 14, 2010 and November 30, 2010. Dr. Miller, dually qualified as a B reader and Board-certified radiologist, interpreted the June 29, 2009 x-ray as positive for pneumoconiosis, while Dr. Tarver, also dually qualified, read it as negative. Director's Exhibit 11; Claimant's Exhibit 4; Employer's Exhibit 5. Dr. Alexander, a dually-qualified radiologist, interpreted the March 26, 2010 x-ray as positive, while Dr. Tarver read it as negative. Director's Exhibit 11; Claimant's Exhibit 4; Employer's Exhibit 6. The July 14, 2010 and November 30, 2010 digital x-rays were read as negative by Dr. Shipley, who is a dually-qualified radiologist. Employer's Exhibits 3, 4.

Noting that all of the physicians are equally qualified as B readers and Board-certified radiologists, and according less weight to Dr. Shipley's interpretations as based on an incorrect standard requiring the appearance of rounded opacities in the upper lung zones, the administrative law judge found the x-ray evidence to be in equipoise. He therefore found it insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. Decision and Order on Remand at 17-18.

Employer argues that the administrative law judge improperly discredited Dr. Shipley's negative digital x-ray readings, and therefore erred in concluding that the x-ray evidence is in equipoise.[11] Employer's Brief at 21-23 (unpaginated). We disagree.

[11] Dr. Shipley also reviewed a CT scan dated February 28, 2011, and determined, in pertinent part:

> The lung windows show non-visualization of the right lower lobe superior segment and secretions filling some of the basilar segments of the left lower lobe. Otherwise, the central airways are patent. The left lung is clear, with no upper zone predominant small or large rounded opacities to suggest coal worker's [sic] pneumoconiosis. Mild centrilobular emphysema is present in both upper zones.

Employer's Exhibit 7. The administrative law judge discounted Dr. Shipley's interpretation of the CT scan for the same reason he discounted Dr. Shipley's interpretation of the digital x-rays. Decision and Order at 18. Because employer raises no specific allegations of error with respect to the CT scan evidence other than its general assertion that there is "no substantial basis for discrediting the reports of Dr. Shipley," we affirm the administrative law judge's determination to accord little weight to the CT scan evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director,*

When reading the July 14, 2010 digital x-ray, Dr. Shipley noted a "soft tissue mass at the right apex," a "band of consolidation in the right mid zone" and that "[t]here are no upper zone predominant small or large rounded opacities to suggest coal workers' pneumoconiosis." Employer's Exhibit 3. With respect to the November 30, 2010 digital x-ray, he noted that "the mass at the right apex is less apparent" than it was on July 14, 2010, and that "there is now patchy consolidation primarily in the right upper zone, but also in the right lower zone," and that "[t]he left lung is clear, with no upper zone predominant small or large rounded opacities to suggest coal workers' pneumoconiosis." Employer's Exhibit 4. In both instances, Dr. Shipley concluded that the findings were not consistent with coal workers' pneumoconiosis. Employer's Exhibits 3, 4.

In his review of the x-ray evidence, the administrative law judge accurately observed that the dually-qualified physicians who diagnosed clinical pneumoconiosis identified round and/or irregular-shaped opacities of pneumoconiosis in all zones of both lungs.[12] Decision and Order on Remand at 17-18. Noting that the regulations do not require primarily rounded opacities in the upper lung zones to support a finding of pneumoconiosis, the administrative law judge determined that Dr. Shipley applied an improper standard in focusing on the lack of rounded opacities in the upper zones.[13] Decision and Order on Remand at 18, *citing* 20 C.F.R. §718.102(d). It is the administrative law judge's duty as fact-finder to weigh the evidence, draw appropriate inferences, and determine credibility and the reviewing authority must defer to the administrative law judge's assessment, unless it is plainly irrational. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511 (6th Cir. 2002). In this case, the administrative law judge rationally determined that Dr. Shipley's opinion that the digital x-rays were negative for pneumoconiosis was entitled to little weight, in light of the doctor's specific comments on both readings regarding the lack of rounded opacities in the upper lung zones. 20 C.F.R. 718.102(d); *see Tenn. Consol.*

OWCP, 10 BLR 1-119, 1-120-21 (1987) (holding that unless the party identifies errors and briefs its allegations of error in terms of the relevant law and evidence, the Board has no basis for review).

[12] Dr. Alexander read the March 26, 2010 x-ray and found opacities (p/p) in the upper and middle zones of both lungs. Claimant's Exhibit 3. Dr. Miller read the June 29, 2009 x-ray and found small predominantly irregular opacities (t/p) and secondary small round opacities in all zones of both lungs. Claimant's Exhibit 4. Both doctors opined that these findings are consistent with pneumoconiosis.

[13] Employer acknowledges that there is no requirement that a positive x-ray be based on a finding of upper zone-predominant rounded opacities. Employer's Brief at 22 (unpaginated).

Coal Co. v. Crisp, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); Decision and Order on Remand at 18. We therefore affirm the administrative law judge's determination to accord less weight to Dr. Shipley's digital x-ray readings and his finding that the x-ray evidence is in equipoise, based on an equal number of positive and negative readings of the analog x-rays by equally-qualified radiologists.[14] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281 (1994); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

The administrative law judge next considered the medical opinions of Drs. Broudy and Westerfield, who opined that the miner did not have clinical pneumoconiosis. Decision and Order on Remand at 18; Employer's Exhibits 1, 2, 9, 10. He discredited their opinions on the ground that the physicians considered the x-ray evidence to be negative for clinical pneumoconiosis, contrary to the administrative law judge's finding that the evidence is inconclusive. Decision and Order on Remand at 18. As employer does not allege specific error in the administrative law judge's credibility determination, it is affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because we affirm the administrative law judge's discrediting of the opinions of Drs. Broudy and Westerfield, the only opinions supportive of a finding that the miner did not have clinical pneumoconiosis, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have clinical pneumoconiosis. Thus, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by proving that the miner did not have pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i); *see*

[14] We note that in claims such as this one, filed before May 19, 2014, readings of digital x-rays performed before that date must be considered as "other medical evidence" pursuant to 20 C.F.R. §718.107, which requires the party submitting the digital x-ray to establish that it is "medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits." 20 C.F.R. §718.107(b). The administrative law judge's error in weighing the digital x-rays with the analog x-rays at 20 C.F.R. §718.202(a)(1) and failing to determine whether employer established their medical acceptability is harmless, however, as he provided a valid reason for discounting Dr. Shipley's negative readings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). For claims filed after May 19, 2014, the Department of Labor adopted quality standards for digital x-rays, with the intent of placing them on "equal footing" with analog x-rays. 79 Fed. Reg. 21,606 (Apr. 17, 2014); Black Lung Benefits Act Bulletin Nos. 14-08 (June 2, 2014), 14-11 (Sept. 29, 2014).

[15] Because employer is required to rebut the existence of both legal and clinical pneumoconiosis, the administrative law judge's conclusion that employer failed to

Morrison v. Tenn. Consol. Coal Co., 644 F.3d 473, 480 (6th Cir. 2011); Decision and Order on Remand at 18.

Disability Causation

The administrative law judge next addressed whether employer rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order on Remand at 18-19. The administrative law judge rationally discounted the disability causation opinions of Drs. Broudy and Westerfield as neither physician diagnosed the miner with clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order on Remand at 19. Because the administrative law judge permissibly discredited the only opinions supportive of employer's burden, we affirm his determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii).[16] We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and we affirm the award of benefits in the miner's claim. 30 U.S.C. §921(c)(4) (2012).

Survivor's Claim

Finally, the administrative law judge found that claimant satisfied her burden to establish each fact necessary for entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order on Remand at 20. Because we have affirmed the award of benefits in the miner's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits

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disprove the presumed existence of clinical pneumoconiosis precludes a finding of rebuttal at 20 C.F.R. §718.305(d)(1)(i).

[16] Employer's arguments that the opinions of Drs. Broudy and Westerfield establish that no part of the miner's totally disabling impairment was caused by legal pneumoconiosis are unavailing. Employer's Brief at 24-30. Employer's failure to meet the "no part" standard set forth in 20 C.F.R. §718.305(d)(1)(ii) with respect to clinical pneumoconiosis precludes a finding of rebuttal thereunder.

pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits in the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge