BRB No. 13-0424 BLA

DORIS E. KISER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA POCAHONTAS COAL COMPANY/ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 05/14/2014
	)	
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 of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jonathan Rolfe (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05323) of Administrative Law Judge Stephen R. Henley, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the

Act). This case involves a subsequent claim filed on November 17, 2009.[1] Director's Exhibit 4.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least sixteen years of qualifying coal mine employment.[3] The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying amended Section 411(c)(4) to this claim. Employer also argues that the administrative law judge erred in finding that claimant has sufficient years of coal mine employment to

[1] This is claimant's third claim for benefits. His first claim, filed on October 31, 1975, was finally denied on December 4, 1992, for failure to invoke the interim presumption at 20 C.F.R. §727.203(a). Director's Exhibit 1. His second claim, filed on January 20, 2005, was finally denied by Administrative Law Judge William S. Colwell on June 25, 2008, for failure to establish that his totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] All of claimant's coal mine employment was in Virginia and West Virginia. Hearing Transcript at 28. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

invoke the Section 411(c)(4) presumption. Finally, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Board to reject employer's contentions regarding the administrative law judge's application of Section 411(c)(4), the length of claimant's coal mine employment, and the administrative law judge's decision to discredit Dr. Rosenberg's opinion, at rebuttal. Employer has filed a reply brief reiterating its previous contentions.[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. 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c);[5] *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish that his totally disabling respiratory impairment is due to pneumoconiosis. Director's Exhibit 2. Therefore, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that his impairment is due to pneumoconiosis. *See* 20 C.F.R. §725.309(c)(3), (4).

Application of Amended Section 411(c)(4)

Employer initially asserts that the administrative law judge's application of amended Section 411(c)(4) to this case was premature because the Department of Labor (DOL) had yet to promulgate implementing regulations. Employer's Brief at 27-29. The

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12-13.

[5] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *See Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Moreover, the DOL's recently promulgated regulations are consistent with the provisions applied by the administrative law judge. Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

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

Employer contends that the administrative law judge erred in finding that claimant has at least fifteen years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption.[6] In determining the total length of claimant's coal mine employment, the administrative law judge considered an employment history form, written statements from claimant's former employers, and Social Security Administration (SSA) earnings records. Decision and Order at 5-6; Director's Exhibits 5, 7-10. Utilizing this evidence, the administrative law judge found that claimant has at least sixteen years of qualifying coal mine employment. Decision and Order at 6.

Employer argues that claimant failed to establish the beginning and ending dates of his coal mine employment, and that, therefore, the administrative law judge should have applied a formula set forth at 20 C.F.R. §725.101(a)(32)(iii) to calculate claimant's coal mine employment by using his reported SSA earnings.[7] Employer contends that the formula at 20 C.F.R. §725.101(a)(32)(iii) is the only "credible" method available in this case for determining the length of claimant's employment. Employer's Brief at 15-16.

[6] In order to invoke the Section 411(c)(4) presumption, claimant must initially 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). The record reflects, and employer does not dispute, that all of claimant's coal mine employment was performed underground. Director's Exhibit 5.

[7] Section 725.101(a)(32)(iii) provides, in relevant part, that:

> *If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year*, then the adjudication officer *may* use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

Had the administrative law judge utilized that formula, employer argues, claimant would have established no more than 14.74 years of coal mine employment, and therefore could not invoke the Section 411(c)(4) presumption. *Id*. at 19-20. Employer's arguments lack merit.

In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Contrary to employer's contention the administrative law judge was not required to use the calculation method set forth in 20 C.F.R. §725.101(a)(32)(iii). The regulation provides only that an administrative law judge "may" use such method. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Moreover, the regulatory formula may be used where the miner's employment lasted less than one year, or where the beginning and ending dates of the miner's coal mine employment cannot be established. *See* 20 C.F.R. §725.101(a)(32)(iii). Here, the administrative law judge found, based on claimant's employment records, that claimant's coal mine employment began in 1951, and ended in 1974. Decision and Order at 6; Director's Exhibit 10. Therefore, the administrative law judge did not err in declining to apply the formula at 20 C.F.R. §725.101(a)(32)(iii). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007).

In determining the total length of claimant's coal mine employment, the administrative law judge initially identified the number of quarters in each year in which claimant's SSA earnings records indicated that he earned at least $50.00 from coal mine employment, and credited claimant with a total of twenty-seven quarters, or six years and nine months, of employment for the years 1951 through 1959. The Board has held that this is a reasonable method of calculation. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). The administrative law judge also reasonably considered written statements from a foreman at Bishop Coal Company, indicating that claimant worked for him for three and a half years, from April 1965 to September 1968, and from employer, listing claimant's employment for about six years, from October 1968 to October 1974. *See* 20 C.F.R. §725.101(a)(32)(ii); Decision and Order at 6; Director's Exhibits 8, 9. The administrative law judge correctly found that these statements were confirmed by claimant's SSA documentation. Decision and Order at 6; Director's Exhibits 8, 9. Adding these terms of employment together, the administrative law judge found that claimant has at least sixteen years of qualifying coal mine employment. Decision and Order at 6. Because the administrative law judge's determination in this case is based on a reasonable method of computation, and is supported by substantial evidence, we affirm his finding that claimant has established at least sixteen years of qualifying coal mine employment. *See Tackett*, 6 BLR at 1-839; *Combs v. Director, OWCP*, 2 BLR 1-904 (1980).

In light of our affirmance of the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, and that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge's determinations that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. 30 U.S.C. §921(c)(4); *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 793-95 (7th Cir. 2013); Decision and Order at 13.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[8] or by proving 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 Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 22-24. The Board rejected this argument in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). Therefore, we reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose*, 614 F.2d at 938-40, 2 BLR at 2-43-44. Moreover, as discussed *supra* n.2, the DOL recently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

[8] "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). "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).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 25-27. Contrary to employer's argument, the administrative law judge correctly explained that, because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 13; 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[9] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

We now turn to the administrative law judge's rebuttal findings. In determining whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rosenberg and Hippensteel, that claimant does not have legal pneumoconiosis, but suffers from disabling chronic obstructive pulmonary disease (COPD) that is due to smoking and asthma, and is unrelated to coal mine dust exposure. Employer's Exhibits 1 at 14-17; 3 at 16-23; 4 at 16, 18-23, 25-28.

The administrative law judge discounted the opinions of Drs. Rosenberg and Hippensteel, because he found that they were not well-reasoned, as they were inconsistent with the scientific views endorsed by the DOL in the 2000 preamble to the regulatory revisions, or not well explained. Decision and Order at 19-20. The administrative law judge therefore determined that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Hippensteel. Employer's Brief at 29-32, 41-50. We disagree. The administrative law judge examined the reasoning employed by Drs. Rosenberg and Hippensteel to eliminate coal mine dust exposure as a cause of claimant's COPD, and found that it was not credible. Specifically, the administrative law judge

[9] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "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." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); Director's Brief at 2.

noted that Dr. Rosenberg eliminated coal mine dust exposure as a source of claimant's COPD, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC value which, in Dr. Rosenberg's view, is characteristic of obstruction due to smoking, but not of lung disease caused by coal mine dust exposure. Decision and Order at 19; Employer's Exhibits 1 at 15-16; 3 at 16, 18-20. As the Director asserts, the administrative law judge permissibly found that the reasoning Dr. Rosenberg used to eliminate coal mine dust exposure as a source of claimant's COPD was inconsistent with the medical science accepted by the DOL, recognizing that coal mine dust can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323 (4th Cir. 2013) (Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Decision and Order at 19; Director's Brief at 2-3.

Assessing the credibility of Dr. Hippensteel's opinion, the administrative law judge accurately noted that Dr. Hippensteel relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of the miner's obstructive impairment. Decision and Order at 19; Employer's Exhibit 4 at 10-12, 22-23, 25-26. The administrative law judge further noted, however, that several of claimant's pulmonary function studies demonstrated the presence of a totally disabling impairment, even after the administration of bronchodilators. Decision and Order at 19; Director's Exhibits 19, 20; Employer's Exhibit 1; Claimant's Exhibit 3. The administrative law judge concluded, as was within his discretion, that Dr. Hippensteel failed to adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as even an aggravating or exacerbating cause of his obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19-20.

Contrary to employer's contention, the administrative law judge recognized that Drs. Rosenberg and Hippensteel provided additional reasons in support of their conclusions that coal mine dust exposure did not contribute to claimant's COPD. Decision and Order at 11-12; Employer's Brief at 42-50. However, the administrative law judge permissibly discounted their opinions for the reasons he gave. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). Because the administrative law judge provided valid reasons for discrediting the opinions of Drs.

Rosenberg and Hippensteel, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[10] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

The administrative law judge next addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge discredited the opinions of Drs. Rosenberg and Hippensteel, that claimant's disabling impairment is unrelated to his coal mine employment, because he found their opinions, that claimant dos not suffer from legal pneumoconiosis, to be not credible. Decision and Order at 20.

Employer argues that the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to reject the disability causation opinions of Drs. Rosenberg and Hippensteel. Employer's Brief at 50-53. Employer contends that, because the existence of legal pneumoconiosis was established by presumption, the opinions of Drs. Rosenberg and Hippensteel are not contrary to any affirmative findings made by the administrative law judge. Employer's Brief at 50-53. Contrary to employer's contention, the administrative law judge reasonably found that the same reasons that he provided for discrediting the opinions of Drs. Rosenberg and Hippensteel, on the issue of legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Ogle*, 737 F.3d at 1074 (rejecting the employer's contention that an administrative law judge may not discredit a disability causation opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is only presumed, rather than factually found); Decision and Order at 20. Therefore, we affirm the administrative law judge's finding that employer failed to rebut the Section

[10] Because employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we need not address employer's contention that the administrative law judge erred in his evaluation of the evidence in finding that employer did not disprove the existence of clinical pneumoconiosis. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Employer's Brief at 29-41.

411(c)(4) presumption by establishing that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment.[11] *See Rose*, 614 F.2d at 939, 2 BLR at 2-43.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[11] Thus, we need not address employer's contention that the administrative law judge failed to adequately consider claimant's smoking history. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 29.