U.S. Department of Labor

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

BRB No. 17-0286 BLA

JAMES R. HOWTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON MINING, INCORPORATED	)	
	)	
and	)	
	)	
PITTSBURG & MIDWAY COAL MINING	)	DATE ISSUED: 03/29/2018
	)	
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 Denying Modification of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Denying Modification (2015-BLA-05711) of Administrative Law Judge Colleen A. Geraghty, awarding benefits on a subsequent claim[1] filed on July 16, 2013, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with twenty-three years of surface coal mine employment in conditions substantially similar to those in an underground mine,[2] and found that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant established a change in the applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309(c), and invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge also found that employer failed to rebut the presumption. Accordingly, she denied employer's request for modification of the award of benefits pursuant to 20 C.F.R. §725.310.[4]

On appeal, employer contends that the administrative law judge erred in finding that claimant worked in conditions substantially similar to those in an underground coal

[1] Claimant filed two prior claims that the district director finally denied on September 19, 2003 and October 24, 2005 for failure to establish that claimant was totally disabled. Director's Exhibit 1 at 7-11; Director's Exhibit 2 at 3-8.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[4] The administrative law judge found that employer failed to establish a mistake of fact in the district director's decision to award benefits. Decision and Order at 28; *see* 20 C.F.R. §725.310(a).

mine, erred in finding that he has a totally disabling respiratory or pulmonary impairment, and thus erred in finding that he invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response. In a reply brief, employer reiterates its contentions.[5]

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).

Burden of Proof on Modification

As a threshold matter, we note that the administrative law judge applied the burden of proof incorrectly, given the procedural posture of this case. The district director issued a proposed decision and order awarding benefits on January 21, 2014. Director's Exhibit 26. Because employer did not timely request a hearing before the administrative law judge, the award of benefits became final and effective thirty days after its issuance. 20 C.F.R. §725.419(d). On April 3, 2014, employer sought modification of the award before the district director. Director's Exhibit 28. After the district director denied modification, employer requested a hearing before the administrative law judge. Director's Exhibits 36, 37. Under modification proceedings, an award or denial of benefits can be reconsidered if the party seeking modification establishes either a change in conditions or a mistake in a determination of fact, including the ultimate fact of whether the claimant is entitled to benefits. *See* 20 C.F.R. §725.310(a), (b); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-33 (1996).

Because employer sought modification to terminate the award of benefits, the administrative law judge should have evaluated the modification request with the burden on employer to establish a change in conditions or a mistake of fact with regard to at least one element of entitlement. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997); *D.S.* [*Stiltner*] *v. Ramey Coal Co.*, 24 BLR 1-33, 1-38 (2008). The administrative law judge's decision and order, however, reflects some confusion

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

regarding the applicable burden. She stated employer's burden correctly at the conclusion of her decision, when she denied employer's request for modification after finding that employer "has not established that a mistake was made in a previous determination of fact, or that [c]laimant was not totally disabled due to pneumoconiosis." Decision and Order at 28. She analyzed the claim, however, as if the burden were on claimant to re-establish the elements of entitlement.[6]

As explained below, however, we affirm the administrative law judge's findings that claimant invoked the Section 411(c) presumption and employer failed to rebut it. Therefore, her errors in applying the burden of proof were harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Invocation of the Section 411(c)(4) Presumption
Qualifying Coal Mine Employment

To invoke the Section 411(c)(4) presumption, claimant must establish that he worked at least fifteen years at underground coal mines, or at surface mines in conditions "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). Conditions at a surface 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 found, based on claimant's deposition and hearing testimony, that he was regularly exposed to coal dust throughout his twenty-three years of surface coal mine employment, operating bulldozers and front-end loaders, and that such conditions were substantially similar to those in an underground mine. Decision and Order at 6.

On appeal, employer argues that claimant was not credible in testifying that "his work inside an enclosed cab, above ground, often working with wet and cleaned coal[,] was somehow synonymous" with underground mining work. Employer's Brief at 24.

[6] For instance, she found that claimant's "uncontested testimony is sufficient to establish he was regularly exposed to coal dust throughout his employment, and that his surface coal mine employment was 'substantially similar' to underground coal mine employment[.]" Decision and Order at 6. As a result, she noted that claimant could invoke the Section 411(c)(4) presumption "if he can establish total disability." *Id*. at 10. The administrative law judge then found that claimant "established that he has a totally disabling respiratory or pulmonary impairment based on the medical opinions of Dr. Chavda," and thus invoked the presumption. *Id*. at 11-19.

This argument lacks merit. First, claimant did not need to establish that dust conditions in his job were "synonymous" with or identical to conditions in an underground mine. He needed only to establish that the conditions were "substantially similar" to those in an underground mine, and could do so by showing that he was "regularly" exposed to coal mine dust.[7] *See* 20 C.F.R. §718.305(b)(2); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014); *see also Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219-23 (10th Cir. 2018). Second, employer does not explain why claimant's testimony cannot be considered credible. It is well established that assessing the credibility of witness testimony is for the administrative law judge as fact-finder, and the Board will not disturb her findings unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). We therefore affirm the administrative law judge's finding that claimant had twenty-three years of qualifying coal mine employment for purposes of the Section 411(c)(4) presumption.

Total Disability

A miner is considered 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). A claimant may establish total disability based on pulmonary function tests, arterial blood gas studies, evidence of 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 consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

[7] The administrative law judge cited claimant's uncontroverted testimony that his working conditions were always dusty, that dust entered the closed cabs of the equipment he operated, and that he would be "black with coal dust" when he went home from work. Decision and Order at 6; Employer's Exhibit 3 at 6; Hearing Transcript at 15-18, 23, 25. Substantial evidence supports the administrative law judge's finding that claimant worked in conditions substantially similar to those in an underground mine. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, 25 BLR 2-725, 2-735-36 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014).

The administrative law judge found that the medical opinion evidence supports a finding of total disability, giving controlling weight to Dr. Chavda's opinion.[8] Decision and Order at 13-18. In his report, Dr. Chavda noted claimant's description of his work as a bulldozer operator, which claimant said required him to climb up and down a seven-step ladder, into and out of the cab, seven or eight times a day. Director's Exhibit 15 at 23. Dr. Chavda also considered claimant's FEV1 value of 2.35, which is above the 2.04 value necessary to qualify as totally disabled under 20 C.F.R. §718.204(b)(2)(i), and his MVV value of 42, which "meets the criteria" under the regulation. *Id*. at 27. He concluded:

> In my clinical opinion [claimant's] FEV1 2.35 with MVV 42 is significantly low enough that I can say he does not have enough lung capacity to be employed in a coal mine job. . . . He had to climb step ladders frequently. With the climbing activity, dozer activity, and coal dust exposure his lung capacity is not enough to be able to do this job due to reduced FEV1 and MVV.

Id. The administrative law judge noted that Dr. Chavda's conclusion was consistent with claimant's testimony about his impairment at his deposition and the hearing. Decision and Order at 17. Giving controlling weight to Dr. Chavda's opinion, she determined that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 17-18.

Employer argues, as it did before the administrative law judge, that Dr. Chavda's opinion should be rejected[9] because it is based on FEV1 and MVV values from

[8] The administrative law judge determined that the pulmonary function tests and arterial blood gas studies do not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), and that there is no evidence in the record of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11-13.

[9] Employer also contends that Dr. Sood's opinion that claimant is totally disabled cannot establish total disability. Employer's Brief at 18-19. Any errors in the administrative law judge's consideration of Dr. Sood's opinion are harmless, however, because the administrative law judge discredited it and did not rely on it when she determined that claimant is totally disabled. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 17-18.

claimant's non-qualifying[10] pulmonary function test. Employer's Brief at 19-20. This argument lacks merit. Employer essentially contends that non-qualifying results of objective tests preclude a finding of total disability; however, as the administrative law judge accurately stated, the regulations and controlling case law explicitly permit such a finding, in spite of non-qualifying testing, if a physician "concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in" his usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 17. We therefore reject employer's allegation of error and affirm the administrative law judge's rational finding that Dr. Chavda's opinion is well-reasoned and persuasive.[11] *See Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744, 21 BLR 2-203, 2-211-12 (6th Cir. 1997).

Next, employer contends that the administrative law judge erred in discrediting Dr. Rosenberg's opinion that claimant is not totally disabled. Employer's Brief at 20-22. Dr. Rosenberg concluded in his report:

> From an impairment perspective, [claimant] has a mild degree of airflow obstruction. His oxygenation is preserved and he is not disabled from performing his previous coal mine job.

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[10] A qualifying pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[11] Employer argues that Dr. Chavda's opinion is irrational, given claimant's job requirements and his assertion, noted in Dr. Chavda's report, that he can walk up to 200 yards at a fast pace, lift up to 60 pounds, and climb one flight of stairs. Employer's Reply Brief at 3-4; Director's Exhibit 15 at 25. We disagree. Dr. Chavda's opinion is not based on claimant's inability to lift a particular amount of weight, walk, or climb a flight of stairs, but on his conclusion that claimant is unable to climb a step ladder into and out of the cab of a bulldozer several times a day. *See Larioni*, 6 BLR at 1-1278; Director's Exhibit 15 at 27. We further decline to consider employer's argument, that its own "minimal scientific research" suggests that claimant exaggerated the weight of the oil he was required to lift, as employer has raised this argument for the first time on appeal. *See McKinney v. Benjamin Coal Co.*, 6 BLR 1-529, 1-531 (1983); Employer's Reply Brief at 1-3. Regardless, it would not affect the outcome because, as explained, Dr. Chavda's opinion, on which the administrative law judge relied to find total disability, is based on claimant's inability to climb a step ladder several times a day, not on claimant's inability to carry buckets of oil. *See Larioni*, 6 BLR at 1-1278.

Director's Exhibit 16 at 5. The administrative law judge discounted the opinion because Dr. Rosenberg "did not expand upon this summary conclusion, and it does not appear that he compared [c]laimant's exertional requirements as a Dozer Operator with his pulmonary impairment." Decision and Order at 18.

Employer argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion given her earlier finding that all three physicians had "an adequate understanding of [c]laimant's last coal mine employment and current symptomology." Employer's Brief at 20-21; Decision and Order at 17. Contrary to employer's argument, however, the administrative law judge did not discount Dr. Rosenberg's opinion because he failed to understand claimant's job requirements; she rejected it because his "summary conclusion" failed to evaluate claimant's impairment in terms of his ability to perform those requirements. Decision and Order at 18. Employer does not otherwise challenge the administrative law judge's permissible finding that Dr. Rosenberg's opinion is conclusory and inadequately explained. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-451 (6th Cir. 2013); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 18. Thus, we affirm the administrative law judge's determination that Dr. Rosenberg's opinion is entitled to little weight.

Finally, employer argues that the administrative law judge should have credited Dr. Rosenberg's opinion because he relied more on "objective diagnostic data than on [c]laimant's inconsistent reporting," and that her finding of total disability reflects "an imbalance in relying upon the [c]laimant's credibility." Employer's Brief at 21-22. Employer also argues that claimant cannot be found totally disabled because his objective test results and physical limitations have not changed significantly since his previous claim, and because, in employer's view, claimant testified that his symptoms have improved.[12] *Id*. at 22-23. These arguments lack merit because they ask the Board simply to reweigh evidence, which it may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge has the authority to weigh the

[12] When asked if his "coughing and wheezing" has changed since he worked in coal mines, claimant said, "It hasn't changed much." Hearing Transcript at 26. Claimant was then asked if his coughing and wheezing has gotten better or worse, and said, "It might be a little better; I'd be afraid to say." *Id*. When asked if he "spit up material" when he worked in the mines, claimant testified that he spit up "close to a cup" a day when he was working, and that "it's still about a cup a day" now. *Id*. In weighing the evidence of total disability, the administrative law judge considered claimant's testimony and noted that "Claimant testified that he has coughing and wheezing, and spits up close to a cup of material each day." Decision and Order at 14.

evidence and make credibility determinations. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Because the administrative law judge's decision to credit Dr. Chavda's opinion over Dr. Rosenberg's contrary opinion is rational and supported by substantial evidence, we affirm her determination that claimant established that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 18. As employer raises no other challenges to the administrative law judge's findings with respect to total disability, we affirm her findings that claimant: established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R §718.204(b)(2); invoked the Section 411(c)(4) presumption; and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *Id*. at 9, 19.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[13] or that "no part of the miner'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). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[14] Employer's Brief at 11-14. Rebutting the presumption of legal pneumoconiosis required employer to prove that the miner's pulmonary or respiratory impairment was neither caused nor substantially aggravated by the miner's coal mine dust exposure. *See* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(2)(i)(A). The administrative law judge credited the opinions of Drs. Chavda and Sood that claimant has legal pneumoconiosis, and discredited Dr. Rosenberg's

[13] "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).

[14] Based on the weight of the x-ray and medical opinion evidence, the administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 26.

contrary opinion. Decision and Order at 22-27; Director's Exhibits 15, 16; Claimant's Exhibit 1. Dr. Rosenberg diagnosed a mild airflow obstruction, but attributed claimant's impairment to his "extensive smoking history of over 50 years[.]"[15] Director's Exhibit 16 at 5. Although he acknowledged that coal mine dust exposure can cause airflow obstruction, and that its effects and the effects of smoking can be additive, Dr. Rosenberg concluded that the "degree of exposure" claimant would have experienced during his coal mine employment "would not be expected to have contributed any significant additive effect on the adverse effects from cigarette smoking." *Id*. at 5-6. The administrative law judge discredited Dr. Rosenberg's opinion for relying on assumptions and general statistics rather than the "particularized facts" of claimant's coal mine employment, and for relying on a study (the "Marine" study) that is not in the record for her to review. Decision and Order at 26-27.

We reject employer's argument that the administrative law judge erred in discrediting Dr. Rosenberg's opinion. She permissibly discounted his opinion for being based on statistics instead of the facts of claimant's particular case. *See Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 830 (10th Cir. 2017); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013); *Knizner v. Bethlehem Mines Corp*., 8 BLR 1-5, 1-7 (1985). We affirm that finding, which employer has not challenged on appeal.[16] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also reject employer's argument that the administrative law judge erred by ignoring the evidence from claimant's prior claims. Employer's Brief at 14. Contrary to employer's contention, the administrative law judge acknowledged the evidence generated by the prior claims, but permissibly gave the most weight to the evidence

[15] The administrative law judge found that claimant has smoked one to two cigars a day for the past forty-five to fifty years. Decision and Order at 6; Hearing Transcript at 19-21.

[16] Employer argues that the administrative law judge erred by discounting Dr. Rosenberg's opinion for failing to include the Marine study but not discrediting Dr. Sood's opinion, which cited several studies not included in the record. Employer's Brief at 13-14. Employer also contends that the administrative law judge improperly provided "her own medical analysis" in discrediting Dr. Rosenberg's opinion. *Id*. We need not address these arguments, however, because the administrative law judge permissibly discredited Dr. Rosenberg's opinion for being based on general statistics and not the particular facts of claimant's case. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

submitted in this claim because she found that "it provides a more accurate depiction of the [c]laimant's current physical condition." Decision and Order at 9; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 623-24, 11 BLR 2-147, 2-148 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985).

Because the administrative law judge permissibly discredited Dr. Rosenberg's opinion, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i).[17] *See Ogle*, 737 F.3d at 1069-70, 25 BLR at 2-443-44.

Furthermore, because Dr. Rosenberg did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove its existence, the administrative law judge permissibly discounted his opinion as to whether legal pneumoconiosis caused claimant's totally disabling respiratory or pulmonary impairment. *See Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; Decision and Order at 28. Additionally, because it is unsupported by any physician's opinion, the administrative law judge properly rejected employer's own "bare assertion" — which employer makes again on appeal — that claimant's impairment is due to his two heart attacks and a stroke, in addition to cigar smoking. *See Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 28; Employer's Brief at 25. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part" of claimant's totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 28. Consequently, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption.[18]

[17] We need not address employer's arguments that the administrative law judge erred in crediting the opinions of Drs. Chavda and Sood, because those opinions cannot assist employer in establishing that claimant does not have legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278; Decision and Order at 27; Employer's Brief at 11-13, 15-16; Employer's Reply Brief at 5-7.

[18] Employer argues that the administrative law judge erred in finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, because, in employer's view, the evidence establishes that claimant does not have pneumoconiosis and that any impairment is due to claimant's smoking and cardiac conditions. Employer's Brief at 15-17. Because we have affirmed the administrative law judge's findings that employer failed to prove that claimant does not have legal pneumoconiosis, or that no part of his totally disabling respiratory or pulmonary

Accordingly, the administrative law judge's Decision and Order Denying Modification and awarding benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

impairment is due to legal pneumoconiosis, employer's arguments regarding 20 C.F.R. §718.203 necessarily fail.