U.S. Department of Labor

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

BRB No. 15-0270 BLA

RHEBA F. DAVID (Widow of MORGAN H. DAVID) Claimant-Respondent v. LUZERNE COAL CORPORATION and OLD REPUBLIC GENERAL INSURANCE CORPORATION Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/17/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits – On Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James W. Creenan (Creenan & Baczkowski, PC), Murrysville, Pennsylvania, for claimant.

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

Helen H. Cox (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, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits – On Remand (2011-BLA-5161) of Administrative Law Judge Thomas M. Burke rendered on a survivor's 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 is before the Board for the second time. In his original Decision and Order, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and found that claimant[1] established that the miner worked for 20.5 years in surface coal mine employment, but failed to establish that the miner's work conditions were substantially similar to those in an underground mine. Therefore, the administrative law judge determined that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge found that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), but failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205. Accordingly, benefits were denied.

On appeal, the Board vacated the administrative law judge's finding that claimant failed to establish that the miner's surface coal mine employment was performed in conditions substantially similar to those in an underground coal mine pursuant to Section 718.305(b), as the administrative law judge failed to provide an adequate rationale for discounting claimant's testimony. Hence, the Board also vacated the administrative law judge's determination that claimant was not entitled to invocation of the rebuttable presumption of death due to pneumoconiosis pursuant to Section 411(c)(4), and remanded the case for further findings. In addition, the Board vacated the administrative law judge's finding that claimant failed to affirmatively establish that the miner's death

[1] Claimant is the widow of the miner, who died on December 13, 2007. The miner did not file a claim for benefits during his lifetime. Director's Exhibit 8; Claimant's Exhibit 4. Claimant filed her survivor's claim on December 21, 2009. Director's Exhibit 2.

[2] Relevant to this survivor's claim, Section 411(c)(4) provides a presumption that a miner's death was due to pneumoconiosis if the miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012).

was due to pneumoconiosis pursuant to Section 718.205, as the administrative law judge did not properly consider whether Dr. Wecht provided a reasoned and documented opinion on the issue. Accordingly, the Board vacated the denial of benefits and remanded the case for further consideration. *David v. Luzerne Coal Corp.*, BRB No. 13-0504 BLA (July 30, 2014) (unpub.).

On remand, the administrative law judge found claimant's testimony sufficient to establish that the conditions in the miner's surface coal mine employment were substantially similar to those in an underground mine. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and was entitled to invocation of the Section 411(c)(4) presumption. The administrative law judge further found that employer failed to establish rebuttal of the presumption, and awarded benefits.

In the present appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Employer contends that the administrative law judge erred in relying on 20 C.F.R. §718.305(b)(2), which employer asserts is invalid, to find that dust conditions in the miner's surface coal mine employment were substantially similar to those in an underground coal mine. Further, employer contends that the administrative law judge erred in finding total respiratory disability established and in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that Section 718.305(b)(2) is invalid. The Director further maintains that the administrative law judge permissibly relied upon the preamble to the 2001 revised regulations in discounting the opinions of employer's physicians on rebuttal. Employer has filed a combined reply brief, reiterating its previous contentions. Claimant has also filed a supplemental brief, challenging various statements made by employer, to which employer responds in support of its position.

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

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

Employer contends that the administrative law judge erred in finding that claimant established invocation of the Section 411(c)(4) presumption. Employer specifically challenges the administrative law judge's reliance on the regulatory provisions at Section 718.305(b)(2), which employer maintains are arbitrary, capricious, contrary to congressional intent, and an abuse of discretion because they lack "any support in the rulemaking record or elsewhere." Employer's Brief at 14. Assuming *arguendo* that Section 718.305(b)(2) is valid, employer asserts claimant's testimony, that her husband returned home "sweaty and dusty" from work, is insufficient to affirmatively establish that conditions in the miner's surface coal mine employment were comparable to those found in an underground coal mine. *Id*. at 18.

Section 411(c)(4) requires that a miner work for at least fifteen years either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). In promulgating Section 718.305(b)(2) to implement Section 411(c)(4) of the Act, the Department of Labor (DOL) explained that the regulation was intended to codify the Director's long-standing interpretation of "substantially similar," as reflected in the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).[4] 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013). The United States Courts of Appeals for the Sixth and Tenth Circuits have also recognized that Section 718.305(b)(2) did not change the law but, rather, codified "DOL's long-standing interpretation of the statutory presumption." *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014). Because Section 411(c)(4) does not define the term "substantially similar," DOL promulgated Section 718.305(b)(2) in order to fulfill the legislative gap. Section 718.305(b)(2) provides, "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that

[4] In *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988), interpreting the originally-enacted Section 411(c)(4), the United States Court of Appeals for the Seventh Circuit rejected the argument that surface miners must present evidence addressing the conditions in underground mines in order to prove substantial similarity. Instead, the court held that a surface miner "is required only to produce sufficient evidence of the surface mining conditions under which he worked." *Leachman*, 855 F.3d at 512-13.

the miner was regularly exposed to coal-mine dust while working there."[5] 20 C.F.R. §718.305(b)(2). The Director's interpretation of the Act is reasonable and entitled to deference, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984), "has been accepted by both of the courts of appeals that have considered the issue," *see Sterling*, 762 F.3d at 489-490, 25 BLR at 2-642-643; *Goodin*, 743 F.3d at 1342, 25 BLR at 564-566, and is consistent with prior regulations and agency practices. Hence, we reject employer's argument that Section 718.305(b)(2) is invalid.

After delineating the Board's remand instructions, the administrative law judge reconsidered claimant's testimony, and "credit[ed] her testimony that the miner was exposed to significant coal dust during his 20.5 years in coal mine employment." Decision and Order on Remand at 3. Noting that claimant testified that the miner's coal mine work consisted of "operating a bulldozer, operating a drag line, shoveling coal in the pit, working as an oiler, and loading holes for blasting," the administrative law judge found that such work demonstrated that "the miner regularly worked in the type of jobs that would expose him to coal mine dust." *Id.*; *see* Hearing Transcript at 17. Claimant testified that the miner's hand-shoveling job was located in the pit, where he "would shovel the coal by hand, cleaning off the shovel." Hearing Transcript at 20. Additionally, when claimant packed his daily lunches, the miner instructed her to wrap any fruit or dessert in wax paper that could be peeled back, as his hands were "too dirty to handle" his food. *Id.* Claimant further testified that, when the miner returned home from work, his clothes, face, hands, and exposed skin were "black," and that he was covered in "black coal dust" every day. *Id.* at 20-21. The administrative law judge was

[5] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013); *see* Decision and Order on Remand at 3.

persuaded by claimant's testimony that, on hot days, the miner returned home sweaty and wearing dirty clothes, which suggested that the miner "was not sitting in an enclosed air-conditioned cab all day." Decision and Order on Remand at 4; Hearing Transcript at 37-38. The administrative law judge acted within his discretion in finding that claimant's testimony was credible and demonstrated that the miner worked in conditions substantially similar to those in underground mines. Decision and Order on Remand at 4. As substantial evidence supports the administrative law judge's findings, we affirm his determination that claimant established an equivalency to at least fifteen years of underground coal mine employment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).

Employer next challenges the administrative law judge's determination that the miner was totally disabled prior to his death pursuant to Section 718.204(b), and argues that claimant's lay testimony and the medical opinion evidence were insufficient as a matter of law to establish total respiratory disability. Specifically, employer argues that claimant's testimony, that the miner suffered from shortness of breath, merely describes a symptom, rather than an impairment, and that Drs. Wecht and Renn indicated that the miner's shortness of breath could be due to both pulmonary and non-pulmonary conditions, including neurological, muscular, or cardiac conditions. While employer acknowledges that Dr. Wecht diagnosed clinical pneumoconiosis and Dr. Oesterling diagnosed a "possible respiratory disability," employer maintains that neither physician definitively concluded that the miner suffered from a totally disabling respiratory impairment. Employer's Brief at 21. Lastly, employer asserts that the administrative law judge's total respiratory disability determination is flawed, as he failed to compare any assessments of the miner's respiratory limitations with the exertional requirements of his usual coal mine employment. Employer's arguments lack merit.

In determining whether a claimant has established total respiratory disability, an administrative law judge is tasked with weighing conflicting evidence and drawing inferences therefrom. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-94, 13 BLR 2-348, 2-355-56 (7th Cir. 1990). It has consistently been held that "[p]hysicians need not phrase their medical conclusions in terms of 'total disability' in order to establish a presumption sufficient to set out the physical impairments that rule out work." *Poole*, 897 F.2d at 894, 13 BLR at 2-356, *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534, 7 BLR 2-209, 2-210 (11th Cir. 1985). A description of physical limitations in performing routine tasks may be sufficient to allow the administrative law judge to infer total disability.

The administrative law judge assessed claimant's testimony and, within a reasonable exercise of discretion, credited her account of the miner's breathing problems that precluded the miner from performing daily tasks and normal chores around the house. The administrative law judge was persuaded by claimant's observations that the

miner "struggled to breathe," and that he could not walk more than a few steps before having to stop and catch his breath. Hearing Transcript at 22, 27; *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-219, 20 BLR 2-360, 2-374 (6th Cir. 1996) (because the administrative law judge personally observes the demeanor of a witness, "his conclusions with respect to credibility should not be discarded lightly and should be accorded deference.").

After accurately summarizing the explanations and bases for the various physicians' conclusions, the administrative law judge permissibly found that the pathological opinions of Drs. Wecht and Oesterling bolstered claimant's testimony. After conducting the autopsy of the miner, Dr. Wecht diagnosed, *inter alia*, anthracosilicosis, coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and bilateral severe pulmonary fibrosis, and opined that the miner's "upper lobes of the lungs demonstrated severe emphysema, 'with the appearance of collapsed blackened paper bags'." Decision and Order on Remand at 5; Claimant's Exhibit 5. Dr. Wecht reviewed additional medical records and documents, and emphasized that "coal workers pneumoconiosis, which was a substantial contributing factor in [the miner's] death, had manifested itself through various clinical signs and symptoms for several years preceding this gentleman's terminal illness and death." Claimant's Exhibit 6. The administrative law judge then reviewed Dr. Oesterling's reports, and permissibly credited his conclusion that the miner's "very significant panlobular pulmonary emphysema . . . . would have produced significant respiratory impairment and could have produced disability." Decision and Order on Remand at 6; Employer's Exhibits 1A, 1B. As Drs. Wecht and Oesterling, as well as Dr. Renn, diagnosed significant emphysema, the administrative law judge acted within his discretion in concluding that "the miner had breathing difficulties severe enough to be disabling pursuant to [Section] 718.204(b)(1)," based on claimant's testimony, as corroborated by the opinions of Drs. Wecht and Oesterling.[6] Decision and

[6] The facts of this case are distinguishable from those in *Sword v. G & E Coal Co.*, 25 BLR 1-127 (2014)(Hall, J., dissenting), where the administrative law judge invoked the Section 411(c)(4) presumption of death due to pneumoconiosis after discounting all of the medical evidence of record and finding total respiratory disability established based solely on lay testimony. Because the record in *Sword* contained extensive medical evidence addressing the miner's pulmonary status, including multiple pulmonary function studies, arterial blood gas studies, medical reports and treatment notes, the Board agreed with employer's argument that it was not appropriate to rely solely on the lay testimony to find total disability established, and reversed the award of benefits. *Sword*, 25 BLR at 1-131. In the present case, the administrative law judge did not rely exclusively on claimant's testimony, but credited it as supported by the limited medical evidence of record establishing that the miner had severe emphysema. Decision and Order on Remand at 6.

Order on Remand at 6. Contrary to employer's argument, the administrative law judge's conclusion constitutes a permissible inference drawn from the uncontradicted testimony that the miner's inability to perform routine tasks and walk more than a few steps due to his breathing difficulties would preclude him from performing his usual coal mine employment duties, which the administrative law judge previously identified as "operating a bulldozer, operating a drag line, shoveling coal in the pit, working as an oiler, and loading holes for blasting." Decision and Order on Remand at 3; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); *see generally Olszewski v. The Youghiogheny & Ohio Coal Co.*, 6 BLR 1-521, 1-524 (1983). Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that the relevant evidence of record was sufficient to establish total respiratory disability at Section 718.204(b), and that claimant was entitled to invocation of the presumption of death due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

Employer challenges the administrative law judge's determination that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Employer maintains that the administrative law judge's use of the preamble to the revised regulations in gauging the credibility of the conflicting medical opinions violates the Administrative Procedure Act (APA), 5 U.S.C. §§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), "by relying on material that is neither in the record nor evidence nor part of any regulation." Employer's Brief at 25. Employer also asserts that the administrative law judge provided invalid reasons for crediting the opinion of Dr. Wecht that the miner had both clinical and legal pneumoconiosis over the contrary opinions of Drs. Oesterling and Renn that the miner did not have either clinical or legal pneumoconiosis. Employer avers that the administrative law judge engaged in a selective analysis of the evidence by finding the probative value of Dr. Wecht's opinion enhanced based on his citation to a medical treatise, without granting similar treatment to Dr. Renn's opinion. Employer's arguments lack merit.

The Board and multiple United States Circuit Courts of Appeals have held that an administrative law judge, as part of the deliberative process, may permissibly evaluate expert opinions in conjunction with the Department of Labor's (DOL) discussion of prevailing medical science as set forth in the preamble to the revised regulations. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004).

In reviewing the evidence relevant to rebuttal of the presumed fact of legal pneumoconiosis,[7] the administrative law judge summarized the opinions of Drs. Wecht, Oesterling, and Renn, and the underlying bases supporting their conclusions. Decision and Order on Remand at 5-8; Director's Exhibits 9, 11, 12; Claimant's Exhibits 5-7; Employer's Exhibits 1, 2, 6, 7. The administrative law judge noted that all three physicians found the presence of severe emphysema, but disagreed as to its etiology, with Drs. Oesterling and Renn attributing the emphysema solely to cigarette smoking, and Dr. Wecht attributing it to both cigarette smoking and coal dust exposure.

During his deposition on October 16, 2012, Dr. Wecht explained that "advanced centrilobular emphysema cannot be distinguished from advanced panlobular emphysema" and that "it is impossible to differentiate in a case as advanced as the miner's, given the large blebs and bullae and the collapsed appearance of the lungs." Decision and Order on Remand at 8; Claimant's Exhibit 7 at 35-36, 43. The administrative law judge found that Dr. Wecht's opinion was further bolstered by his citation to "a treatise by W.A.D. Anderson that came to the same conclusions," and was "in accord with the explanatory comments to the preamble." Decision and Order on Remand at 8. Since the preamble to the regulations specifies that emphysema may be caused by coal mine dust[8] and does not acknowledge an exception for panlobular emphysema, the administrative law judge permissibly found that Dr. Wecht's opinion was more persuasive than the contrary opinion of Dr. Oesterling. *Id.*; *see* 65 Fed. Reg. 79,920, 79,939, 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491-492, 25 BLR 2-633, 2-645 (6th Cir. 2014) (absent the type and quality of medical evidence that would invalidate the scientific studies found credible

[7] Employer argues that the administrative law judge failed to reconcile the conflict between Dr. Wecht's findings on his microscopic examination of the autopsy diagnosing clinical pneumoconiosis and Dr. Oesterling's findings of only a minimal amount of anthracotic pigmentation insufficient to diagnose clinical pneumoconiosis. After discussing the disagreement between the pathologists, the administrative law judge concluded that "the determinative issue here is legal pneumoconiosis, that is, the cause of the miner's emphysema." Decision and Order on Remand at 7. Consequently, the administrative law judge did not assess whether employer established rebuttal of the presumed fact of clinical pneumoconiosis. *Id*.

[8] The preamble recognizes that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, and that the risk of developing airways obstruction caused by coal dust exposure is additive with smoking. *See* 65 F.3d Reg. 79,938-79,943 (Dec. 20, 2000). Hence, it is the position of the Department of Labor that emphysema may be caused by coal dust exposure and constitute legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b).

by DOL in the preamble to the regulations, a physician's opinion that is inconsistent with the preamble may be discredited); *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

The administrative law judge acknowledged Dr. Renn's reference to medical literature buttressing his view that "autopsy slides have shown that both exposure to coal mine dust and/or [coal workers' pneumoconiosis] does not result in emphysema beyond the types of centrilobular and focal." Employer's Exhibit 2; Decision and Order on Remand at 8. However, the administrative law judge permissibly discounted Dr. Renn's opinion because it was predicated on the belief that coal dust causes only focal emphysema with the presence of a coal macule, a subtype of centrilobular emphysema, as opposed to centrilobular/panlobular emphysema, contrary to the prevailing view of medical science contained in the preamble underlying the current regulations. Decision and Order on Remand at 8; *see Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. Based on the foregoing, the administrative law judge permissibly concluded that Dr. Wecht's opinion was entitled to determinative weight. *See Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Oesterling and Renn were insufficient to establish rebuttal of the Section 411(c)(4) presumption of legal pneumoconiosis.

Finally, employer contends that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish rebuttal of the presumed fact of death due to pneumoconiosis at Section 411(c)(4). We disagree. Both Drs. Wecht and Oesterling opined that the miner's emphysema was a contributing cause of the miner's death from heart disease, while Dr. Renn opined that the miner suffered a cardiac death with no contribution from any sort of lung disease. Claimant's Exhibit 7; Employer's Exhibits 6, 7. As Dr. Renn did not personally observe the autopsy slides, and substantially relied on the pathologists' reports in determining the cause of death, the administrative law judge acted within his discretion in according greater weight to the opinions of Drs. Wecht and Oesterling. Decision and Order on Remand at 9. Further, since Dr. Oesterling did not opine that the miner's emphysema constituted legal pneumoconiosis, contrary to the administrative law judge's finding, Dr. Oesterling was not in a position to provide a probative opinion that no part of the miner's death was due to pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption and that claimant is entitled to benefits.

Accordingly, the Decision and Order Awarding Benefits - On Remand of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge