U.S. Department of Labor

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

BRB No. 15-0418 BLA

DARLENE G. MOYE (On behalf of JAMES W. MOYE) Claimant-Respondent v. MEADOW RIVER COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/29/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, 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.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-05460) of Administrative Law Judge Scott R. Morris, rendered on a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the miner worked for 26.22 years in coal mine employment, with at least fifteen years spent either in underground mines or on the surface in conditions substantially similar to those in an underground mine. The administrative law judge also determined that the miner suffered from a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Based on those determinations and the filing date of the claim, the administrative law judge found that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Because claimant established the miner's total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b), an element of entitlement that the miner failed to prove in his prior claim, the administrative law judge also found that claimant demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Further, the administrative law judge determined that employer did not establish rebuttal of the Section 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), that claimant invoked the Section 411(c)(4) presumption, and that she demonstrated a change in an

[1] The miner's initial claim for benefits, filed on May 21, 2003, was denied by Administrative Law Judge Daniel L. Leland in a Decision and Order issued on January 13, 2009, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1. The miner took no further action until he filed this subsequent claim on April 30, 2012. Director's Exhibit 3. While the case was pending, the miner died on October 28, 2012. Director's Exhibit 25. Claimant, the widow of the miner, is pursuing the claim on his behalf. Director's Exhibit 24.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis where the record establishes 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), as implemented by 20 C.F.R. §718.305.

applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer also contends that the administrative law judge erred in his consideration of the medical opinions relevant to rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.[3]

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.[4] 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. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION – TOTAL DISABILITY

Pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), the administrative law judge noted that the newly submitted evidence consisted of a single pulmonary function study and a single arterial blood gas test, both conducted by Dr. Rasmussen on May 29, 2012. Decision and Order at 13-14; Director's Exhibit 12. Because the pulmonary function study was non-qualifying[5] for total disability, the administrative law judge found that claimant failed to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2)(i). *Id*. However, because the arterial blood gas test, conducted at rest

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the miner worked for at least fifteen years in qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because the miner's coal mine employment was in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 5.

[5] A "qualifying" pulmonary function test yields values that are equal to or less than the values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" test exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

only, was qualifying for total disability,[6] the administrative law judge determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).[7] *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the miner's "last usual coal mine employment was as a continuous miner operator and continuous miner helper, which required heavy and some very heavy physical exertion." Decision and Order at 22, n. 33. The administrative law judge then discussed the medical opinions of Drs. Rasmussen, Ghio, Perper, and Castle regarding whether the miner was totally disabled.

Dr. Rasmussen examined the miner on behalf of the Department of Labor (DOL) on May 29, 2012. Director's Exhibit 12. On the Form CM-988, Dr. Rasmussen indicated that he had reviewed the miner's employment history, Form CM-911a, dated April 18, 2012. *Id*. Dr. Rasmussen reported that the miner had "moderate loss of lung function," as reflected by the "reduced single breath diffusing capacity" and a qualifying blood gas test showing moderate resting hypoxia. *Id*. He concluded that the miner "is not capable of performing moderate to heavy exercise." *Id*. In an attachment to the Form CM-988, Dr. Rasmussen noted that the miner had worked "10-12 years" as a "continuous miner helper or operator." *Id*. He reiterated that "[t]he degree of impairment in this case would prevent [the miner] from performing moderate to heavy manual labor." *Id*.

In a March 6, 2013 report, Dr. Ghio reviewed medical records provided by employer, including Dr. Rasmussen's report. Employer's Exhibit 4. Dr. Ghio noted that the miner "operated a continuous miner for either [six or sixteen years]" and was "a loader operator, supply man, an electrician, and general inside laborer." *Id*. at 2. He noted that "[t]he American Thoracic Society's criteria for respiratory impairment are based on spirometry and diffusing capacity." *Id.* at 6. Dr. Ghio opined that the miner had a respiratory impairment, based on reductions in his diffusing capacity, but that it was not severe enough to prevent the miner from performing his usual coal mine employment. *Id*.

[6] A "qualifying" blood gas test yields values that are equal to or less than the 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).

[7] The administrative law judge found that because there was no evidence that the miner had cor pulmonale with right-sided congestive heart failure, claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 14-15.

The administrative law judge observed that neither Dr. Rasmussen nor Dr. Ghio specifically identified the exertional requirements of the miner's usual coal mine job in their respective reports. The administrative law judge noted that, "in 2008 – in relation to [the miner's] prior denied claim – Dr. Ghio testified that '[his] expectations [were] that [the miner's] position could be *demanding*,'" but that "Dr. Ghio did not *specifically opine on the level of exertion* required of [the miner's] job as a miner operator." Decision and Order at 22, *quoting* Director's Exhibit 1 (emphasis added). The administrative law judge concluded:

> I give Dr. Ghio little weight because his opinion was silent as to the exertional requirement that [the miner's] usual coal mine employment demanded of him. This oversight is important, because the regulations define total disability in light of [the miner's] usual coal mine work. Without Dr. Ghio's impression of the exertional requirements of [the miner's] usual coal mine employment, I am unable to assess whether Dr. Ghio had a full and accurate understanding of the level of disability he would need to observe in order to find the [miner] totally disabled, under the Act.

Decision and Order at 22 (internal quotations and citations omitted).

With respect to Dr. Rasmussen, the administrative law judge observed that Dr. Rasmussen opined, in his most recent report, "that [the miner] was 'not capable of performing *moderate to heavy exercise* . . . [or] manual labor[.]'" Decision and Order at 22, *quoting* Director's Exhibit 12 (emphasis added). Furthermore, in a 2003 report, prepared in conjunction with the miner's prior claim, Dr. Rasmussen specifically identified that the position of a continuous miner operator required "considerable *heavy and some very heavy* manual labor." Director's Exhibit 1 (emphasis added). Taking into consideration both of Dr. Rasmussen's reports, the administrative law judge found that Dr. Rasmussen's opinion was entitled to probative weight as to whether the miner was totally disabled from performing his usual coal mine work. Decision and Order at 22. The administrative law judge also found that Dr. Rasmussen's opinion was supported by the miner's "physical examination and the objective medical evidence derived from his testing." *Id*. at 24.

Although Dr. Perper concluded that the miner was totally disabled by a respiratory or pulmonary impairment, the administrative law judge determined that his opinion was entitled to "less weight" because it was based on a non-qualifying pulmonary function study. Decision and Order at 21, 23. Lastly, the administrative law judge noted that Dr. Castle opined that the miner "was totally disabled," but attributed the disability "to other issues besides [a] pulmonary condition; such as obesity, congestive heart failure, and old age." *Id*. at 21, *citing* Employer's Exhibit 3. The administrative law judge gave "less

weight" to Dr. Castle's opinion because he found that it was not well-reasoned. Decision and Order at 22.

In weighing all of the evidence together, the administrative law judge noted that because the miner had a qualifying arterial blood gas test, "[e]mployer was required [t]o provide 'rebutting evidence' based on [a] physician's opinion that [the miner] was not totally disabled due to a pulmonary impairment." Decision and Order at 24 n. 39. The administrative law judge stated, "[e]ven if the physician's opinions of record [did] not weigh in favor of [a] finding of total disability, I find in the alternative that [e]mployer was unable to provide 'rebutting evidence' to a finding of total disability based on [the miner's] qualifying arterial blood gas test results." *Id.* The administrative law judge concluded that claimant established total disability under 20 C.F.R. §718.204(b)(2), taking into consideration the qualifying arterial blood gas test, Dr. Rasmussen's opinion and the lay testimony, consisting of interrogatories the miner answered at the request of employer, four months prior to his death. *Id.* at 24.

Employer asserts on appeal that the administrative law judge did not rationally explain the weight he accorded the conflicting medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv).[8] Specifically, employer argues that the administrative law judge erred in finding that Dr. Rasmussen was aware of the exertional requirements of the miner's usual coal mine work, while finding that Dr. Ghio's opinion was "silent" on those exertional requirements. Employer maintains that the administrative law judge's "treatment of the disability opinions of Drs. Rasmussen and Ghio is disparate" because he allowed defects in Dr. Rasmussen's 2012 opinion to be cured by his prior report, but refused to similarly allow Dr. Ghio's 2013 opinion to be cured by his statements in 2008. Employer's Brief in Support of Petition for Review at 9.

An administrative law judge is required to determine the exertional requirements of a miner's usual coal mine work. *See Cornett v. Benham Coal*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). The administrative law judge must then consider the documentation and reasoning underlying the medical opinions, and explain whether the medical opinions, when considered in light of those exertional requirements, establish the presence of a totally disabling respiratory impairment. *Id*.

In this case, we see no error in the administrative law judge's decision to credit Dr. Rasmussen's opinion over that of Dr. Ghio on the issue of whether the miner was totally

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted arterial blood gas tests established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

disabled. Employer does not challenge the administrative law judge's conclusion that the miner's usual coal mine employment required heavy manual labor. *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 22, n. 33. Even assuming, as employer suggests, that Dr. Ghio had an accurate understanding of the physical requirements of the miner's usual coal mine employment, the administrative law judge rationally found that Dr. Ghio *did not explain his opinion* in light of the objective testing recognized by the DOL as supporting a finding of total disability. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Specifically, Dr. Ghio offered the following rationale for why the miner was not totally disabled, despite the qualifying blood gas test:

> Those [arterial blood gas tests] that were taken in 2010 would be considered disabling, yeah. The oxygen level is 55. The others certainly before 2010, no, they're not[.] But in 2010 they would be [disabling]. . . . When you say "disabling," they would be viewed as abnormal. Disability – pulmonologists do not define disability. Society defines disability. We define impairment. *These are not included in impairment. Impairment is determined, as I stated earlier, by the American Thoracic Society. This is based on [pulmonary function studies] and diffusing capacity*.

Employer's Exhibit 8 at 24 (emphasis added).

In rejecting Dr. Ghio's rationale, the administrative law judge accurately noted that "the language of Appendix C to Part 718, [states that] '[a] miner who meets the following medical specifications [for arterial blood gas tests] must be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met.'" Decision and Order at 22 n. 34, *quoting* Appendix C to Part 718. As Dr. Ghio stated that arterial blood gas testing is not included in his assessment of a pulmonary impairment, the administrative law judge permissibly found that Dr. Ghio's opinion "is in conflict with the objective medical evidence of record" and "runs counter to the regulatory language." Decision and Order at 22 n. 34; *see* 20 C.F.R. §718.204(b)(2)(ii); Employer's Exhibit 8 at 24. Thus, we affirm the administrative law judge's decision to assign Dr. Ghio's opinion little weight on the issue of whether the miner was totally disabled. *See Lane v. Union Carbide*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997).

The administrative law judge also acted within his discretion in crediting Dr. Rasmussen's opinion, that the miner could not perform moderate to heavy manual labor, as reasoned and documented, because Dr. Rasmussen based his disability finding on the miner's "physical examination and the objective medical evidence derived from his testing." Decision and Order at 22, 24; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th

Cir. 1997). The administrative law judge rationally found that because the miner was impaired from performing heavy manual labor, the miner could not perform his last job, which the administrative law judge specifically determined required that type of labor. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

We also reject employer's argument that the administrative law judge erred in assigning less weight to Dr. Castle's opinion. In his March 6, 2013 report, Dr. Castle noted that the "most recent [arterial] blood gas [test] did show resting hypoxemia which was due to [the miner's] obesity and chronic cardiomyopathy with chronic congestive heart failure." Employer's Exhibit 3 at 24. He opined that the miner was "*permanently and totally disabled* as a result of his cardiomyopathy with chronic congestive heart failure, morbid obesity, his age and other medical problems, none of which are related to coal mine employment." *Id*. at 25 (emphasis added).

The relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precluded the performance of his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1)(i), (2)(iv). The etiology of the miner's pulmonary impairment relates to the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer is able to successfully rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(b), (c); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). To the extent that Dr. Castle conceded that the miner was totally disabled, based on the qualifying arterial blood gas test, and in light of our affirmance of the administrative law judge's decision to credit Dr. Rasmussen's opinion over that of Dr. Ghio, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv).[9] *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Furthermore, we affirm the administrative law judge's overall finding that claimant established total disability, taking into consideration all of the contrary probative evidence under 20 C.F.R. §718.204(b)(2).[10] *See Fields v. Island Creek Coal Co.*, 10 BLR

[9] In light of the administrative law judge's rational determination that Dr. Rasmussen's opinion is entitled to "greater and otherwise more significant" weight than the opinions of Drs. Castle, Perper, and Ghio, we need not address employer's argument that the administrative law judge erred in ascribing more weight to Dr. Perper's opinion than those of Drs. Castle and Ghio. Decision and Order at 24; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

[10] Employer argues that the administrative law judge erred in considering statements made by the miner prior to his death on the issue of total disability. Specifically, employer argues that the regulation at 20 C.F.R. §718.305(b)(iii) "does not

1-19, 1-21 (1987); *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 at 24. As claimant met her burden of establishing the miner's total disability, we affirm the administrative law judge's finding that claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), *see* 20 C.F.R. §718.305(b), and his finding that claimant satisfied her burden to demonstrate a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d).

II. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In order to rebut the Section 411(c)(4) presumption, employer must affirmatively establish that the miner had neither legal[11] nor clinical[12] pneumoconiosis, or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 137; *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 154-56 (2015) (Boggs, J.,

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permit a finding of total disability based upon lay testimony" such as the miner's answers to interrogatories. Employer's Brief in Support of Petition for Review at 23. Contrary to employer's argument, the administrative law judge found total disability established by arterial blood gas test and medical opinion evidence under 20 C.F.R. §718.204(b)(2)(ii), (iv). Therefore, error, if any, committed by the administrative law judge in determining that lay testimony buttressed the finding of total disability is harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni*, 6 BLR at 1-278.

[11] Legal pneumoconiosis is defined as "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). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[12] 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. 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).

concurring and dissenting). The administrative law judge found that employer failed to rebut the presumption of clinical pneumoconiosis because the "autopsy reports and physician's [sic] opinions of record all support the conclusion that [the miner] had at least simple pneumoconiosis." Decision and Order at 38. Therefore, the administrative law judge found that employer failed to rebut the presumption of pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). The administrative law judge also rejected the opinions of Drs. Ghio, Castle, and Oesterling relevant to whether the miner's total disability was caused by clinical pneumoconiosis, and therefore found that employer did not establish rebuttal under 20 C.F.R. §718.305(d)(1)(ii). *Id*. at 37-38.

As an initial matter, we affirm, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), as it failed to disprove the existence of clinical pneumoconiosis.[13] *See Skrack*, 6 BLR at 1-711; Decision and Order at 36. 20 C.F.R. §718.305(d)(1)(i); *Bender*, 782 F.3d at 137. Relevant to the second method of rebuttal, whether the miner's respiratory disability was due to clinical pneumoconiosis, employer asserts that the administrative law judge's credibility findings with respect to Drs. Castle, Ghio, and Oesterling are not supported by substantial evidence. We disagree.

In excluding clinical pneumoconiosis as the cause of the miner's disabling arterial blood gas test, Dr. Castle identified that older arterial blood gas tests were variable and when coal workers' pneumoconiosis causes "significant hypoxemia" it is expected to be a "fixed permanent" disease process.[14] Employer's Exhibit 9 at 30. In discussing Dr. Castle's opinion regarding the cause of the miner's respiratory impairment, the administrative law judge observed that "Dr. Castle's retrospective opinion that [the miner] displayed variable arterial blood gas test results in his prior claims does not completely sever the connection" between the miner's most recent qualifying blood gas test and his pneumoconiosis, as pneumoconiosis is recognized to be a progressive disease. Decision and Order at 23. The administrative law judge permissibly found that Dr. Castle's opinion "does nothing to prove that [the miner's] qualifying results could [not] have been due to pneumoconiosis" and rejected his opinion as not well reasoned.

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[13] The administrative law judge made no findings with respect to the issue of legal pneumoconiosis.

[14] In his March 6, 2013 report, Dr. Castle identified a number of arterial blood gas studies conducted between 2003 and 2010, and explained that "[o]n some occasions [the miner] had resting hypoxemia which has improved[,] [but has] been totally normal on other occasions[.]" Employer's Exhibit 3.

Id. Additionally, the administrative law judge noted that "Dr. Castle did not discuss why [the miner's] twenty-six plus years of coal mining played no part in his disability." *Id*. at 37. Because the administrative law judge acted within his discretion in finding that Dr. Castle's opinion was not well-reasoned on the issue of causation of the miner's disabling impairment, we affirm his conclusion that Dr. Castle's opinion does not satisfy employer's burden of proof. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

We also reject employer's argument that the administrative law judge erred in weighing Dr. Ghio's opinion. Dr. Ghio testified that "[c]ertainly coal workers' pneumoconiosis can impact hypoxia" but opined that "[m]ost *frequently* this is complicated disease. Simple doesn't – *infrequently*. And certainly the amount – the extent of his involvement is so mild that I can't imagine that it would impact his . . . diffusing capacity." Employer's Exhibit 8 at 25 (emphasis added). Contrary to employer's argument, we see no error in the administrative law judge's finding that Dr. Ghio's opinion is "not particularized to [the miner's] specific condition" and that "he never explained why the medical evidence of record – specific to the [m]iner – supported his opinion that *no part* of [m]iner's total disability was due to his observed simple pneumoconiosis." Decision and Order at 37 (emphasis added); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985).

Finally, Dr. Oesterling prepared an autopsy report, based on his review of nineteen slides of the miner's right and left lungs, as prepared by the autopsy prosector, Dr. Cinco.[15] Employer's Exhibit 6; *see* Claimant's Exhibit 7. Dr. Oesterling noted at the outset of his report, "the absence of discernible black pigment in any of these lung cross sections." Employer's Exhibit 6. Contrasting his findings with those of Dr. Cinco, Dr. Oesterling reported no "anthracotic pigmentary deposits" on microscopic review of many of the slides. *Id*. Specifically, he disagreed with Dr. Cinco that slide 5 revealed any "anthracotic deposits of any significance," slide 8 revealed "alveolar anthracotic pigmentary deposits," slide 9 revealed "lesions of anthracotic pigment which supposedly reached 5 [millimeters]," and slide 17 revealed "significant perivascular and peribronchial anthracotic deposits." *Id*.; *see* Claimant's Exhibit 8 at 43-47. Dr. Oesterling concluded that the slides showed "minimal pleural based and interstitial macular [coal workers'] pneumoconiosis" and that "[t]his is an extremely low level of the disease process producing no significant structural damage." Employer's Exhibit 6. Dr.

[15] Dr. Cinco indicated that slides 1 and 2 were of the right main bronchus and lymph nodes, slides 3-9 were representative sections of the right lung, slides 10 and 11 were of the left main bronchus and lymph nodes, and slides 12-19 were representative sections of the left lung. Claimant's Exhibit 7.

Oesterling stated, "Without structural damage coal workers' pneumoconiosis was not a factor causing respiratory impairment or disability during the miner's lifetime." *Id.*

Dr. Perper also reviewed the same slides and identified "anthracotic pigments" on multiple slides, including slides 5, 8, 9, and 17. Claimant's Exhibit 8 at 43-47. Specifically, Dr. Perper identified "alveoli contain[ing] anthracotic pigment" on slide 5, "[f]ibro-anthracotic pleura with fibro-anthracotic strand" on slide 8, "[f]ibro-anthracotic pneumoconiosis macro nodule (mixed coal dust type) measuring close to 9 mm" on slide 9, and "macrophages laden with anthracotic pigment as well as few anthracotic pigment" on slide 17. *Id*.

Employer argues that the administrative law judge failed to properly consider Dr. Oesterling's opinion relevant to whether employer established that the miner's disability was not due to pneumoconiosis. Although the administrative law judge did not specifically discuss Dr. Oesterling's opinion in the context of rebuttal of the presumed fact of disability causation, the administrative law judge explained, in his discussion of the autopsy evidence, why he found that Dr. Oesterling's opinion was not persuasive. Specifically, the administrative law judge gave less weight to Dr. Oesterling's opinion that the miner's pneumoconiosis was too mild to have contributed to his death or disability, "because [Dr. Oesterling's] observations were contradicted by the other two physicians of record that reviewed evidence derived from [the miner's] autopsy."[16] Decision and Order at 32 n. 44. We conclude that the administrative law judge acted within his discretion in finding that Dr. Oesterling's opinion was outweighed by the

[16] In concluding that Dr. Oesterling's findings were in conflict with Drs. Cinco and Perper, the administrative law judge noted that, "[f]or example Dr. Oesterling stated that he observed no anthracotic pigment in [the miner's] left lung." Decision and Order at 32 n. 44. Employer contends that this specific example is not supported by the record, as Dr. Oesterling identified black pigment on slide 12, pertaining to the miner's left lung. Employer's Brief in Support of Petition for Review at 20. Although the administrative law judge may have overlooked slide 12, his overall conclusion that Dr. Oesterling's opinion is contradicted by the opinions of Drs. Cinco and Perper is supported by substantial evidence, as Dr. Oesterling did not agree with the other pathologists regarding the degree of "anthracotic pigment deposits" evidenced by the slides. *See Larioni*, 6 BLR at 1-1278; *see* Employer's Exhibit 6; Claimant's Exhibits 7, 8. Because the administrative law judge acted within his discretion in giving less weight to Dr. Oesterling's opinion, we reject employer's argument that remand is necessary for the administrative law judge to further consider Dr. Oesterling's opinion on the issue of whether employer rebutted the presumed fact of disability causation. *See Larioni*, 6 BLR at 1-1278.

preponderance of the other credible evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Because the administrative law judge acted within his discretion in rendering his credibility findings, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(ii), by establishing that no part of the miner's respiratory disability was due to pneumoconiosis as defined at 20 C.F.R. §718.201.[17] *See Bender*, 782 F.3d at 137. Thus, we affirm the administrative law judge's award of benefits in the miner's claim.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[17] Employer asserts that the administrative law judge did not explain his basis for finding that the miner had a twenty-one pack year smoking history, and that "any inference by the [administrative law judge] that [the opinions of Drs. Castle and Ghio] have been negatively impacted based upon their acknowledgement that the [m]iner alleged a higher smoking history is not supported by the record." Employer's Brief in Support of Petition for Review at 19-20. We need not address this argument, however, as the administrative law judge did not reject any of the medical opinions in this record on the ground that the physician relied on an inaccurate smoking history. *See Larioni*, 6 BLR at 1-1278.