U.S. Department of Labor

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

BRB No. 18-0045 BLA

JOSHUA HARMON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COAL CARRIERS, INCORPORATED	)	DATE ISSUED: 01/10/2019
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, 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 (2013-BLA-0555) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U. S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on March 27, 2012, and is before the Board for the second time.[1]

Pursuant to employer's previous appeal, the Board held that Administrative Law Judge Pamela J. Lakes failed to explain her rationale for relying on the lower table height in Appendix B to 20 C.F.R. Part 718 to find that claimant's April 15, 2014 pulmonary function study is non-qualifying for total disability.[2] The Board also vacated Judge Lakes' finding that the medical opinion evidence failed to establish total disability, as she improperly analyzed Dr. Zaldivar's opinion by conflating the issues of total disability and disability causation. The Board therefore remanded the case for her to reevaluate the pulmonary function studies and medical opinions, and to reconsider whether claimant established that he is totally disabled and 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).[3] *Harmon v. Coal Carriers, Inc*., BRB No. 16-0127 BLA (Dec. 27, 2016) (unpub.).

On remand, the case was reassigned, without objection, to Administrative Law Judge Daniel L. Solomon (the administrative law judge). In his Decision and Order on Remand, which is the subject of the current appeal, the administrative law judge adopted

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[1] This is claimant's eighth claim for benefits. His most recent prior claim, filed on March 1, 2006, was denied on October 24, 2006 by the district director, who found that he did not establish any element of entitlement. Director's Exhibit 7. Claimant took no further action on that claim.

[2] A pulmonary function study is "qualifying" for total disability if it shows an FEV1 value that is equal to or less than those listed in Table B1, Appendix B, 20 C.F.R. Part 718, "for an individual of the miner's age, sex, and height," and also shows either: an FVC or an MVV value that is equal to or less than those listed in Tables B3 and B5 "for an individual of the miner's age, sex, and height;" or an FEV1/FVC ratio of less than 55 percent. 20 C.F.R. §718.204(b)(2)(i). A pulmonary function study is "non-qualifying" if the values are in excess of the relevant table values. *Id.*

[3] Pursuant to Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he 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 also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Judge Lakes' finding of twenty years of underground coal mine employment or employment in conditions substantially similar to those in an underground mine. He further found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thus invoking the Section 411(c)(4) presumption and establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] The administrative law judge found that employer did not rebut the presumption and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), filed a response brief in this 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).

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[4] 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). As previously indicated, claimant's most recent prior claim was denied for failure to establish any element of entitlement. Consequently, to obtain review of the merits of his claim, claimant had to establish one element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order on Remand at 1; Director's Exhibit 10.

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

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[7] 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pulmonary Function Studies

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the three new pulmonary function studies submitted in this claim, which were conducted on June 8, 2012, March 6, 2013, and April 15, 2014. Decision and Order on Remand at 6-9; Director's Exhibit 18; Claimant's Exhibit 7; Employer's Exhibit 1. He adopted Judge Lakes' permissible determination that claimant's average height is 65.8 inches for purposes of applying the table values at 20 C.F.R. Part 718, Appendix B.[8] *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order on Remand at 2, 9. Acknowledging that claimant's height falls between the heights of 65.7 inches and 66.1 inches in the applicable tables, the administrative law judge agreed with the Director's position that using the closest greater height is a reasonable means of resolving the regulatory ambiguity. Decision and Order on Remand at 9. Thus, applying the height of 66.1 inches and claimant's corresponding age on the date of each study, the administrative law judge found that the June 8, 2012 study administered by Dr. Rasmussen and the April 15, 2014 study administered by Dr. Almatari were qualifying, while the March 6, 2013 study administered

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[7] The administrative law judge reiterated Judge Lakes' previous findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order on Remand at 9.

[8] If there are substantial differences in the recorded heights among the pulmonary function studies, the administrative law judge must make a factual finding to determine the miner's actual height. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Claimant's recorded height was 65 inches for the June 8, 2012 study, 66.5 inches for the March 6, 2013 study, and 66 inches for the April 15, 2014 study. Director's Exhibit 18; Claimant's Exhibit 7; Employer's Exhibit 1.

by Dr. Zaldivar was non-qualifying.[9] *Id.* The administrative law judge therefore concluded that "the preponderance of the pulmonary function studies is qualifying" and establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.* at 12-13.

Employer does not contest that the June 8, 2012 and the April 15, 2014 studies are valid and qualifying. Rather, employer argues that the administrative law judge erred in weighing the pulmonary function study evidence which it believes is, at best, in equipoise. Employer's sole argument in this regard is that the administrative law judge failed to consider a fourth, non-qualifying study conducted on May 14, 2012.[10] Employer's Brief at 5-9; Director's Exhibit 18.

The study in question was conducted by Dr. Rasmussen as part of claimant's Department of Labor (DOL)-sponsored pulmonary evaluation. Director's Exhibit 18. Because claimant had "a poor ventilatory performance,"[11] however, Dr. Rasmussen concluded that a second pulmonary function study was required. Director's Exhibit 18. He thus administered a repeat study on June 8, 2012, which was qualifying for total disability.

Contrary to employer's argument, we see no error in the administrative law judge's omission of the May 14, 2012 study from consideration. A DOL-sponsored pulmonary evaluation is required to include the results of "a pulmonary function study." 20 C.F.R. §718.406(a). If the initial study is deficient due to "a lack of effort on the part of the miner," he is entitled to "one additional opportunity to produce a satisfactory result." 20 C.F.R. §725.406(c). Dr. Rasmussen's decision to provide claimant with a second opportunity to satisfactorily perform his DOL-sponsored pulmonary function study on June 8, 2012,

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[9] Drs. Rasmussen and Zaldivar conducted studies both before and after the administration of a bronchodilator, while Dr. Almatari did not administer a bronchodilator. Director's Exhibit 18; Claimant's Exhibit 7; Employer's Exhibit 1.

[10] At the hearing, Director's Exhibit 18, which contains Dr. Rasmussen's report of his examination of claimant, was admitted without objection. Hearing Transcript at 6. Although the pulmonary function studies dated May 14, 2012 and June 8, 2012 are both included in Director's Exhibit 18, no party designated the May 14, 2012 study as either affirmative or rebuttal evidence under 20 C.F.R. §725.414(a).

[11] The section of the pulmonary function study report labeled "Comments," indicates: "[P]atient had poor effort throughout [the] test;" he was "unable to repeat effort on DLCO;" and "multiple attempts were made to achieve reproducible spirometry." Director's Exhibit 18. Dr. Rasmussen's signature appears below the section labeled "Computerized Interpretation," in which claimant's effort is described as "poor." *Id.*

based on his poor performance on the May 14, 2012 study, is consistent with the regulatory requirements and employer has set forth no argument that establishes otherwise.[12] Furthermore, neither party designated the May 14, 2012 study as part of its affirmative or rebuttal evidence.[13] *See* Claimant's and Employer's Evidence Summary Forms. Thus, even if the results of the May 14, 2012 pulmonary function study could be considered valid, employer has not established error in the administrative law judge' failure to consider evidence that was not designated by the parties. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-47 (2006) (holding that it is the duty of the parties to designate their evidence in accordance with the evidentiary limitations at 20 C.F.R. §725.414); *Smith v. Martin County Coal Corp.,* 23 BLR 1-69, 1-73-74 (2004).

Based on our determination that the administrative law judge permissibly omitted from consideration the May 14, 2012 study, and employer's failure to otherwise challenge his finding that a preponderance of the June 8, 2012, March 6, 2013, and April 15, 2014 studies are valid and qualifying,[14] we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Medical Opinions

The administrative law judge next considered whether the medical opinions of Drs. Rasmussen and Zaldivar support a finding of total disability under 20 C.F.R.

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[12] Although employer argues that Dr. Rasmussen "did not overtly invalidate" the study, Employer's Brief at 6, employer has consistently noted throughout the proceedings Dr. Rasmussen's opinion that claimant gave "very poor effort throughout the [May 14, 2012] test," and that Dr. Rasmussen re-tested claimant on June 8, 2012 "because of the poor performance." *See*, *e.g.*, Employer's Response Brief in *Harmon v. Coal Carriers, Inc*., BRB No. 16-0127 BLA, at 4-5; Employer's Revised/Supplemental Brief on Remand at 9-10.

[13] Claimant designated the June 8, 2012, March 6, 2013, and April 15, 2014 studies, while employer designated only the March 6, 2013 study. *See* Claimant's and Employer's Evidence Summary Forms. In her initial decision, Judge Lakes limited her consideration to the three studies designated by the parties, as did the Board when the matter was first appealed. There is no indication in the record that employer, on remand, sought to amend its Evidence Summary Form to designate the May 14, 2012 study as evidence.

[14] To the extent employer argues that claimant cannot be disabled because the results of his pulmonary function studies are variable, that argument is rejected. *Greer v. Director, OWCP*, 940 F.2d 88 (4th Cir. 1991) (rejecting argument that higher pulmonary function study values are always more reliable because "on any given day, it is possible to do better,

§718.204(b)(2)(iv). Decision and Order on Remand at 10-12. He noted that to make this determination, he was required to render a finding as to the exertional requirements of claimant's usual coal mine work and compare them to the physicians' assessments of claimant's impairment. *Id*. at 10. Accordingly, he reviewed claimant's DOL Form CM-913 (Description of Coal Mine Work and Other Employment) submitted with the current claim, claimant's hearing testimony, and Dr. Rasmussen's reports. *Id*.

On Form CM-913, claimant reported in section 5 that he last worked as a coal truck driver, describing his duties as follows: "Drove a coal truck. Sometimes I have to load the truck with an end loader. It was extremely dusty. I had to climb steps to get in the truck and to get in the end loader. I did maint[en]ance on the truck replacing and repairing parts and changed tires." Director's Exhibit 11. In section 7 of the form, which asks claimant to describe the exertional requirements of his last job, he reported that he sat ten to twelve hours per day, stood for "0" hours, crawled for "0" hours, and did no lifting or carrying. *Id*. At the hearing, claimant responded "yes" when asked by employer's counsel whether he sat in the coal truck while it was loaded and whether he would "just drive" the truck and "unload it from inside the truck at the tipple." Hearing Transcript at 25. Dr. Rasmussen, who examined claimant on May 14, 2012, indicated in his initial report that claimant "was a truck driver hauling coal mostly off road. When he went on road, he climbed up to place a tarp and level off the load. He helped change flats." Director's Exhibit 18. In a supplemental report dated March 21, 2015, Dr. Rasmussen expanded on his description, stating: "In addition to actually operating his vehicle, [claimant] was required to climb the rig to place the tarp on. This required considerable effort to get to the top of his coal truck bed. He also was required to change flats on the road trips, which required considerable heavy manual labor." Director's Exhibit 39. Accepting Dr. Rasmussen's description as accurate and taking judicial notice of the *Dictionary of Occupational Titles*,[15] the

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and indeed to exert more effort, than one's typical condition would permit"). Furthermore, employer's expert, Dr. Zaldivar, was aware of the qualifying results from claimant's most recent study, conducted on April 15, 2014, but did not discuss the variability of those results as compared to the other studies or offer an opinion as to whether the study's results rendered claimant totally disabled. Employer's Exhibit 9.

[15] The administrative law judge noted that the *Dictionary of Occupational Titles* describes heavy work as greater than medium work, which requires exerting 20 to 50 pounds of force occasionally, and/or ten to twenty-five pounds of force frequently, and/or greater than negligible up to ten pounds of force constantly to move objects. Decision and Order on Remand at 10.

administrative law judge determined that claimant's last coal mine work as a truck driver required heavy labor. Decision and Order on Remand at 10.

The administrative law judge then credited Dr. Rasmussen's opinion diagnosing a totally disabling respiratory impairment and discredited Dr. Zaldivar's contrary opinion because although Dr. Zaldivar found no total disability, he implied that claimant cannot function due to asthma.[16] Decision and Order on Remand at 10-11; Director's Exhibits 18, 39; Employer's Exhibits 1, 9. The administrative law judge therefore found that claimant established total disability based on the medical opinion evidence. Decision and Order on Remand at 11.

Employer initially contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find that claimant's last coal mine job required heavy manual labor. Employer's Brief at 12-14. Employer maintains that Dr. Rasmussen's characterization of claimant's coal mine work is contrary to claimant's own description of the physical requirements of his last job. Employer argues, therefore, that the administrative law judge erred in crediting Dr. Rasmussen's diagnosis of a totally disabling impairment. These contentions are without merit.

Although employer is correct that in section 7 of Form CM-913, claimant filled in blanks indicating that he did no standing, crawling, lifting or carrying, claimant more fully explained his duties elsewhere on Form CM-913. In his written description of his last coal mine job in section 5, claimant noted that he had to climb to enter the cab of the truck and the end loader, and that he replaced and repaired parts on the truck, and changed tires. Director's Exhibit 11. Dr. Rasmussen's description of claimant's job duties, as reported by claimant, corroborates the details claimant provided on Form CM-913. Director's Exhibits 18, 39. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine the credibility of the evidence. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017). We therefore affirm his finding that claimant established that his work as a truck driver required heavy manual labor, as it is rational and supported by substantial evidence. *See Compton v. Island Creek Coal Co.*,

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[16] Dr. Rasmussen diagnosed a moderately severe, irreversible restrictive and obstructive ventilatory impairment based on the June 8, 2012 pulmonary function study, and stated that claimant does not retain the pulmonary capacity to perform the heavy manual labor required for his last mining job as a truck driver. Director's Exhibits 18, 39. Dr. Zaldivar diagnosed moderate restriction and mild irreversible obstruction due to asthma. Employer's Exhibits 1, 9. He opined that claimant retains the pulmonary capacity to perform his coal mining work but also observed that "intensive" use of bronchodilators and quitting smoking could restore the deficits in his ventilatory capacity. *Id.*

211 F.3d 203, 207-208 (4th Cir. 2000); Decision and Order on Remand at 10. Because employer raises no further arguments regarding the credibility of Dr. Rasmussen's opinion,[17] we affirm the administrative law judge's determination that Dr. Rasmussen's opinion is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order on Remand at 12.

We also reject employer's contention that the administrative law judge erred in discrediting Dr. Zaldivar's opinion on the ground that it is internally inconsistent. Employer's Brief at 14-16. In rejecting Dr. Zaldivar's opinion, the administrative law judge specifically reviewed Dr. Zaldivar's statements that:

> As the lungs are damaged by repeated episodes of asthma which are called exacerbations, there is remodeling of the lungs with loss of airways and loss of function.
>
> …
>
> [Claimant's] lungs . . . are damaged by the lifelong history of smoking and whether they will regain any pulmonary function as he takes his asthma medications is undetermined at this time.

Employer's Exhibit 1 at 5. Based on these statements, and noting that "asthma is competent to produce total disability," the administrative law judge found that Dr. Zaldivar indicated that claimant cannot function due to his asthma, while also stating that from a pulmonary perspective, claimant is able to perform his usual coal mine employment. Decision and Order on Remand at 11. Given the administrative law judge's role as fact-finder and Dr.

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[17] Because we have affirmed the administrative law judge's omission of the May 14, 2012 pulmonary function study from consideration, we decline to address employer's argument that the administrative law judge erred in failing to resolve a purported conflict between Dr. Rasmussen's characterization of claimant's effort on this study and the study he administered on June 8, 2012. Employer's Brief at 9-12. To the extent that employer raises an argument regarding Dr. Rasmussen's reliance on the June 8, 2012 study, we note that this study was not invalidated by any physician and Dr. Rasmussen did not state that the results are an unreliable indicator of claimant's actual pulmonary capacity. Director's Exhibits 18, 39. Thus, the fact that Dr. Rasmussen described claimant's effort as "relatively poor" did not preclude the administrative law judge from crediting Dr. Rasmussen's diagnosis of a totally disabling pulmonary impairment. *See Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111, 1-113 (1989) (holding that the Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge).

Zaldivar's statements, it was reasonable to interpret Dr. Zaldivar's opinion as internally inconsistent and not fully explained.[18] *See Compton*, 211 F.3d at 211; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997).

Therefore, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion was entitled to more weight than Dr. Zaldivar's opinion, and that claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Doss v. Director, OWCP*, 53 F.3d 654, 659 (4th Cir. 1995). We further affirm the administrative law judge's determination that when all of the relevant evidence is weighed together, claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 12-13.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; Decision and Order at 12-13, 17.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis, 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). As employer raises no challenge to the administrative law judge's determinations that it failed to establish rebuttal by either method, those findings are affirmed. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

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[18] As previously mentioned, in his supplemental reported dated May 20, 2015, Dr. Zaldivar summarized the qualifying results from claimant's April 15, 2014 pulmonary function study, and stated that the tracings "appear acceptable overall." Employer's Exhibit 9. He did not, however, address whether claimant is totally disabled based on the results of that study, but instead reiterated his earlier opinion that claimant has asthma unrelated to coal dust exposure. *Id*.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge