U.S. Department of Labor

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

BRB Nos. 15-0414 BLA
and 15-0428 BLA

FREIDA S. TAYLOR (Widow of and on behalf of FLOYD E. TAYLOR)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY/ PITTSTON COMPANY c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 07/18/2016
Self-Insured Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order on Reconsideration Awarding Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the January 28, 2015 Decision and Order Denying Benefits and the June 18, 2015 Decision and Order on Reconsideration Awarding Benefits of Administrative Law Judge Stephen R. Henley, rendered with respect to a miner's subsequent claim (2012-BLA-05097), filed on June 14, 2010, and a survivor's claim (2014-BLA-05421), filed on January 8, 2014, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] In his January 28, 2015 Decision and Order, the administrative law judge determined that claimant established that the miner had 28.75 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Based on those determinations and the filing dates of the claims, the administrative law judge found that claimant invoked the rebuttable presumptions that the miner was totally disabled due to pneumoconiosis, and that his death was due to pneumoconiosis, under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found, however, that employer rebutted each of the presumptions by establishing that the miner did not have pneumoconiosis. Accordingly, benefits were denied in the miner's claim and the survivor's claim.

On February 26, 2015, claimant filed a motion for reconsideration, arguing that the administrative law judge erred in failing to place the burden of proof on employer to disprove the existence of legal and clinical pneumoconiosis. In his Decision and Order on Reconsideration, the administrative law judge reweighed the evidence and determined that employer failed to disprove that the miner had clinical pneumoconiosis or establish that the miner's total disability was not due to pneumoconiosis. Accordingly, the administrative law judge found that employer failed to rebut the Section 411(c)(4)

[1] The miner filed an initial claim for benefits on July 20, 1999, which was denied by the district director for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The miner filed a second claim for benefits on August 20, 2008, which was denied by reason of abandonment. MC Director's Exhibit 2. The miner took no further action until filing the current subsequent claim on June 14, 2010. MC Director's Exhibit 4. The miner passed away on November 28, 2013, prior to the hearing before the administrative law judge on July 9, 2014. Survivor's Claim (SC) Director's Exhibit 5. Claimant, the surviving spouse of the miner, is acting on behalf of the miner's estate. Claimant filed her survivor's claim on January 8, 2014. SC Director's Exhibit 1.

[2] Pursuant to Section 411(c)(4) of the Act, a miner's total disability and/or death is presumed to be due to pneumoconiosis if 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 also suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

presumption, and he awarded benefits in the miner's claim. Additionally, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to 30 U.S.C. §932(*l*),[3] and awarded benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's weighing of the pulmonary function study and medical opinion evidence on the issue of total disability, and asserts that he erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge improperly weighed the evidence in finding that it did not rebut the presumption.[4] Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

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.[5] 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).

I. The Miner's Claim:

A. Invocation of the Section 411(c)(4) Presumption - Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies

[3] Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), is applicable to claims filed after January 1, 2005, that are pending on or after March 23, 2010. Under this section, 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*); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193 (2010).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had 28.75 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); January 28, 2015 Decision and Order at 6.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); MC Director's Exhibits 7, 8.

showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) the presence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concluding that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. *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).

In this case, the administrative law judge noted that the record contains five pulmonary function tests performed on October 19, 2010, May 11, 2011, August 23, 2012, January 14, 2013, and May 27, 2013. Decision and Order at 7. The administrative law judge found that the October 19, 2010 pulmonary function test, administered by Dr. Al-Khasawneh, and the May 11, 2011 pulmonary function test, administered by Dr. Castle, were each qualifying for total disability before the use of a bronchodilator, and non-qualifying after the use of a bronchodilator.[6] *Id.*; Miner's Claim (MC) Director's Exhibits 18, 19. He also determined that the August 23, 2012 pulmonary function test, administered by Dr. Fino, was non-qualifying, before and after use of a bronchodilator. Decision and Order at 7; MC Employer's Exhibit 38. Further, the administrative law judge found that the January 14, 2013 pulmonary function test, administered by Dr. Wolfe, and the May 27, 2013 pulmonary function test, administered by Dr. Agarwal, were qualifying for total disability, before and after use of a bronchodilator. Decision and Order at 7; MC Claimant's Exhibits 1, 2.

In determining the weight to accord the pulmonary function tests, the administrative law judge observed that "pre-bronchodilator values are the better indicator of [the miner's] condition as related to total disability." Decision and Order at 8. The administrative law judge found that while "three post-bronchodilator and one pre-bronchodilator" tests were non-qualifying, "the majority of [the miner's] values, including the most recent tests were qualifying." *Id*. Thus, the administrative law judge concluded that the pulmonary function study evidence established total disability under 20 C.F.R. §718.204(b)(2)(i). *Id*.

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

Next, the administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as each of the five arterial blood gas studies, dated October, 19, 2010, May 11, 2011, August 23, 2012, January 14, 2013, and May 27, 2013 was non-qualifying.[7] Decision and Order at 9; MC Director's Exhibits 18, 19; MC Employer's Exhibit 38; MC Claimant's Exhibits 1, 2. Furthermore, as there was no evidence in the record indicating that the miner had cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant was unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 9.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed four medical opinions. Decision and Order at 10-11. Dr. Al-Khasawneh examined the miner on October 19, 2010, and diagnosed a severe pulmonary impairment. MC Director's Exhibit 18. Dr. Al-Khasawneh stated that the miner "does not retain the pulmonary capacity to work as a coal miner. He is completely disabled and impaired from his last coal mine employment job." *Id*.

Dr. Agarwal examined the miner on May 27, 2013, and opined that he was "severely impaired" and totally disabled, as established by the pulmonary function study results that showed reductions in the FEV1, FVC, and diffusion capacity values. MC Claimant's Exhibit 2. Dr. Fino examined the miner on August 23, 2012 and opined that he had "disabling respiratory impairment due to scleroderma." MC Employer's Exhibit 38.

Dr. Castle examined the miner on May 5, 2011, and prepared a report dated June 1, 2011, wherein he opined that the miner was not totally disabled as a result of coal mine dust exposure. MC Director's Exhibit 19. During his deposition, Dr. Castle testified that the miner did not have a significant respiratory impairment at the time of the examination that would have prevented him from returning to his usual coal mine work. MC Employer's Exhibit 48 at 34.

After summarizing the medical opinion evidence, the administrative law judge observed that "factors to be considered in relying on a medical opinion include the reasoning employed by the physician and the physician's credentials." Decision and Order at 11. The administrative law judge noted that each of the physicians was Board-certified in pulmonary disease and, taking into consideration that three out of four of the Board-certified pulmonologists opined that the miner had a disabling pulmonary

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

impairment, he found that claimant established total disability by a preponderance of the medical opinion evidence. *Id*. at 10, 13. The administrative law judge stated:

> After considering all of the probative evidence, I find that the preponderance of the evidence establishes that [the miner] was totally disabled on a pulmonary or respiratory basis such that he could not return to his last and usual coal mine employment as a Belt Cleaner, at the time of his death. While all of the [the miner's] arterial blood gas exams produced non-qualifying values, the majority of [the miner's] pulmonary function tests produced qualifying values, and three board-certified doctors, providing medical opinions found that he was totally disabled from a pulmonary or respiratory standpoint. While [the miner] was unable to testify to the specific exertion requirements of his job, he described the requirements as having to carry 50-100 pounds on a varying basis, and all the physicians found him disabled from returning to work.

Id. at 13. Thus, the administrative law judge concluded that claimant satisfied her burden to establish that the miner was totally disabled, and invoked the Section 411(c)(4) presumption. *Id*.

Employer contends that the administrative law judge erred in relying on the May 27, 2013 pulmonary function test to find that claimant is totally disabled because its validity was questioned by Drs. Agarwal and Fino.[8] Although we agree that the administrative law judge did not properly address evidence concerning the validity of the May 27, 2013 pulmonary function test, we consider the administrative law judge's error to be harmless, as his finding of total disability is supported by a preponderance

[8] Dr. Agarwal stated that, "[o]n review of volume versus time curve, there appeared to be some delay in initial rise in the volume, suggesting submaximal effort and therefore underestimating FEV1." MC Claimant's Exhibit 2 at 3. During his August 14, 2014 deposition, Dr. Fino discussed the May 27, 2013 pulmonary function test and stated:

> I don't like the effort on this test. There was a lot of hesitancy and inconsistency on the flow volume loops indicating that [the miner] did not give a good effort and on the volume time curves the same. So I don't think that is a valid study.

MC Employer's Exhibit 49 at 22.

of the qualifying pre-bronchodilator tests.[9] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Excluding the May 27, 2013 pulmonary function test as invalid, but applying the administrative law judge's rationale to credit the pre-bronchodilator values, his finding of total disability is supported by three out of four qualifying pre-bronchodilator tests, including the next most recent test performed on January 14, 2013. MC Director's Exhibits 18, 19; MC Claimant's Exhibit 1.

Employer also argues that the administrative law judge failed to weigh the contrary probative evidence indicating that the abnormalities seen on the miner's pulmonary function tests were due to congestive heart failure and not a lung condition.[10] Employer's Brief at 6-7. Contrary to employer's contention, the proper inquiry at 20 C.F.R. §718.204(b)(2)(i) is whether the pulmonary function tests are qualifying for total disability under the regulatory criteria. 20 C.F.R. §718.204(a), (b). The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether rebuttal of the Section 411(c)(4) presumption has been established by evidence showing that the miner's respiratory or pulmonary disability was not due to pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(2). As the administrative law judge permissibly concluded that the weight of the pulmonary function tests is qualifying for total disability, we affirm the administrative law judge's finding of total disability under 20 C.F.R. §718.204(b)(2)(i). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 8.

With regard to the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), employer argues that the administrative law judge failed to properly consider Dr. Fino's opinion, and did not adequately explain the bases for his credibility findings under the

[9] The administrative law judge permissibly credited the pre-bronchodilator values in determining the issue of total disability. *See* 45 Fed. Reg. 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

[10] Dr. Fino opined that the "main cause of [the miner's] problem[s] in his pulmonary system is heart failure." Employer's Exhibit 49 at 34. Employer further relies on Dr. Castle's statement that the miner "had a respiratory impairment that was not related to intrinsic lung disease. He has some physiologic restriction due to severe and recurrent congestive heart failure." Employer's Brief at 7, *quotin*g Employer's Exhibit 48 at 34.

Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] We disagree.

The administrative law judge properly noted that Drs. Al-Khasawneh and Argawal specifically opined that the miner was totally disabled from returning to his last coal mine employment based on the results of the pulmonary function testing. Decision and Order at 11-12; MC Director's Exhibit 18; Claimant's Exhibit 2. The administrative law judge also correctly observed that Dr. Fino specifically diagnosed that the miner suffered from a "*disabling respiratory impairment* due to scleroderma" in his September 13, 2012 report. MC Employer's Exhibit 38 at 13. In his August 14, 2014 deposition, Dr. Fino stated that "the main cause of the problem in [the miner's] pulmonary system is heart failure and the main reason for that heart failure is mitral stenosis." Employer's Exhibit 49 at 31. In response to the question of whether the miner had a respiratory impairment prior to his death, Dr. Fino stated: "He did because he had a secondary effect on his lungs from his heart, but he had no primary lung disease resulting in a respiratory impairment." *Id*. at 30. When asked whether the miner was "disabled from performing his job as a coal miner from the effects on his lungs," Dr. Fino replied, "Yes." *Id*. at 33.

Based on his report and deposition testimony, the administrative law judge rationally summarized Dr. Fino's opinion as being "that [the miner's] non-pulmonary conditions caused his [disabling] pulmonary impairment." Decision and Order at 11; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the etiology of the miner's respiratory disability is not at issue under 20 C.F.R. §718.204(b), the administrative law judge correctly concluded that the opinions of Drs. Fino, Al-Khasawneh, and Agarwal support "a finding of total disability from a pulmonary or respiratory standpoint." Decision and Order at 13; 20 C.F.R. §718.204(a). Moreover, the administrative law judge permissibly found that Dr. Castle's opinion that the miner had no respiratory disability[12] was less persuasive and outweighed. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

Thus, we affirm the administrative law judge's finding that claimant established total disability by a preponderance of the medical opinion evidence. 20 C.F.R.

[11] The Administrative Procedure Act provides that every adjudicatory decision must include 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), as incorporated into the Act by 30 U.S.C. §932(a).

[12] The administrative law judge noted that each of the physicians was a Board-certified pulmonologist. Decision and Order at 10-11 n.21.

§718.204(b)(2)(iv); Decision and Order at 12. We also affirm the administrative law judge's overall finding that, weighing the supportive evidence against the contrary probative evidence, claimant established total disability pursuant to 20 C.F.R. §718.204(b). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 13. Because claimant established that the miner had at least fifteen years of qualifying coal mine employment and suffered from a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4).

B. 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 rebut the presumption by establishing that the miner had neither legal[13] nor clinical[14] pneumoconiosis, 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)(i), (ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer disproved the existence of legal pneumoconiosis but failed to establish that the miner did not have clinical pneumoconiosis. The administrative law judge specifically found that the x-ray evidence was "at best in equipoise," as there were six positive readings for pneumoconiosis and five negative readings by physicians who were dually-qualified as Board-certified radiologists and B readers. Decision and Order on Reconsideration at 5.

[13] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[14] Clinical pneumoconiosis is defined as:

> [T]hose 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).

With regard to the autopsy evidence, the administrative law judge noted that Dr. Hudgens performed the autopsy of the miner on November 29, 2013. MC Employer's Exhibit 45. In his "microscopic description," Dr. Hudgens noted a "single anthrasilicotic nodule which measures 8 [millimeters]" and a mild degree of anthracosis with minimal fibrosis and no macules of focal emphysema. *Id*. at 2. Dr. Hudgens concluded that there was "not sufficient evidence to support the diagnosis of coal worker's pneumoconiosis." *Id*.

Dr. Caffrey reviewed the autopsy slides and prepared a report dated June 4, 2014. MC Employer's Exhibit 47. Under "microscopic examination," he reported that the lymph node tissue on slide "I" showed "a moderate amount of anthracotic pigment with focal areas of fibrosis" and that lymph node tissue on slide "J" showed "a mild amount of anthracotic pigment with focal fibrosis." *Id*. at 2. Dr. Caffrey further noted that slide "J" showed "a 6 x 4 mm (0.6 x 0.4 cm) micronodule with hyalinization and anthracotic pigment within lymph node tissue." *Id*. Dr. Caffrey concluded:

> I am unable to make a diagnosis of coal workers' pneumoconiosis (CWP). There is *anthracotic pigment* present, but anthracotic pigment is not synonymous with the lesion of CWP. Also, the hilar lymph node shows *anthracotic pigment* with one micronodule, but for the diagnosis of CWP to be made, the disease must be identified within the lung tissue, that is, anthracotic pigment with reticulin and fibrosis or collagen formation must be present within the lung tissue and in my opinion, the micronodule identified on the autopsy slides is within hilar lymph node tissue.

Id. at 3 (emphasis added).

Dr. Perper reviewed the miner's autopsy slides and prepared a report dated June 10, 2014. MC Claimant's Exhibit 9, 10. Dr. Perper diagnosed "simple coal workers' pneumoconiosis, mild, interstitial fibro-anthracotic type with a fibro-hyalinino anthracotic (silicotic) macronodule, measuring slightly more than 8 [millimeters]." MC Claimant's Exhibit 9 at 53.

The administrative law judge found Dr. Hudgen's opinion that the miner did not have coal workers' pneumoconiosis to be "internally inconsistent" with his specific description of anthracosis.[15] Decision and Order on Reconsideration at 6. The

[15] The administrative law judge observed correctly that the term "anthracosis" satisfies the regulatory definition of clinical pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(1). Accordingly, Dr. Hudgen's opinion does not aid employer in establishing rebuttal of the presumption under 20 C.F.R. §718.305(d)(1)(i)(B).

administrative law judge also considered Dr. Caffrey's "diagnosis of anthracotic pigment with focal areas of fibrosis" to be consistent with a diagnosis of "anthracosis" under the regulations. *Id.* The administrative law judge further stated, "despite the physician's opinion that it must be present in the lung tissue, I finding that its presence in the hilar lymph node constitutes a diagnosis of pneumoconiosis." *Id., citing, inter alia, Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpub.); *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984). The administrative law judge concluded that "all three opinions based on the autopsy evidence diagnose the presence of clinical pneumoconiosis according to the regulatory definition and case law." Decision and Order on Reconsideration at 6.

Employer asserts that the administrative law judge conflated the terms anthracosis and anthracotic pigmentation in reviewing Dr. Caffrey's report and improperly acted as a medical expert by interpreting Dr. Caffrey's autopsy findings to support a conclusion that the miner had clinical pneumoconiosis. Employer's Brief at 18. Contrary to employer's arguments, even if we were to conclude that the administrative law judge erred in finding that Dr. Caffrey diagnosed "anthracosis," that error is harmless, based on the administrative law judge's alternate finding that:

> [E]ven if Dr. Caffrey's opinion is taken at its face value, the opinions by the physicians who are board-certified in pathology, Dr. Caffrey and Dr. Perper, are in conflict, which is insufficient to sustain [e]mployer's burden to rebut the presence of clinical pneumoconiosis by a preponderance of the evidence.

Decision and Order on Reconsideration at 6; *see Larioni*, 6 BLR at 1-1278.

The credibility of the evidence and the weight to accord it is within the sound discretion of the trier-of-fact. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Employer's argument that Dr. Caffrey's opinion is entitled to controlling weight is a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the administrative law judge acted within his discretion in finding that employer failed to satisfy its burden of proof, we affirm the administrative law judge's determination that the pathology evidence does not disprove that the miner had clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law judge's finding that

employer failed to rebut the Section 411(c)(4) presumption by affirmatively establishing that the miner did not have clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B). *See Bender*, 782 F.3d at 129.

With regard to the second prong of rebuttal, the administrative law judge found that the opinions of Drs. Castle and Fino were insufficient to satisfy employer's burden to establish that no part of the miner's respiratory disability was caused by pneumoconiosis, as defined in 20 C.F.R. §718.201. Decision and Order on Reconsideration at 8. Contrary to employer's assertion, the administrative law judge permissibly determined that the opinions of Drs. Castle and Fino were not sufficiently reasoned to prove that no part of the miner's respiratory disability was due to clinical pneumoconiosis, as neither physician diagnosed the miner with clinical pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Reconsideration at 8. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). Because employer did not establish rebuttal under 20 C.F.R. §718.305(d)(1)(i) or (ii), we affirm the administrative law judge's award of benefits in the miner's claim. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 138-43.

II. The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her 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 Reconsideration at 8. Based on these findings, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed with respect to invocation of the Section 411(c)(4) presumption, and the Decision and Order on Reconsideration Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge