BRB No. 12-0460 BLA

LYNDELL N. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN COAL COMPANY	)	
	)	DATE ISSUED: 06/17/2013
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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (09-BLA-5884) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim for benefits on June 23, 2008. Director's Exhibit 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

Applying amended Section 411(c)(4),[1] the administrative law judge noted that the parties stipulated to twenty-nine years of coal mine employment.[2] The administrative law judge determined that claimant's surface coal mine employment was substantially similar to work in an underground mine, and he found that the evidence established that claimant suffers from a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption, and he awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant's aboveground coal mine employment was comparable to underground mining. Further, employer challenges the administrative law judge's finding of total disability, and his finding that employer did not establish rebuttal of the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that claimant's coal mine employment in surface mines was comparable to underground coal mine employment.

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

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[1] Because of difficulties that arose in scheduling a hearing, which the parties ultimately decided to waive, the record in this case remained open until January 20, 2012.

[2] Claimant's last coal mine employment was in Kentucky. Director's Exhibits 3, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Qualifying Coal Mine Employment

In order to invoke the amended Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). To establish that his work was substantially similar to underground coal mine employment pursuant to Section 411(c)(4), a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 480, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Leachman*, 855 F.2d at 512.

All of claimant's coal mine employment took place in surface mines. Director's Exhibit 16 at 5. Claimant described his early coal mine employment as working the horizontal driller in the pit, where he was exposed to dust. Claimant's Exhibit 11 at 28. Claimant drove a truck for six years, where, he testified, at times it was so dusty there was no visibility. *Id.* at 18-20. He also stated that he worked as an oiler on a shovel, where he was covered in dust. *Id.* at 22-23. During his last fifteen years of coal mine employment, he worked as a field mechanic, fixing and maintaining dozers and the equipment that hauls and loads coal, wherever the equipment was located or had broken down. *Id.* at 6-7. He often worked in the pit where the coal was being mined and loaded, in dusty conditions, where, he testified, there was "zero visibility at times." *Id.* at 12. His last five years of coal mine employment were primarily at the tipple, "where the trucks came off the ramp." *Id.* at 16. According to claimant, this location was "real dusty." *Id.* at 17. Claimant also testified that he came home "black" each day. *Id.* at 29.

The administrative law judge found that claimant's uncontradicted testimony established that the conditions in his surface mine employment were substantially similar to those in an underground mine: "I find that the Claimant is credible that he worked at the tipple for at least five years, in close proximity to it for more than another ten years, and in extremely dusty jobs for an excess of 15 years. I find that there is no evidence otherwise." Decision and Order at 6.

Employer challenges the administrative law judge's finding, contending that the administrative law judge "failed to make the required comparative analysis between the conditions described by [claimant] and those of underground mining," Employer's Brief at 14, and maintains that his finding is insufficient to satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a),

by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer also contends that the absence of standards for determining the comparability of the conditions in aboveground and underground coal mine employment violates the requirements of the APA.

We agree with claimant and the Director that, based on claimant's uncontradicted testimony, the administrative law judge rationally relied upon claimant's statements and his own understanding of the coal mine industry to conclude that the conditions of claimant's surface coal mine employment were substantially similar to those in underground coal mining. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Summers*, 272 F.3d at 480, 22 BLR at 2-276; *Leachman*, 855 F.2d at 512; *Blakley*, 54 F.3d at 1319, 19 BLR at 2-202; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge considered the comparability of the conditions between claimant's surface coal mine employment and underground coal mine employment, and substantial evidence supports this finding, we reject employer's argument that the administrative law judge's coal mine employment finding failed to comply with the requirements of the APA. *See Leachman*, 855 F.2d at 512. Therefore, we affirm the administrative law judge's determination that claimant established that at least fifteen years of his employment in surface mines took place in conditions substantially similar to those in underground coal mine employment.

Total Disability

Employer asserts that the administrative law judge erred in finding total disability established based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).[3] The record contains the medical opinions of Drs. Baker and Houser, who opined that claimant lacks the respiratory capacity to perform his last coal mine employment, Director's Exhibit 13; Claimant's Exhibit 6, Dr. Chavda, who stated that claimant's FEV1 value is reduced but "does not meet the criteria for total pulmonary disability," Claimant's Exhibit 7, and Drs. Broudy, Repsher, and Jarboe, who opined that claimant could perform his usual coal mine employment. Employer's Exhibits 1, 2, 7, 8, 10, 12, 14-18.

Dr. Baker examined claimant in 2008 and noted that claimant ran a loader, hauled coal out of the pit, and worked as a mechanic for the haul trucks, "lifting heavy objects such as tires and parts many time[s] during his shift." Director's Exhibit 13. Dr. Baker opined that claimant had "a moderate [restrictive] impairment with a vital capacity

[3] The administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii).

decreased to a class III level." Director's Exhibit 13. In an addendum, Dr. Baker explained that, "With a class 3 impairment, the patient could not have the respiratory capacity to do the work of a coal miner nor comfortable [sic] work in a dusty environment." *Id.*

Dr. Houser examined claimant in 2010. He noted that claimant's coal mine jobs were operating a loading shovel, driving a truck, working as a mechanic, and loading coal, and that claimant's last job was working as a mechanic, primarily in the field, which included some welding. The job duties Dr. Houser noted included "lifting and moving various parts that were being replaced or repaired on the equipment. The gearbox on the coal truck weighed as much as 200 pounds." Claimant's Exhibit 6. Dr. Houser interpreted claimant's pulmonary function study as revealing a moderate obstructive impairment, and opined that "[s]olely from a respiratory standpoint, I do not believe [claimant] is physically able to perform his last [coal mine employment] as described under occupational history." Claimant's Exhibit 6.

Dr. Chavda examined claimant in 2011. He concluded that claimant "has reduced FEV1, but it does not meet the criteria for total pulmonary disability." Claimant's Exhibit 7 at 2.

Dr. Broudy examined claimant in 2009. He opined that claimant "retained the respiratory capacity to perform the work of an underground coal miner or do similarly arduous manual labor." Employer's Exhibit 1. Dr. Broudy reviewed additional medical records, and stated that claimant had "the capacity to perform hard manual labor from a respiratory standpoint." Employer's Exhibit 7.

Dr. Repsher examined claimant in 2009, and noted that claimant's last coal mine employment was as a mechanic and truck driver. Dr. Repsher found that claimant had no clinically significant pulmonary impairment, and opined that "from a respiratory point of view, [claimant was] fully fit to perform his usual coal mine work." Employer's Exhibit 2. Dr. Repsher later reviewed additional medical records and stated that claimant has a moderate obstructive impairment, based on Dr. Chavda's June 2, 2011 pulmonary function study, but stated that his opinion was unchanged that claimant is not totally disabled. Employer's Exhibits 8, 10, 15, 16. In his deposition, Dr. Repsher indicated that he was familiar with the exertional requirements of a mechanic and a truck driver, which he described as "generally relatively light. . . [with] brief episodes of moderate to heavy work." Employer's Exhibit 14 at 25-26. Dr. Repsher stated that claimant had the respiratory capacity to perform this work. *Id*. at 26.

Dr. Jarboe reviewed claimant's medical records and wrote a report dated February 20, 2011. Dr. Jarboe stated that claimant:

> has a significant respiratory impairment based on the most recent functional studies of 12/29/10. This impairment is a moderate degree of airflow obstruction. However, the values exceed the federal limits for disability in coal workers. I do not believe that [claimant] has a totally and permanently disabling pulmonary condition.

Employer's Exhibit 12. Dr. Jarboe reviewed additional medical records and opined that claimant retains the respiratory capacity to perform his past coal mine employment. Employer's Exhibit 17. During his deposition, however, Dr. Jarboe stated that he did not "have information specifically about all the jobs that [claimant] did as a surface worker." Employer's Exhibit 18 at 21.

In evaluating the medical opinion evidence regarding total disability, the administrative law judge stated that claimant "maintained that [his] work required heavy lifting," while Dr. Repsher "described the job as light with intermittent heavy lifting." Decision and Order at 8. The administrative law judge found claimant's testimony to be credible, and determined that claimant's last mining job "as actually performed was heavy." *Id*. The administrative law judge next found that the preponderance of the medical opinion evidence, "as stated by Drs. Houser, Chavda and Jarboe," established that claimant has a moderate obstructive impairment.[4] *Id*. The administrative law judge also discounted Dr. Repsher's opinion because it did not take into account the more recent pulmonary function studies conducted by Drs. Houser and Chavda:

> When challenged on cross examination, Dr. Repsher maintained that the Claimant would have the capacity to do medium to moderately heavy work and the capacity to do intermittent heavy work. (EX 14 at 29). Although there had been other examinations after his examination in early 2009, I note that during the deposition, Dr. Repsher was not asked to comment on the Houser or Chavda reports. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older.

Decision and Order at 8-9. The administrative law judge further found that only Dr. Houser demonstrated an accurate understanding of the exertional requirements of claimant's usual coal mine employment, noting that "none of the other physicians were

[4] The administrative law judge discounted Dr. Broudy's opinion that claimant has no significant impairment, as Dr. Broudy did not consider later pulmonary function study evidence considered by the other physicians. He also discounted Dr. Baker's opinion that claimant's impairment was restrictive in nature.

presented this vocational history, which I find is credible based on Claimant's presentation." Decision and Order at 9. The administrative law judge stated that Dr. Jarboe did not have " a complete understanding that [claimant's] work was 'heavy' as defined by the Department of Labor." *Id.* Therefore, the administrative law judge found that Dr. Houser's opinion regarding disability "is the most credible as he applied the proper vocational standard to the claimant's preponderant respiratory profile." Id. The administrative law judge therefore concluded that claimant established total disability "through a reasoned medical report." Decision and Order at 10.

Contrary to employer's initial assertion, the administrative law judge permissibly found that Dr. Houser's description of claimant's job requirements matched claimant's description of his job. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order at 8-9; Claimant's Exhibit 6. Therefore, we reject employer's assertion that Dr. Houser did not consider the exertional requirements of claimant's last job. Claimant's Exhibit 6. We also reject employer's assertion that Dr. Houser's opinion is not well-reasoned or well-documented. The determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, substantial evidence supports the administrative law judge's determination that Dr. Houser's opinion was reasoned, as Dr. Houser based his opinion on his examination of claimant, claimant's coal mine employment and smoking histories, and the results of objective testing. Decision and Order at 9; Claimant's Exhibit 6. Therefore, the administrative law judge reasonably found that Dr. Houser's opinion, that claimant is not capable of performing his usual coal mine employment, was reasoned. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

However, we agree with employer that the administrative law judge mischaracterized Dr. Repsher's opinion. The administrative law judge found that Dr. Repsher's opinion was entitled to less weight regarding disability, because he relied "entirely on older testing," noting that Drs. Houser, Chavda and Jarboe "read a more complete record." Decision and Order at 9. As employer argues, Dr. Repsher's July 21, 2011 report was written after he reviewed additional evidence, in particular, the June 2, 2011 pulmonary function study and blood gas study administered by Dr. Chavda. Employer's Exhibit 15. Consequently, the administrative law judge's characterization of Dr. Repsher's opinion, as based solely on older evidence, cannot be affirmed. Therefore,

we vacate the administrative law judge's finding that Dr. Repsher's opinion is "less worthy" because it was based entirely on older evidence.[5] Decision and Order at 9.

Additionally, we cannot affirm the administrative law judge's finding that Dr. Houser's opinion was the most credible because Dr. Houser "applied the proper vocational standard to the claimant's preponderant respiratory profile," Decision and Order at 9, in that "none of the other physicians were presented with [Dr. Houser's] vocational history. . . ." *Id.* at 9. As employer asserts, Dr. Jarboe reviewed Dr. Houser's opinion, which includes Dr. Houser's description of claimant's vocational history. Employer's Exhibit 12. We further note, however, that when deposed, Dr. Jarboe stated that he did not have specific information about all of claimant's mining jobs. Director's Exhibit 18 at 21. Therefore, on remand, the administrative law judge must determine the extent of Dr. Jarboe's knowledge of claimant's vocational history and the exertional requirements of his jobs, prior to weighing the medical opinion evidence regarding total disability. *See Cornett*, 227 F.3d at 576, 22 BLR at 2-120.

Employer also argues that the administrative law judge erred when he stated that "every physician rendering an opinion in this record agrees that the miner had totally disabling [chronic obstructive pulmonary disease]." Decision and Order at 7. There is merit to employer's argument that this statement is "belied by the opinions of Drs.

[5] Similarly, the administrative law judge's discrediting of Dr. Repsher's opinion in favor of the opinions of "Drs. Houser, Chavda and Jarboe, who read a more complete record," Decision and Order at 9, cannot be affirmed. Drs. Houser and Chavda each based their opinions solely on their own examinations of claimant and the objective testing that each administered, Claimant's Exhibits 6, 7, while Drs. Jarboe and Repsher appear to have considered similar medical data in rendering their reports. Employer's Exhibits, 2, 8, 10, 12, 14, 15, 17. Further, Dr. Repsher considered Dr. Baker's July 25, 2008 report and his January 7, 2010 deposition, and Dr. Broudy's January 26, 2009 report. Employer's counsel sent Dr. Houser's December 29, 2010 report to Dr. Repsher for evaluation, by letter dated January 4, 2011. Employer's Exhibit 10. Dr. Repsher's response, dated January 5, 2011, does not specifically refer to Dr. Houser's report. *Id.* Similarly, employer's counsel sent Dr. Chavda's June 2, 2011 report to Dr. Repsher for evaluation, by letter dated July 18, 2011. Employer's Exhibit 15. Dr. Repsher's response, dated July 18, 2011, addresses the pulmonary function test and blood gas study administered by Dr. Chavda on June 2, 2011, but does not specifically refer to Dr. Chavda's report. *Id.* Because the administrative law judge's findings are not adequately supported by the evidence, and because the administrative law judge has not fully explained his reasoning, we vacate his determination to discount Dr. Repsher's opinion because it was based on a less complete record.

Broudy, Repsher and Jarboe. . . ." Employer's Brief at 22. Because the administrative law judge's finding is not supported by substantial evidence, it is vacated.

Employer also argues that the administrative law judge erred in rejecting the "older evidence," arguing that there is no presumption of progressivity. On remand, the administrative law judge has the discretion to rely on the more recent evidence; however, he must fully explain the basis of his determination to do so. *See* 5 U.S.C. §557(c)(3)(A); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (en banc); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Further, on remand, the administrative law judge must consider the job descriptions provided by each physician and determine whether these descriptions of the exertional requirements of claimant's job are similar to the administrative law judge's finding on this issue. *Cornett*, 227 F.3d at 569, 22 BLR at 2-107.

Accordingly, we vacate the administrative law judge's finding that the evidence established the existence of a totally disabling respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand this case for further consideration of the medical opinion evidence.[6] Therefore, we also vacate the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

Rebuttal

In view of our holdings regarding invocation of the Section 411(c)(4) presumption, we also vacate the administrative law judge's finding that employer did not rebut this presumption. In the interest of judicial economy, and to avoid any repetition of error if the administrative law judge again finds invocation of the Section 411(c)(4) presumption established on remand, we will review the administrative law judge's determination that employer failed to rebut the presumption.

To establish rebuttal, employer must disprove the existence of pneumoconiosis, or establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). The administrative law judge concluded that employer did not disprove the existence of pneumoconiosis:

[6] In addition, on remand, the administrative law judge must weigh all contrary probative evidence, like and unlike, in making a determination regarding total disability. *See* 20 C.F.R. §718.204(b); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc).

> After a review of the x-ray evidence, I find that the two most recent x-rays are more probative and the evidence from them is in equipoise.
>
> Therefore, I find that the Employer cannot rule out pneumoconiosis based on the x-ray evidence. I note further that the "other" evidence is not recent and therefore is less probative than the x-ray evidence.
>
> In reviewing, I attribute less weight to the opinions of [Drs.] Broudy, Repsher and Jarboe because they do not account for the respiratory impact of 29 years of coal mine employment. I find that the opinions of Drs. Broudy and Repsher are not well reasoned because they do not address the pulmonary function studies of 2010 and 2011. I find that the "other" medical evidence, including the CT scan does not expressly rule out pneumoconiosis. The CT scan was performed in 2009, two years before the more recent evidence was produced.

Decision and Order at 11-12 (citations and footnotes omitted). With respect to the second method of rebuttal, the administrative law judge quoted the standard set forth in 20 C.F.R. §718.204(c), under which a claimant who is attempting to establish entitlement under 20 C.F.R. Part 718 must prove that pneumoconiosis is a substantially contributing cause of his or her total disability. Decision and Order at 12. The administrative law judge then stated:

> Dr. Houser stated that [claimant's] totally disabling impairment is due to a combination of his coal dust exposure and cigarette smoking history.
>
> I credit this opinion. I reject the opinions of the physicians who failed to diagnose pneumoconiosis.
>
> Therefore, I find that total disability is due in part to pneumoconiosis.

Id. at 12-13.

Employer contends that, in finding that employer did not disprove the existence of pneumoconiosis, the administrative law judge improperly relied on the evidence from 2010 and 2011, over the evidence from 2009, and that the administrative law judge mischaracterized Dr. Repsher's opinion. Employer also contends that the administrative law judge erred in rejecting the opinions of Drs. Broudy, Repsher, and Jarboe regarding the existence of pneumoconiosis because they did not account for the respiratory impact of twenty-nine years of coal mine employment. Regarding disability causation, employer argues that the administrative law judge simply accepted Dr. Houser's opinion, and that his findings are unexplained.

There is merit in employer's assertion that the administrative law judge misconstrued Dr. Repsher's opinion when he found that the physician did not consider

the more recent evidence, as Dr. Repsher reviewed the results of the June 2, 2011 pulmonary function study and blood gas study. Employer's Exhibit 15. Further, if, on remand, the administrative law judge favors the more recent evidence, he must explain his reasons for this preference. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-162.

We disagree, however, with employer's assertion that the administrative law judge erred by discounting medical opinions regarding the existence of pneumoconiosis on the basis that the physicians did not adequately account for claimant's twenty-nine years of coal mine employment. An administrative law judge may permissibly discount a medical opinion if he finds that the physician did not adequately explain how he determined that claimant's coal mine dust exposure did not contribute to, or aggravate, his lung disease. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-155. On remand, however, the administrative law judge must explain the specific bases for his determination if he concludes that a physician has not adequately accounted for the respiratory impact of claimant's years of coal mine dust exposure. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-162.

Turning to disability causation, we agree with employer that the administrative law judge's rebuttal finding was not adequately explained. On remand, if reached, the administrative law judge must fully explain his weighing of the evidence regarding the cause of claimant's disability. *See* 5 U.S.C. §557(c)(3)(a); *Wojtowicz*, 12 BLR at 1-162. Further, the administrative law judge must apply the rebuttal standard set forth in Section 411(c)(4), and determine whether employer has established that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

In sum, we remand this case for the administrative law judge to determine whether claimant has established total disability, and therefore invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. If the administrative law judge finds that claimant has established invocation of this presumption, the burden will then shift to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison* , 644 F.3d at 479, 25 BLR at 2-8.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those limitations to the instant case. However, because the Board has adopted precedent to the contrary, *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2010), I concur with my colleagues in all respects.

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JUDITH S. BOGGS
Administrative Appeals Judge