U.S. Department of Labor

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

BRB No. 18-0248 BLA

CLAYTON J. SPENCER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLEMENS COAL COMPANY C/O BUILDEX, INCORPORATED	)	DATE ISSUED: 07/26/2019
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-05236) of Administrative Law Judge Clement J. Kennington, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on November 19, 2012.

The administrative law judge found employer is the properly designated responsible operator. He also determined claimant had twenty-six years of employment as a surface coal miner in conditions substantially similar to those in an underground mine, and a totally disabling pulmonary or respiratory impairment. Thus, he determined claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] He further found employer did not rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding it is the properly designated responsible operator. Employer also asserts the administrative law judge erroneously determined claimant has twenty-six years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore erred in finding claimant invoked the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding it did not rebut the presumed existence of pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, asserting employer is the properly designated responsible operator.

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

[1] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be due to pneumoconiosis if he has 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); 20 C.F.R. §718.305(b).

[2] Because claimant's coal mine employment was in Kansas, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 5.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[3] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator financially capable of assuming liability for benefits more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

As the administrative law judge observed, because employer is the only operator claimant worked for, it may be relieved of liability only if it proves that it is financially incapable of paying for benefits. Decision and Order at 10. Relevant to that issue, when this claim was before the district director, a question arose as to whether employer's insurance policy contained an endorsement for black lung claims. The district director attempted to obtain additional information about employer's insurance coverage and financial assets via a subpoena duces tecum on Mr. Dennis Woolman, former president of Clemens Coal Company.[4] He declined to provide the requested information and responded that employer went out of business, was liquidated through bankruptcy proceedings, and a receiver was appointed. *Id*.; Director's Exhibits 45, 46. At the hearing before the administrative law judge, employer's counsel represented that its black lung insurance policy is the subject of ongoing litigation in federal court. Hearing Transcript at 5.

In his Decision and Order, the administrative law judge found that employer "presented no argument on [the responsible operator] issue" in its post-hearing brief, aside from a general statement that liability should transfer to the Black Lung Disability Trust

[3] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[4] The district director sought information regarding whether Mr. Woolman was capable of paying benefits, and whether Clemens Coal Company entered into any contracts or transferred its assets subsequent to filing for bankruptcy. Director's Exhibit 45.

Fund. Decision and Order at 10. He further found that even if employer's insurance policy did not have an endorsement for black lung claims, it "provided no evidence to establish that it is not capable of paying benefits." *Id.* at 11. Because employer did not satisfy its burden to establish it does not have sufficient assets to pay benefits, the administrative law judge determined employer is the properly designated responsible operator. *Id.*

Employer argues that it cannot be held liable for the payment of benefits because it filed for bankruptcy in 1997 and is still under the protection of the bankruptcy court via an appointed receiver. Employer also asserts that the administrative law judge erred in focusing on the fact that it did not provide the financial information requested in the subpoena duces tecum. Instead, employer asserts the subpoena was unlawful because it was served on an individual who is not the custodian of any documents for the bankrupt Clemens Coal Company. Employer also faults the district director for not making any attempt to contact the bankruptcy receiver.

Employer's contentions have no merit. Pursuant to 20 C.F.R. §725.495(c)(1), employer has the burden of proving "[t]hat it does not possess sufficient assets to secure the payment of benefits." Neither in its response to the subpoena duces tecum nor at any other point in the adjudication of this claim, has employer provided evidence establishing it is still in receivership under federal bankruptcy law and incapable of paying black lung benefits. The administrative law judge therefore properly found employer did not satisfy its burden under 20 C.F.R. §725.495(c)(1).[5] *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 873 (10th Cir. 1996); Decision and Order at 11. Consequently, we affirm the administrative law judge's determination employer failed to establish it is not the properly designated responsible operator. 20 C.F.R. §725.495(c).

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

Length of Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of employment "in one or more underground coal mines," or "in a coal mine other than an underground mine" in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4)(2012); *Muncy v. Elkay Mining Co.*, 25 BLR 1-

[5] Contrary to employer's contention, it was not found liable because it failed to respond to the subpoena duces tecum, but rather because it failed to rebut the presumption that it is capable of assuming liability for the payment of benefits. Decision and Order at 11.

21, 1-29 (2011). "The conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge considered claimant's testimony concerning the dust conditions of his surface coal mine work and his responses on Department of Labor Form 913 (Description of Coal Mine Work and Other Employment). Decision and Order at 9. At the hearing, he described working as a pump operator, dragline oiler, and dragline operator. He also occasionally did other jobs, including unloading coal cars at the tipple, which involved placing coal cars over a hopper and tripping a lever that would release the coal. Hearing Transcript at 44.

Claimant testified that each of his positions regularly exposed him to dust. His "heaviest exposure" was "working at the tipple," where he "would eat coal dust right out of that hopper," causing him to "be black with coal dust" at the end of every shift. Hearing Transcript at 44-45. His position as a dragline operator further exposed him to fine rock and coal dust that would "sift through around the edge of the window" of the cab.[6] *Id*. at 45. He experienced further dusty conditions as a dragline oiler because the machine was positioned between seventy-two and seventy-eight feet from where coal was excavated and "they would load right up to us." *Id*. at 34. He was exposed to more coal dust performing maintenance "because the dragline was usually sitting around the pit there where, you know, they would be loading coal." *Id*. at 44. He further stated he would "be dusty [and] dirty at the end of the day" no matter if he "had the cab closed up or not." *Id*. at 45. Claimant indicated his wife often took his work clothes to a laundromat because she "wouldn't want them in her washer." *Id*. at 38.

On Form 913, claimant reported that he worked as a pumper from November 21, 1969 to March 13, 1971; a dragline oiler from July 27, 1981 to December 31, 1986; and a dragline operator from March 16, 1971 to July 25, 1997.[7] Director's Exhibit 4. He

[6] Claimant explained that until the pump truck and dragline were equipped with air conditioning in approximately 1989, workers kept the windows open in the summer. Hearing Transcript at 35.

[7] When asked to identify the dates he worked his last coal mine job, which he identified as dragline operator, claimant appears to have combined his employment as a dragline operator and as a dragline oiler. Director's Exhibit 4. At the hearing, claimant testified he worked as a pump operator before shifting between jobs as a dragline oiler and

recorded that when he pumped water from the coal pit "coal dust would blow" on him from trucks being filled with coal. Director's Exhibit 4. He further indicated that when operating a dragline, there was no air conditioner and the windows were open, exposing him to coal dust. *Id*.

The administrative law judge credited claimant's testimony that he was directly exposed to coal-mine dust during all of his work with employer and observed "there is no evidence rebutting" claimant's assertion. Decision and Order at 10. The administrative law judge therefore credited claimant with twenty-six years of qualifying coal mine employment.

Employer alleges that in finding claimant's above ground dust conditions substantially similar to underground mining, the administrative law judge failed to distinguish between claimant's exposure to coal dust and his exposure to dirt. Employer's Brief at 18-20. Contrary to employer's contention, the definition of "coal-mine dust" is not limited to coal dust specifically, but encompasses "the various dusts around a coal mine." *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990). Thus, exposure to any kind of coal-mine dust may support a finding of substantially similar conditions. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 665 (6th Cir. 2015); *Garrett v. Cowin & Co., Inc*., 16 BLR 1-77, 1-81 (1990).

Moreover, the administrative law judge acted within his discretion in crediting claimant's testimony that his work "involved direct exposure to rock and coal dust, comparable to the level of dust that could be expected in underground mining." Decision and Order at 10; *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1344 (10th Cir. 2014) (affirming the administrative law judge's finding the miner's testimony provided substantial evidence of regular exposure to coal dust); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc) (assessing witness credibility is within the administrative law judge's discretion as fact-finder, and the Board will not disturb his or her findings unless they are inherently unreasonable). Thus, we affirm as supported by substantial evidence the administrative law judge's determination that claimant established he worked in conditions substantially similar to those in an underground coal mine for all twenty-six years of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i), (2); *see Muncy*, 25 BLR at 1-29; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979).

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a dragline operator, doing the latter for twenty-two to twenty-three years. Hearing Transcript at 13-14.

Total Disability

A miner is 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). Total disability can be established based on pulmonary function or blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant evidence supporting disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987). The administrative law judge found that claimant established total disability based on the blood gas studies and medical opinions, and when weighing the evidence as a whole.[8] 20 C.F.R. §718.204(b)(2); Decision and Order at 23.

Initially, we reject employer's contention that because claimant's obesity rather than coal dust exposure is the cause of his hypoxia, the administrative law judge erred in crediting the qualifying exercise blood studies. The proper inquiry under 20 C.F.R. §718.204(b)(2) is whether the miner suffered from a totally disabling respiratory or pulmonary impairment, regardless of its cause. 20 C.F.R. §718.204(b); *see Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233 (Table), 1996 WL 13850, at *2 (4th Cir. Jan. 12, 1996) (the inquiry at total disability is the existence of respiratory impairment, not its etiology). The cause of the impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption has been rebutted by proving that no part of the miner's total respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

We also reject employer's assertion that the results of the blood gas studies "needed to be correlated with" the pulmonary function studies. Employer's Brief at 25-26. Employer does not explain its argument, but if it is suggesting that blood gas studies cannot evidence total disability unless the pulmonary function studies are similarly disabling, it is mistaken. These tests measure different types of impairment and can form the basis of a total disability finding even if the other type of objective testing is non-qualifying. *Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984).

[8] The administrative law judge found that because all of the pulmonary function studies are non-qualifying, and there is no evidence of cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability pursuant to pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). Decision and Order at 21-22. He further found there is no evidence in the record of complicated pneumoconiosis that could invoke presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 26.

Finally, we reject employer's contention that the results of the two qualifying exercise blood gas studies are questionable because the amount of time elapsed between the drawing and the analysis of claimant's blood sample was not recorded.[9] Employer's Brief at 26. Employer has not explained why failure to include this data renders the studies unreliable, in light of the fact that no physician of record offered an opinion that the studies are invalid on this or any other basis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Director's Exhibits 10-11; Claimant's Exhibits 3, 5; Employer's Exhibits 9-10. To the contrary, Drs. Sparks, Houser, and Istanbouly based their opinions, in part, on these studies and Dr. Parmet reviewed them and did not indicate they are invalid.[10] We therefore affirm the administrative law judge's determination that the qualifying exercise blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-977 (1980); Decision and Order at 22.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Sparks, Houser, Istanbouly, Parmet, and Barkman. Decision and Order at 22-23. Drs. Sparks, Houser, and Istanbouly opined claimant has a respiratory or pulmonary impairment that prevents him from performing his previous coal mine employment.[11] Director's Exhibit 10; Claimant's Exhibits 3, 5. Dr. Parmet diagnosed a

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[9] The regulation at 20 C.F.R. §718.105(c)(9) provides that any report of a blood gas study conducted in connection with a claim "shall specify" the time between the drawing of a sample and the analysis of a sample.

[10] Moreover, employer does not allege that the omission of the elapsed time establishes these studies are not in substantial compliance with the quality standards, nor does it identify any evidence in support of its general contention that the omission precluded the administrative law judge from relying on these studies to find total disability established at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge is not required to reject objective studies that are in substantial compliance with the applicable quality standard. 20 C.F.R. §718.101(b).

[11] Dr. Sparks diagnosed chronic obstructive pulmonary disease (COPD), congestive heart failure and hypoxemia, and stated claimant "is [one hundred percent] impaired [due to] hypoxia which worsens on physical activity." Director's Exhibit 10. Dr. Houser diagnosed COPD/chronic bronchitis and exercise-induced hypoxemia. Claimant's Exhibit 5. He stated:

> Both of the exercise blood gas studies which have been performed exceed the Department of Labor guidelines for establishing disability using arterial

mild impairment but made no statement as to whether it is totally disabling. Employer's Exhibit 10. Dr. Barkman did not address the extent of claimant's respiratory impairment or whether he could perform his previous coal mine employment. Director's Exhibit 11. Relying on the opinions of Drs. Sparks, Houser, and Istanbouly, which he found well-reasoned and supported by the objective medical evidence, the administrative law judge determined that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 23.

Employer argues that none of the physicians who examined claimant rationally found that he has a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Employer also asserts that the objective evidence does not support a finding of total disability since the pulmonary function studies are non-qualifying, the blood gas studies are questionable, and a comment by the doctor who validated one of the blood gas studies identified obesity as the cause of claimant's hypoxia. We reject these contentions. As previously indicated, claimant is not required to establish the cause of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(iv), merely that one exists. *See Roberts*, 74 F.3d 1233 (Table), 1996 WL 13850, at *2. In addition, because we rejected employer's argument that the qualifying exercise blood gas studies are unreliable, we also reject its assertion that the administrative law judge erred in crediting the opinions of Drs. Sparks, Houser, and Istanbouly because they relied on these studies. *See Pickup*, 100 F.3d at 873; *Hansen v. Director, OWCP*, 984 F.2d 364, 370 (10th Cir. 1993).

Employer's additional contention that claimant does not have a totally disabling respiratory impairment because he continued working as a miner until the company closed, then took a job as a municipal electrician from which he retired when he had a "massive heart scare" is also without merit. Employer's Brief at 27. The employment history referenced by employer is not relevant to the total disability inquiry. Claimant's ability to perform his usual coal mine employment from a respiratory or pulmonary standpoint is assessed as of the date of the hearing, not the date claimant ceased working as a miner or retired from the workforce. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 738 (6th Cir. 2014); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982).

> blood gas analysis. Even with supplemental oxygen, [claimant] would not be able to perform light work. This would definitely preclude him from physically being able to perform any of his prior [coal mine employment].

Id. Dr. Istanbouly diagnosed COPD "per [pulmonary function test] criteria," and exertional hypoxia. Claimant's Exhibit 3. He observed claimant "would be unable to perform the duties of his last coal mining job due to his respiratory disability." *Id*.

As employer has not raised any other allegations of error regarding the administrative law judge's weighing of the medical opinions, we affirm his finding claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv), as rational and supported by substantial evidence. *See Hansen*, 984 F.2d at 370; Decision and Order at 23. Consequently, we also affirm the administrative law judge's determination, based on a weighing of the evidence as a whole, that claimant established total disability at 20 C.F.R. §718.204(b)(2), and, therefore, invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(iii); *see Rafferty*, 9 BLR at 1-232; Decision and Order at 23.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish claimant has neither clinical nor legal pneumoconiosis,[12] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must establish claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Drs. Sparks, Istanbouly, and Houser diagnosed legal pneumoconiosis, while Drs. Parmet and Barkman did not. Director's Exhibits 10, 11; Employer's Exhibit 10; Claimant's Exhibits 3, 5. The administrative law judge gave little weight to the opinions of Drs. Sparks and Istanbouly because they did not explain the basis for their diagnoses. Decision and Order at 27. He determined that Dr. Houser's opinion was well-reasoned, supported by the objective medical evidence, and

[12] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

consistent with the premises underlying the Act. *Id*. He also found that even if he were to disregard Dr. Houser's opinion, employer did not meet its burden to establish rebuttal of legal pneumoconiosis because the contrary opinions of Drs. Parmet and Barkman were not well-reasoned. *Id*. at 27-28.

Employer argues that the award should be vacated because Dr. Houser's diagnosis of legal pneumoconiosis was not reasoned or documented, and the opinions of Drs. Parmet and Barkman credibly establish claimant does not have legal pneumoconiosis. Employer's Brief at 33-36. These allegations are without merit.

Because it is employer's burden to disprove legal pneumoconiosis, 20 C.F.R. §718.305(d)(1)(i), we decline to address employer's contentions regarding the administrative law judge's weighing of Dr. Houser's opinion.[13] Regarding Dr. Parmet's opinion, the physician stated that the "direct and proximate cause" of claimant's COPD is smoking. He stated further that claimant's "tobacco use could entirely account for his pulmonary condition," but his obesity is "also sufficient to account for approximately [twenty-five] percent of his impairment." Employer's Exhibit 10. He concluded: "[T]here is no need to invoke pneumoconiosis to create any of the impairing conditions that [claimant] suffers from at this time. Any potential contribution would be minimal to subclinical and a trivial factor in his overall health status." *Id*. The administrative law judge permissibly found Dr. Parmet's opinion does not rebut legal pneumoconiosis because employer's burden is not satisfied by "show[ing] other conditions or factors are sufficient to account for [claimant's] pulmonary condition." Decision and Order at 28; *see Pickup*, 100 F.3d at 873. He also permissibly discredited Dr. Parmet's opinion because the physician did not explain why claimant's degree of obesity is "sufficient" to have contributed to claimant's impairment along with smoking, but his twenty-six years of coal dust exposure is not.[14] Decision and Order at 28 n.2.

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[13] We also decline to address employer's arguments regarding the administrative law judge's consideration of the opinions of Drs. Sparks and Istanbouly, as they do not assist employer in establishing rebuttal of the Section 411(c)(4) presumption. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 33-36.

[14] The administrative law judge stated:

> Apparently, despite the fact that the Claimant's smoking history could account for all of his pulmonary condition, Dr. Parmet felt there was still room for his obesity to contribute 25% to that condition. He did not explain

Dr. Barkman's opinion on the cause of claimant's impairment consists of two statements: "I do not believe he has any coal related respiratory disease" and "[h]is mild restriction on pulmonary function is most consistent with his body habitus." Director's Exhibit 11. As the administrative law judge observed, Dr. Barkman provided no explanation for his view that claimant does not have a coal related respiratory disease and failed to explicitly address whether coal dust exposure, in addition to claimant's "body habitus," played a role in his impairment. *Id*.; Decision and Order at 28. The administrative law judge's determination that Dr. Barkman's opinion does not satisfy employer's burden is rational and supported by substantial evidence. *Id*.; *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024 (10th Cir. 2010); *Hansen*, 984 F.2d at 370; Decision and Order at 28.

We therefore affirm the administrative law judge's finding that the opinions of Drs. Parmet and Barkman are insufficient to rebut the presumption that claimant has legal pneumoconiosis. Employer's failure to rebut legal pneumoconiosis precluded it from rebutting the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[15] 20 C.F.R. §718.305(d)(1)(i).

Total Disability Causation

Relying on his findings at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge found the opinions of Drs. Parmet and Barkman do not rebut the causal relationship between claimant's totally disabling respiratory impairment and pneumoconiosis. Decision and Order at 28-29. Because employer has not raised any specific challenge to this finding, we affirm the administrative law judge's determination employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §§718.305(d)(1)(ii), 802.211(b), 802.301(a); s*ee Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 29.

> why there was no room for the Claimant's significant history of coal mine dust exposure to contribute to his pulmonary condition as well.

Decision and Order at 28 n.2.

[15] Accordingly, we need not address employer's allegations of error regarding the administrative law judge's finding that employer did not disprove clinical pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Employer's Brief at 28-32.

Based on claimant's invocation of the Section 411(c)(4) presumption and employer's failure to rebut it, claimant has established his entitlement to benefits.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge