U.S. Department of Labor

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

BRB No. 15-0240 BLA

BILLY L. FOWLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 03/23/2016
	)	
and	)	
	)	
U.S. STEEL & CARNEGIE PENSION FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06095) of Administrative Law Judge Theresa C. Timlin, rendered on a claim filed on October 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Based on the filing date of the claim, and her determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge found that 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] The administrative law judge further found that employer's evidence was insufficient to disprove that claimant has clinical and legal pneumoconiosis or that his disability is related to legal pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established total disability for invocation of the presumption. Employer also argues that the administrative law judge erred in finding that it did not establish rebuttal of the presumption.[2] Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Pursuant to Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability due to pneumoconiosis, if he 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 33.84 years of coal mine employment, and at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 5, 6, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

In considering whether claimant established a totally disabling respiratory or pulmonary impairment, the administrative law judge weighed the results of three pulmonary function studies, dated November 24, 2010, July 19, 2011, and September 7, 2011. Decision and Order at 11; Director's Exhibit 12; Employer's Exhibits 1, 2. As none of the studies produced qualifying values,[4] the administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge weighed three arterial blood gas studies, dated November 24, 2010, July 19, 2011, and September 7, 2011. Decision and Order at 12-13. Each of the studies had non-qualifying values[5] at rest; however, claimant had qualifying values during the exercise portion of the November 24, 2010 blood gas study administered by Dr. Forehand. Director's Exhibit 12; Employer's Exhibits 1, 2. Dr. Castle reported that he did not exercise claimant on July 19, 2011, because he saw "significant cardiomegaly by chest x-ray indicating underlying cardiac disease." Employer's Exhibit 1. Dr. Zaldivar indicated that he did not exercise claimant on September 7, 2011, because of his "general frail condition due to his age." Employer's Exhibit 2. Noting that "[n]one of the physicians who reviewed the November test controverted its accuracy," the administrative law judge gave greatest weight to the November 24, 2010 exercise arterial blood gas study, because she considered the results to be "more probative on the issue of [c]laimant's ability to perform his last coal mine employment."[6] Decision and Order at 12-13. Thus, the

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

[5] A "qualifying" blood gas study yields values that are equal to or less than the values listed in Appendix C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

[6] The administrative law judge found that claimant's last coal mine job was as an underground assistant mine foreman, which involved moderate manual labor and required claimant "to remain on his feet and work underground." Decision and Order at 13. The administrative law judge found that claimant could not perform his last coal mine work based on Dr. Forehand's exercise blood gas study because he showed signs of

administrative law judge found that claimant established total disability under 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge considered the medical opinions of Drs. Forehand, Zaldivar, and Castle.[8] The administrative law judge noted that each of the three physicians opined that claimant is totally disabled from

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hypoxemia after three minutes, which is "far less than the exertion level of the tasks [c]laimant performed in his last coal mine employment." *Id*.

[7] The administrative law judge determined that, although Dr. Alexander indicated that cor pulmonale was present on claimant's November 24, 2010 and September 7, 2011 x-rays, claimant could not establish total disability under 20 C.F.R. §718.204(b)(2)(iii), because no other physician diagnosed this condition. Decision and Order at 13; Claimant's Exhibits 4, 5.

[8] Dr. Forehand examined claimant on behalf of the Department of Labor on November 24, 2010. Director's Exhibit 12. He wrote on the Form CM-988 that claimant has a "normal ventilatory pattern" but suffers from "exercise-induced hypoxemia" and has "insufficient residual gas exchange capacity to return to last coal mine job" as a foreman. *Id*. In a separate report dated November 12, 2012, Dr. Forehand further explained that claimant's "resting pO2 was 85 but fell to 68 during exercise, which is an abnormal response to exercise and indicative of exercise-induced arterial hypoxemia." Claimant's Exhibit 6. Dr. Zaldivar examined claimant on September 7, 2011, and reviewed the testing conducted by Drs. Forehand and Castle. Employer's Exhibits 2, 8. He diagnosed mild restriction of claimant's vital capacity during pulmonary function testing, which corrected after the use of a bronchodilator, mild restriction of total lung capacity, and a moderate impairment of claimant's diffusion capacity. Employer's Exhibit 2. Dr. Zaldivar stated that claimant was "unable to perform the usual activities of an 81-year-old man because of gas exchange abnormalities brought about by the . . . condition of chronic pulmonary emboli with pulmonary hypertension." *Id*. Dr. Castle examined claimant on July 19, 2011, and also reviewed Dr. Forehand's examination findings. Employer's Exhibits 1, 7. Dr. Castle indicated that claimant had a normal pulmonary function study and a normal resting blood gas study during his examination. Employer's Exhibit 1. However, Dr. Castle opined that claimant is disabled based on the November 24, 2010 exercise blood gas study obtained by Dr. Forehand, which he stated is "clearly and entirely due to cardiac disease with decompensation." Employer's Exhibit 7. Dr. Castle concluded that claimant is "not permanently and totally disabled as a result of coal workers' pneumoconiosis or a coal mine dust induced lung disease;" rather he is "permanently and totally disabled as a result of cardiac disease and his advanced years." *Id*.

a pulmonary standpoint, but that they disagree as to the cause of that impairment. Decision and Order at 17. The administrative law judge specifically stated:

> Although Dr. Zaldivar did not opine on whether [c]laimant could perform his last coal mine employment, his statement that [c]laimant is "unable to perform the usual activities of an eighty-one year old man" make it clear that he found [claimant] to be totally disabled. Dr. Castle concluded that [c]laimant is totally and permanently disabled but attributed his pulmonary condition to a different cause.

Id. at 18, *quoting* Employer's Exhibit 2 at 3. The administrative law judge concluded that claimant established total disability, based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and in consideration of all the evidence together. Decision and Order at 18. Because the administrative law judge found that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), she also concluded that claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). *Id*.

Employer states that an issue raised in this appeal is "[w]hether the medical evidence in the record of this claim will support a finding of total disability . . . ." Employer's Brief at 6. In setting forth its argument, employer does not dispute that the November 24, 2010 exercise blood gas study from Dr. Forehand is qualifying for total disability. Instead, employer generally contends that "[t]he better supported and better reasoned medical evidence in the record of this claim demonstrates that the sole indicator of potential disability in this claim, the claimant's abnormal exercise blood gas test result, has resulted not from coal mine dust exposure, but from purely non-occupational disease processes associated with his cardiac and thromboembolitic conditions." *Id.* at 19.

Employer's assertion that the qualifying exercise blood gas values are related to a cardiac condition, and not to claimant's coal dust exposure, however, is not pertinent to whether the administrative law judge committed error in relying on the qualifying exercise blood gas study to find claimant totally disabled. The proper inquiry at 20 C.F.R. §718.204(b)(2) is whether the evidence establishes the presence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(ii). The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether an employer has rebutted the Section 411(c)(4) presumption by establishing that "no part" of claimant's total respiratory or pulmonary disability is due to pneumoconiosis as defined in 20 C.F.R. §718.201. *See* 20 C.F.R. §§718.204(c), 718.305(d)(1)(ii).

Because employer does not identify any specific error by the administrative law judge in her consideration of the blood gas study or medical opinion evidence, we affirm the administrative law judge's findings that claimant established total disability pursuant

to 20 C.F.R. §718.204(b)(2)(ii), (iv), and her overall finding that claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm her determination that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have either legal[9] or clinical[10] pneumoconiosis, or by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i)-(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

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

[10] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

Initially, we note that the administrative law judge erred in considering whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), prior to determining whether claimant was entitled to the rebuttable presumption at Section 411(c)(4). *See Minich*, 25 BLR at 1-159. By failing to first address whether claimant is entitled to the presumption, the administrative law judge failed to properly allocate the burden of proof on rebuttal to employer to disprove the existence of clinical pneumoconiosis. Ultimately, this error is harmless as we conclude that the administrative law judge rationally weighed the conflicting x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge weighed eleven readings of five x-rays dated March 5, 2012, September 7, 2011, July 19, 2011, May 13, 2011, and November 24, 2010. Decision and Order 8-9. The March 5, 2012 x-ray was read as positive for pneumoconiosis by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, but was read as negative by Dr. Willis, also a dually qualified radiologist. Claimant's Exhibit 2; Employer's Exhibit 6. The September 7, 2011 x-ray was read as positive for pneumoconiosis by Dr. Alexander, but as negative for pneumoconiosis by Dr. Zaldivar, a B reader. Claimant's Exhibit 4; Employer's Exhibit 2. The July 19, 2011 x-ray was read as positive by Dr. Miller, a dually qualified radiologist, but as negative by Dr. Castle, a B reader. Claimant's Exhibit 3; Employer's Exhibit 1. The May 13, 2011 x-ray was read as positive by Dr. Miller, but as negative by Dr. Willis. Claimant's Exhibit 1; Employer's Exhibit 5. Lastly, the November 24, 2010 x-ray was read as positive by Dr. Alexander, and by Dr. Forehand, a B reader, but as negative by Dr. Willis. Director's Exhibit 12; Claimant's Exhibit 5; Employer's Exhibit 3.

In resolving the conflict in the x-ray evidence, the administrative law judge indicated that she gave greatest weight to the readings by the dually qualified radiologists, and found that the September 7, 2011 and July 19, 2011 x-rays were positive for pneumoconiosis, while the March 5, 2012 and May 13, 2011 x-rays were in equipoise. Decision and Order at 8-9. With respect to the November 24, 2010 x-ray, the administrative law judge found that, while the film had one positive reading and one negative reading by dually qualified radiologists, Dr. Forehand's positive reading gave "more credence to Dr. Alexander's [positive] interpretation." *Id*. at 9. Therefore, the administrative law judge found that the November 24, 2010 x-ray was positive for pneumoconiosis. *Id*. Based on her consideration of the x-ray evidence as a whole, the administrative law judge concluded:

> All chest [x]-rays were taken between 2010 and 2012, so they are close in time. Although [c]laimant's most recent [x]-ray evidence dated March 5, 2012 was not interpreted as positive for pneumoconiosis, the weight of the controlling evidence is positive for pneumoconiosis.

Id.

On appeal, employer states that the administrative law judge "appears to engage in pure head-counting in assessing each film (and in assessing the films in sum)" and that she should have placed "less emphasis on the number of readings on each side of the 'positive-negative' divide, and more emphasis on the quality and credibility of the readings themselves." Employer's Brief at 9, 11.

Employer's assertion of error is without merit. The administrative law judge properly performed both a qualitative and quantitative review of the x-ray evidence, taking into consideration the number of x-ray interpretations, along with the readers' qualifications, the dates of the films, and the nature of the readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Bateman v. E. Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge permissibly assigned greatest weight to the x-ray readings by the dually qualified radiologists and rationally explained how she resolved the conflict in the x-ray evidence. *See* 20 C.F.R. §§718.102, 718.202(a)(1); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991) (en banc). Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that a preponderance of the x-ray evidence is positive for clinical pneumoconiosis. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

The administrative law judge also rejected the opinions of Drs. Zaldivar and Castle, that claimant does not have clinical pneumoconiosis. Decision and Order 21. Employer has not raised a specific challenge with respect to the administrative law judge's discrediting of the opinions of Drs. Zaldivar and Castle on the existence of clinical pneumoconiosis. *See Sarf*, 10 BLR at 1-120-21; *Fish*, 6 BLR at 1-109. In light of our affirmance of the administrative law judge's weighing of the x-ray evidence, we affirm her finding that employer failed to disprove the existence of clinical pneumoconiosis based on the medical opinions, as she rationally concluded that Drs. Zaldivar and Castle "based their conclusions on the numerical superiority of the negative [x]-ray interpretations, which is not supported by the record." Decision and Order at 21; *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

The administrative law judge next considered the medical opinions regarding the existence of legal pneumoconiosis. Decision and Order 22-24. The administrative law judge found that Dr. Forehand provided a well-reasoned opinion that claimant has legal pneumoconiosis. *Id*. at 22. In contrast, the administrative law judge rejected Dr. Zaldivar's opinion, that claimant does not have legal pneumoconiosis, as "speculative, inadequately documented, contrary to the regulations and contrary to the legal findings in this case." *Id*. The administrative law judge also accorded less weight to Dr. Castle's

opinion, that claimant does not have legal pneumoconiosis, because she found that "the overall evidence of record does not support his diagnosis of cardiac disease." *Id*. at 24. The administrative law judge further stated that although "Dr. Castle acknowledged that [c]laimant has worked in the coal mines for thirty-eight . . . years," he attributed all of claimant's disability to cardiac disease, without "consider[ing] the effect of [c]laimant's coal mine employment." *Id*. at 26. Therefore, the administrative law judge found that employer failed to rebut the presumption of legal pneumoconiosis. *Id*. at 24.

Employer argues that the administrative law judge did not properly address the explanations given by Drs. Zaldivar and Castle for why claimant does not have a chronic respiratory or pulmonary impairment arising out of coal mine employment that would satisfy the definition of legal pneumoconiosis. We disagree. Contrary to employer's argument, the administrative law judge observed correctly that Dr. Zaldivar opined that claimant does not have either legal or clinical pneumoconiosis because he found no radiographic evidence for a coal dust-related disease.[11] Decision and Order at 26. The administrative law judge rationally found that Dr. Zaldivar's opinion is inconsistent with the preamble, and the regulations, "which permit[] a finding that claimant's disabling respiratory impairment is related to coal mine employment, notwithstanding the absence of radiographic evidence of clinical pneumoconiosis." Decision and Order at 26, *quoting Salyers v. Spring Hollow Mining, Inc.*, BRB No. 13-0305 BLA, slip op. at 5 (Mar. 25, 2014) (unpub.); 20 C.F.R. §718.202(a)(4); *see* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 578, 23 BLR 2-184, 2-190 (4th Cir. 2004).

Additionally, the administrative law judge accurately described that Dr. Zaldivar "discounts the possibility that coal dust is the cause of [c]laimant's abnormal results because laboratory testing showed 'only restriction without any obstruction.'" Decision and Order at 23, *quoting* Employer's Exhibit 8 at 2. The administrative law judge permissibly rejected Dr. Zaldivar's opinion because she considered it to be inconsistent with the regulation at 20 C.F.R. §718.201(a)(2), which states that legal pneumoconiosis "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) (emphasis added); *see Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 23.

[11] Dr. Zaldivar stated "there is no evidence of radiographic pneumoconiosis which means that [there] is no evidence of any reactions of the lungs to dust." Employer's Exhibit 8 at 2.

There is also no merit in employer's assertion that the administrative law judge erred in finding Dr. Castle's opinion to be insufficient to establish that claimant does not have legal pneumoconiosis. Although Dr. Castle attributed claimant's exercise blood gas study impairment entirely to cardiac disease, the administrative law judge acted within her discretion in finding that Dr. Castle failed to adequately explain why he totally excluded claimant's thirty-eight years of coal mine employment as a causative factor in claimant's respiratory impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Determining the persuasiveness of a medical opinion is within the discretion of the trier-of-fact, and the Board considers employer's arguments on appeal with regard to its medical experts to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson*, 12 BLR at 1-113. Thus, because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal or clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). *See Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Clark*, 12 BLR at 1-155.

Furthermore, as neither Dr. Zaldivar, nor Dr. Castle, diagnosed legal pneumoconiosis, the administrative law judge permissibly discounted their opinions regarding the cause of claimant's disability. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 26. Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption by establishing that no part of claimant's disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995).

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