U.S. Department of Labor

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

BRB No. 16-0256 BLA

RICHARD GLENN LESTER, SR. Claimant-Respondent v. BLUE FALCON MINING, INCORPORATED 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: 03/24/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-5394) of Administrative Law Judge Scott R. Morris rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on February 26, 2013.

Considering Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with over fifteen years of underground coal mine employment,[3] found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) and 718.204(b) overall. The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] This is claimant's third claim. Director's Exhibit 4. Claimant filed his first claim on February 12, 2003. Director's Exhibit 1. It was finally denied by the district director on February 10, 2004 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his second claim on September 2, 2009. Director's Exhibit 2. It was finally denied by the district director on March 18, 2010 because claimant failed to establish total respiratory disability. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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); *see* 20 C.F.R. §718.305.

[3] The administrative law judge found that "[c]laimant established 26.59 years of coal mine employment over the course of 1973 through 2001; however, [c]laimant's coal mine employment prior to 1978 took place on a strip mine, and there is insufficient evidence to determine whether these conditions were substantially similar to those in an underground mine." Decision and Order at 20. Nevertheless, the administrative law judge found that, "[e]ven when nearly five years are subtracted from [c]laimant's established twenty-six years of coal mine employment, [c]laimant has established over fifteen years of underground, and qualifying, coal mine employment." *Id*.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a brief in this appeal.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[6]

The record contains four new pulmonary function studies conducted on April 17, 2013,[7] August 28, 2013, October 30, 2013 and May 21, 2014. The April 17, 2013 study

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 14.

[6] Because there are no qualifying arterial blood gas studies, the administrative law judge found that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 37; Director's Exhibits 12, 24. Furthermore, as there is no evidence in the record indicating that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 37.

[7] Dr. Gaziano validated the April 17, 2013 pulmonary function study. Director's Exhibit 12.

and the August 28, 2013 study yielded qualifying[8] pre-bronchodilator values.[9] Post-bronchodilator studies were not performed. In contrast, the October 30, 2013 study and the May 21, 2014 study yielded non-qualifying values both before, and after, the administration of a bronchodilator. Director's Exhibits 12, 24; Claimant's Exhibits 6, 7.

Based on the Department of Labor's recognition that post-bronchodilator values do not provide an adequate assessment of a miner's disability, the administrative law judge gave greater weight to the pre-bronchodilator values.[10] Decision and Order at 35, *citing* 45 Fed. Reg. 13,682 (Feb. 29, 1980). Considering the four pre-bronchodilator studies, the administrative law judge initially found that the non-qualifying October 30, 2013 study yielded "a comparatively higher pre-bronchodilation FEV1 value" than the other tests. *Id*. at 36. The administrative law judge further found that, in contrast, the values yielded on the August 28, 2013 and May 21, 2014 studies were more consistent with the values yielded on the April 17, 2013 study, which were validated by Dr. Gaziano. Thus, the administrative law judge discounted the October 30, 2013 non-qualifying study because it yielded "outlier values." Decision and Order at 36.

Considering the remaining three studies, the administrative law judge found that because the April 17, 2013 and August 28, 2013 studies yielded qualifying values, and the FEV1 and FEV1/FVC values of the May 21, 2014 study were "close to qualifying," the preponderance of the pulmonary function study evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer initially asserts that in crediting the August 28, 2013 qualifying pulmonary function study, the administrative law judge "fail[ed] to consider the significant impact of [claimant's] July 2013 hospitalization for pneumonia" on the test results. Employer's Brief at 8. We disagree. While the record reflects that claimant was

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

[9] The administrative law judge found that Dr. Almatari's August 28, 2013 pulmonary function study yielded a non-qualifying FVC value, but the FEV1 and FEV1/FVC ratio of this study yielded qualifying values. Decision and Order at 35 n.37.

[10] Finding that the studies reflected conflicting heights for the miner, the administrative law judge rationally averaged the heights recorded on all four studies to determine claimant's height. *See K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983); Decision and Order at 34-35.

discharged from the hospital on July 24, 2013, having been treated for pneumonia, employer does not point to any medical evidence in the record indicating that, at the time that the August 28, 2013 pulmonary function study was administered, claimant was still suffering from its effects. Further, the administrative law judge noted that "Dr. Almatari administered the [August 28, 2013] test and reported good cooperation and effort." Decision and Order at 35. Without medical evidence establishing the unreliability of pulmonary function studies, neither an administrative law judge nor the Board has the requisite medical expertise to make such a determination. *See generally Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Jeffries v. Director, OWCP*, 6 BLR 1-1013 (1984). Thus, we reject employer's assertion that the administrative law judge erred by relying on the results of the qualifying August 28, 2013 pulmonary function study.

Employer also asserts that the administrative law judge erred in "fail[ing] to be swayed by the fact that the most recent testing result from [May 21, 2014] was non-qualifying." Employer's Brief at 8. The administrative law judge noted that because the two qualifying pulmonary function studies preceded the non-qualifying study, the pulmonary function studies demonstrate an improvement in claimant's condition, rather than the expected deterioration in pulmonary function. Decision and Order at 36. Thus, contrary to employer's argument, the administrative law judge reasonably found that a disharmony exists among the pulmonary function studies that cannot be resolved by the later evidence rule. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-65 (4th Cir. 1992); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); *Sexton v. Southern Ohio Coal Co.*, 7 BLR 1-411, 1-412 (1984); Decision and Order at 36. We, therefore, reject employer's assertion that the administrative law judge erred in failing to give controlling weight to the May 21, 2014 non-qualifying pulmonary function study, as the most recent.

There is merit, however, to employer's allegation that the administrative law judge erred in discounting the results of the October 30, 2013 study on the grounds that it produced "outlier values." Employer's Brief at 9. As employer asserts, the administrative law judge did not find the results of the October 30, 2013 study to be invalid, but discounted the results simply because they were higher than the other pulmonary function studies of record. *Id.* at 11. However, there is no medical opinion of record to support the administrative law judge's conclusion that these higher test results somehow render the study less probative. Rather, both Dr. Zaldivar and Dr. Basheda reviewed the October 30, 2013 study and relied upon it in opining that claimant is capable of performing his last coal mining work, or work of similar effort. Director's Exhibit 24 at 4; Employer's Exhibit 4 at 13-14, 21. Although it is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the

evidence of record and draw his own conclusions and inferences from it, *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), the interpretation of medical data is for the medical experts. *Marcum v. Director,* OWCP, 11 BLR 1-23 (1987). Because there is merit in employer's assertion that the administrative law judge erroneously substituted his opinion for that of the physicians in discrediting the October 30, 2013 pulmonary function study, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i). *Marcum*, 11 BLR at 1-24; Employer's Brief at 13.

We further agree with employer that the administrative law judge failed to adequately explain his weighing of the August 28, 2013 and May 21, 2014 pulmonary function studies. Employer's Brief at 8, 13. Stating that the qualifying FEV1 value for a man of claimant's age and height is 1.94, the administrative law judge found that because the FEV1 value of the May 21, 2014 test was 1.98, only .04 higher, the test was "close to qualifying" and supported a finding of total disability.[11] *See* Decision and Order at 34-35; Claimant's Exhibit 7. In contrast, however, while the FEV1 value of the August 28, 2013 test was 1.90, which is only .04 lower than the non-qualifying table value, the administrative law judge did not address whether the fact that this test was close to non-qualifying undermined the reliability of the test as an indicator of total disability. Decision and Order at 35-36; Employer's Brief at 8. Thus, as employer asserts, the administrative law judge appears to have selectively analyzed these studies. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999) (en banc). On remand, the administrative law judge must reweigh the pulmonary function study evidence and explain his findings.

Employer next challenges the administrative law judge's consideration of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Forehand, Zaldivar and Basheda. Decision and Order at 42-43. Dr. Forehand opined that claimant has a totally disabling respiratory

[11] We note that the qualifying FEV1 value referenced by the administrative law judge pertains to a fifty-eight year old man who is 68.1 inches tall. However, at the time of the May 21, 2014 test, claimant was fifty-nine. Claimant's Exhibit 7. The qualifying FEV1 value for a fifty-nine year old man who is 68.1 inches tall is 1.92. Thus, contrary to the administrative law judge's statement, the FEV1 value of the May 21, 2014 test, at 1.98, is actually .06 higher than the qualifying FEV1 value. However, this error does not negate employer's argument.

impairment.[12] In contrast, Drs. Zaldivar and Basheda opined that claimant does not have a totally disabling pulmonary impairment.[13] Director's Exhibits 12 at 4, 24 at 4; Employer's Exhibit 4 at 21. The administrative law judge gave less weight to the opinions of Drs. Zaldivar and Basheda because he found that the opinions of both doctors were based, in part, on the discredited October 30, 2013 pulmonary function study.[14]

[12] Dr. Forehand diagnosed a significant respiratory impairment and opined that claimant does not have sufficient residual ventilatory capacity to return to his last coal mining job. Director's Exhibit 12 at 4.

[13] Dr. Zaldivar opined that from a pulmonary standpoint claimant is capable of performing even heavy manual labor, and further stated "there is no contraindication from the asthma standpoint for his returning to work as long as he continues to be treated properly for his disease." Director's Exhibit 24 at 4. Similarly, Dr. Basheda diagnosed a very mild pulmonary impairment and opined that claimant would be able to perform his last coal mining work or work of similar effort. Employer's Exhibit 4 at 21.

[14] The administrative law judge noted that both Drs. Zaldivar and Basheda relied upon the October 30, 2013 pulmonary function study results to find that claimant's pulmonary function had improved since the April 17, 2013 study, and that claimant's variable airway obstruction was consistent with asthma rather than pneumoconiosis. Decision and Order at 43; *see* Director's Exhibit 24 at 3; Employer's Exhibit 4 at 18. With respect to Dr. Zaldivar, the administrative law judge stated:

> Dr. Zaldivar's opinion that [c]laimant is not totally disabled is primarily based on his analysis of the pulmonary function test values he obtained [on October 30, 2013], as compared to those obtained by Dr. Forehand [on April 17, 2013]. However . . . the values that Dr. Zaldivar obtained were higher and less consistent with the values obtained in the three other pulmonary function tests of record, particularly since Dr. Gaziano validated Dr. Forehand's test.

Decision and Order at 43. With respect to Dr. Basheda, the administrative law judge stated:

> Dr. Basheda's opinion on the issue of total disability also heavily relies on the comparison between the April and October 2013 pulmonary function tests, which he too interpreted as showing improvement, though I have determined that Dr. Zaldivar's [October 30, 2013] test is less probative.

Id.

Decision and Order at 43-45. In contrast, the administrative law judge gave probative weight to Dr. Forehand's opinion because he found that it is reasoned.[15] *Id*. at 43-45. In so finding, the administrative law judge noted, in part, that the discrepancy between the FEV1 values of Dr. Forehand's April 2013 test and the discredited October 30, 2013 test "len[t] support" to Dr. Forehand's opinion that claimant is totally disabled.[16] Decision and Order at 44. Thus, the administrative law judge found that the weight of the medical opinion evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Finally, considering all of the evidence relevant to disability together, the administrative law judge found that the pulmonary function study and medical opinion evidence supporting total disability, outweighed the contrary blood gas study evidence and established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See 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 45.

As the administrative law judge based his evaluation of the medical opinions, in part, on his weighing of the pulmonary function study evidence, which we have vacated, we must vacate his finding pursuant to 20 C.F.R. §718.204(b)(2)(iv). We must also vacate the administrative law judge's finding that the pulmonary function study evidence and medical opinions outweigh the contrary blood gas study evidence, pursuant to 20

[15] The administrative law judge also found that the results of the August 28, 2013 qualifying pulmonary function study and the May 21, 2014 non-qualifying pulmonary function study supported Dr. Forehand's conclusion. Decision and Order at 44. Specifically, the administrative law judge stated that Dr. Forehand's April 17, 2013 pre-bronchodilator FEV1 value of sixty percent of predicted was consistent with the August 28, 2013 pre-bronchodilator FEV1 value of fifty-five percent of predicted and the May 21, 2014 pre-bronchodilator FEV1 value of fifty-eight percent of predicted. *Id.* As the administrative law judge acknowledged, however, no physician of record reviewed the August 28, 2013 or May 21, 2014 pulmonary function studies or addressed the significance of the results. *Id.*

[16] Specifically, the administrative law judge noted that the discrepancy between the results of Dr. Forehand's April 17, 2013 pulmonary function study and the results of Dr. Zaldivar's October 30, 2013 pulmonary function study "may explain the discrepancy in the physicians' ultimate opinions on the issue of total disability," and "len[t] support to Dr. Forehand's determination that with an FEV1 value of sixty-percent of predicted, [c]laimant is totally disabled from performing his previous coal mine work." Decision and Order at 44.

C.F.R. §718.204(b)(2) overall. On remand, after reconsidering the new pulmonary function study evidence, the administrative law judge must then consider the documentation and reasoning underlying the new medical opinions, and explain whether the medical opinions establish the existence of a totally disabling respiratory impairment. The administrative law judge must explain his findings in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-98.

Moreover, because we vacate the administrative law judge's findings that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2), we further vacate the administrative law judge's findings that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

If the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b), claimant will have established a change in the applicable condition of entitlement and invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012). However, if the administrative law judge finds that the evidence does not establish that claimant is totally disabled, an essential element of entitlement, he must deny benefits.[17] *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the

[17] The administrative law judge found that the evidence does not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *See* 20 C.F.R. §718.304; Decision and Order at 23-33.

Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[18] or by establishing 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). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge initially found that as the new x-ray evidence was uniformly read positive for the existence of pneumoconiosis, the biopsy evidence demonstrated both black pigmentation and fibrosis, and Drs. Forehand, Zaldivar and Basheda all acknowledged radiographic evidence of pneumoconiosis, employer failed to disprove the existence of clinical pneumoconiosis. Decision and Order at 45, 47. As employer does not challenge this determination of appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Finding that employer's failure to disprove the existence of clinical pneumoconiosis precluded employer from rebutting the presumption by establishing that claimant does not have pneumoconiosis, *see* 20 C.F.R. §718.305(d)(1), the administrative law judge found it unnecessary to specifically address whether employer could disprove the existence of legal pneumoconiosis. Decision and Order at 48. Rather, the administrative law judge next considered whether employer was able to rebut the presumption by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii). *Id.*

In adjudicating the issue, the administrative law judge considered the medical opinions of Drs. Zaldivar and Basheda. Decision and Order at 49. Both physicians diagnosed simple, clinical pneumoconiosis, and an obstructive pulmonary impairment. Director's Exhibit 24; Employer's Exhibit 4. Regarding the cause of claimant's impairment, as summarized by the administrative law judge, Dr. Zaldivar stated that claimant's pulmonary abnormalities are not due to his simple, clinical coal workers' pneumoconiosis but are entirely related to the effects of asthma, unrelated to coal mine dust exposure. Decision and Order at 49; Director's Exhibit 24 at 4. With respect to whether any portion of claimant's impairment is due to legal pneumoconiosis, Dr.

[18] "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" 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." 20 C.F.R. §718.201(a)(1).

Zaldivar opined that claimant does not have legal pneumoconiosis. Director's Exhibit 24 at 4. Dr. Basheda similarly opined that claimant does not have legal pneumoconiosis, and that his impairment is due to non-coal mine dust-related asthma, with a possible contribution by cigarette smoke. Employer's Exhibit 4 at 21. Dr. Basheda did not address whether claimant's simple, clinical pneumoconiosis contributed to his impairment. The administrative law judge discounted the opinions of Drs. Zaldivar and Basheda because he found that they did not rule out any contribution by claimant's clinical or legal pneumoconiosis to his disabling respiratory impairment. Decision and Order at 49.

Employer contends that because the administrative law judge did not first provide employer with an opportunity to rebut the presumption of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge's decision must be vacated. Employer's Brief at 14-16. Employer further contends that "[s]ince there is no evidence of record to support that [claimant] has [a] disabling impairment resulting from clinical pneumoconiosis, and since the record is devoid of a finding of legal pneumoconiosis," the administrative law judge's analysis of whether employer ruled out any connection between claimant's disabling impairment and his pneumoconiosis is "skewed" and, therefore, cannot be affirmed. Employer's Brief at 15-16. We disagree.

Because we have affirmed the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, we also affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order at 48. With respect to whether employer established the second means of rebuttal, contrary to employer's contention, claimant is not required to establish that his disabling impairment resulted from his clinical pneumoconiosis; it is employer's burden to disprove the causal connection.[19] 20 C.F.R. §718.305(d)(1)(ii). Further, here, where both physicians diagnosed clinical pneumoconiosis, the administrative law judge permissibly found that Drs. Zaldivar and Basheda "failed to consider pneumoconiosis together with all other possible causes and failed to adequately explain why pneumoconiosis was not at least a partial cause of claimant's respiratory or pulmonary disability." Decision and Order at 49; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

[19] Moreover, contrary to employer's contention, Dr. Forehand opined that both clinical and legal pneumoconiosis contribute to claimant's totally disabling respiratory impairment. Director's Exhibit 12.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Zaldivar and Basheda, the only opinions supportive of a finding that no part of claimant's disabling impairment is due to pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's finding that employer did not satisfy its burden to establish rebuttal.[20] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

In sum, on remand, the administrative law judge must determine whether claimant established the existence of a totally disabling respiratory impairment. If so, claimant will have invoked the Section 411(c)(4) presumption and, in light of our affirmance of the administrative law judge's determination that employer did not rebut the presumption, the administrative law judge may reinstate the award of benefits. If the administrative law judge does not find total disability established, entitlement to benefits under 20 C.F.R. Part 718 is precluded.

[20] Therefore we need not address employer's arguments relevant to whether employer disproved the existence of legal pneumoconiosis, or whether employer established that no part of claimant's disabling impairment is due to legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(1), (ii); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge