BRB No. 12-0082 BLA

ARLIN SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILDER COAL CORPORATION	)	DATE ISSUED: 11/28/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer's Motion to Dismiss Responsible Operator and Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Richard A. Seid (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Wilder Coal Corporation (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05024) of Administrative Law Judge Theresa C. Timlin, with respect to a subsequent claim filed on September 19, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge initially issued an Order denying employer's Motion to Dismiss it as the responsible operator.[2] In her subsequent Decision and Order, the administrative law judge found that claimant established thirty-one years of surface coal mine employment in conditions substantially similar to underground coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that claimant established total disability under 20 C.F.R. §718.204(b)(2), and, therefore, established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d) and invocation of the amended Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed an initial claim for benefits on February 21, 1995, which was denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant filed a second claim for benefits on September 2, 1997, which was denied by the district director because claimant again did not establish any element of entitlement. Director's Exhibit 2. Claimant filed an untimely notice of appeal on November 12, 1998, which was treated as a request for modification. *Id*. Modification was denied initially, and upon reconsideration. *Id*. Claimant untimely requested a hearing on January 10, 2000, which was treated as a request for modification, and which the district director ultimately denied. *Id*. Claimant did not take any further action until he filed the present claim.

[2] The Board dismissed employer's appeal of the administrative law judge's Order as interlocutory.

[3] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. In pertinent part, the amendments reinstated the rebuttable presumption set forth in Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory or pulmonary impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

On appeal, employer, in its brief and reply brief, argues that the administrative law judge erred in denying employer's motion to dismiss it as the responsible operator. Employer also asserts that the administrative law judge erred in awarding benefits based on the application of amended Section 411(c)(4).[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief in which he contends that the Board should affirm the administrative law judge's findings that employer is the responsible operator and that claimant's surface work was comparable to underground mining.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

I. Responsible Operator

In claimant's 1995 claim, the district director identified A&T Augering (A&T), which claimant owned, as the responsible operator. Director's Exhibit 1. In claimant's 1997 claim, the district director designated Birchfield Mining Company (Birchfield) as the responsible operator. Director's Exhibits 1, 2. After acknowledging the present subsequent claim, the district director identified A&T, Birchfield and employer as potentially liable operators and issued Schedules for the Submission of Additional Evidence to employer and A&T. Director's Exhibits 31-33, 41-42, 51. In the Proposed Decision and Order awarding benefits, the district director formally designated employer as the responsible operator. Director's Exhibit 93.

After this case was transferred to the Office of Administrative Law Judges, employer filed a Motion to Dismiss, alleging that under the doctrine of res judicata, the Department of Labor (DOL) was precluded from identifying it as the responsible operator in the present subsequent claim, because it did not designate employer in claimant's two

[4] Employer's argument that the resolution of the challenges to the constitutionality of the Patient Protection and Affordable Care Act may require the Board to vacate the award of benefits in this case is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566, 2012 WL 2427810 (June 28, 2012).

[5] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

prior claims. Employer also argued that DOL did not have the authority to dismiss A&T, which claimant owned, from liability and incorrectly dismissed Birchfield, Rockwood Insurance Company (Rockwood), the Virginia Property & Casualty Insurance Guaranty Association (VPCIGA), and the Kentucky Insurance Guaranty Association (KIGA). By Order dated December 3, 2010, the administrative law judge denied employer's motion to dismiss it as the responsible operator, finding that res judicata did not apply, that DOL properly dismissed A&T and Birchfield, and that employer was properly designated as the responsible operator.

Employer asserts initially that DOL was precluded from designating it as the responsible operator, as liability was not imposed on it in the prior claims and claimant did not return to work. We disagree. To successfully invoke the doctrine of collateral estoppel[6] in this case, employer must establish the following:

> (1) The precise issue raised in the present case was raised and actually litigated in the prior proceeding;
>
> (2) Determination of the issue was necessary to the outcome of the prior proceeding;
>
> (3) The prior proceeding resulted in a final judgment on the merits; and
>
> (4) The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(en banc). In the present case, the administrative law judge rationally determined that the first prong was not satisfied because the responsible operator issue was not actually litigated in either of the prior claims. *Hughes*, 21 BLR at 1-137-38; Order Denying Employer's

[6] Both employer and the administrative law judge discussed the preclusion argument in terms of res judicata, instead of collateral estoppel. However, collateral estoppel is the applicable doctrine, as "[r]es judicata bars the relitigation of the same claim or cause of action[,] while collateral estoppel bars the relitigation of the same issue." *Drummond v. Commissioner of Social Security*, 126 F.3d 837, 840 (6th Cir. 1997). Any error by the administrative law judge is harmless, however, as her analysis encompassed a consideration of the elements relevant to collateral estoppel. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Motion to Dismiss at 3. As the Director states, "the district director merely designated the responsible operator and denied the claims." Director's Brief in Response at 12. In addition, because no hearing was held in either claim, "neither designation was tested by those parties before an independent adjudicator in adversarial proceedings." *Id*. We affirm, therefore, the administrative law judge's finding that DOL was not precluded from designating employer as the responsible operator.

Employer further maintains that the administrative law judge erred in determining that A&T and Birchfield were properly dismissed as responsible operators. Employer argues that the fact that A&T did not self-insure or maintain insurance coverage for federal black lung claims through claimant's last day of coal dust exposure, does not excuse A&T from liability. Regarding Birchfield, employer alleges that a state guaranty fund is capable of assuming liability for the present subsequent claim. Employer's contentions are without merit.

Generally, the most recent coal mine operator that employed claimant for at least one year, and that satisfies specific criteria, will be held liable for any benefits awarded. 20 C.F.R. §725.495(a)(1). The responsible operator must have the financial capability to pay benefits. Therefore, each operator is required to "secure the payment of benefits" by obtaining suitable commercial insurance or by qualifying as a self-insurer. 30 U.S.C. §922(b); 20 C.F.R. §725.493(e). If claimant's most recent employer does not qualify as a potentially liable operator, pursuant to 20 C.F.R. §725.494, then the responsible operator will be the potentially liable operator that next most recently employed claimant. 20 C.F.R. §725.495(a)(3). Although an operator's failure to comply with the insurance requirement may subject it to a civil penalty, it does not relieve any prior potentially liable operators from being responsible for the payment of the claim. *See* 30 U.S.C. §923(d)(1); 20 C.F.R. §§725.300-725.302. However, if a self-insurer authorized by DOL "no longer possesses sufficient assets to secure the payment of benefits," the Black Lung Disability Trust Fund (Trust Fund) becomes liable, despite any other earlier operators who otherwise would be potentially liable. 20 C.F.R. §725.495(a)(4).

In this case, the administrative law judge acted within her discretion as fact-finder in determining that A&T could not be designated the responsible operator, as A&T was not insured on the date of claimant's last exposure to coal dust and does not have any assets with which to pay benefits. 20 C.F.R. §§725.493(e), 725.494(a)(4); *see England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *Gilbert v. Williamson Coal Co., Inc.*, 7 BLR 1-289, 1-294 (1984); Order Denying Employer's Motion to Dismiss at 3-4. In addition, employer has failed to cite any evidence establishing that A&T was an authorized self-insurer that is financially incapable of securing payment of benefits such that the Trust Fund must assume liability. 20 C.F.R. §725.495(a)(4).

With respect to Birchfield, employer bears the burden of proving that Birchfield, a subsequent employer, is capable of paying claimant's benefits. 20 C.F.R. §725.495(c)(2). The administrative law judge acted within her discretion in determining that employer did not satisfy this burden, as Birchfield's private insurer, Rockwood, was liquidated and employer did not establish that Birchfield is capable of assuming liability, without insurance or reinsurance. *See England*, 17 BLR at 1-144; Order Denying Employer's Motion to Dismiss at 4. The administrative law judge also rationally found that employer failed to prove that the state guaranty funds operated by Kentucky and Virginia could satisfy an award of benefits. As the administrative law judge concluded, although Birchfield was covered by VPCIGA and KIGA, this coverage applied to claims filed before August 26, 1992 and July 15, 1999, respectively. Order Denying Employer's Motion to Dismiss at 4. Because the current subsequent claim was filed on September 18, 2006, the administrative law judge correctly determined that VPCIGA and KIGA could not be deemed responsible for paying benefits. *Id*. Furthermore, the administrative law judge properly found that, contrary to employer's argument, state-run insurance guaranty associations are not covered by 20 C.F.R. §726.203(c), which prohibits private insurance carriers from limiting their liability for black lung claims. *See Boyd & Stevenson Coal Co. v. Director, OWCP* [*Slone*], 407 F.3d 663, 23 BLR 2-288 (4th Cir. 2005); *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998); Order Denying Employer's Motion to Dismiss at 4.

Employer's final assertion, that DOL's alleged failure to timely notify KIGA of its potential liability in claimant's initial and subsequent claim constituted a violation of due process requiring transfer of liability to the Trust Fund, is also without merit. Employer maintains that if DOL had informed KIGA of the filing of claimant's 1995 claim, that claim would have fallen within KIGA's coverage of Birchfield, and KIGA would have been put on notice of its potential liability. The administrative law judge rationally determined that "KIGA was not put on notice that it would be responsible for paying benefits sometime after the bar date had passed," because the 1995 claim was finally denied and, therefore, has no bearing on employer's liability in the present claim. 20 C.F.R. §§725.309, 725.419(d); Order Denying Employer's Motion to Dismiss at 4. In addition, as noted *supra*, the administrative law judge properly found that the filing of the present subsequent claim in 2006, well after the expiration of KIGA's coverage of employer, precluded a determination that KIGA is the responsible operator. *See Slone*, 407 F.3d at 668, 23 BLR at 2-299. We affirm, therefore, the administrative law judge's determination that the district director properly dismissed A&T and Birchfield and properly designated employer as the responsible operator in the current claim.

II. Invocation of the Presumption – Qualifying Coal Mine Employment

The administrative law judge stated that to invoke the amended Section 411(c)(4) presumption, claimant was required to establish that at least fifteen of the thirty-one years he worked at surface mines were in conditions substantially similar to those in an underground mine. Decision and Order at 15. The administrative law judge summarized claimant's testimony as follows:

> Here, Claimant has testified that his work was very dusty. He said the dustiest jobs he did were drilling and loading coal. He went into coal pits to load the coal up, and had to sweep the dust off to clean his equipment. A tractor-like machine called a sweeper is sometimes used, but Claimant said he often had to use a broom instead. He said the tractor throws dust up in the air and it blows back into the operator's face. At the end of his shift, dust would be on his body, in his ears, and up his nose. Claimant also considers drilling and augering, which involves removal of coal which is then sent away on a conveyor belt, one of the dustiest jobs there is. At the end of a shift spent augering, he had pockets full of dust and it accumulated in his ears, down his shirt, in his nose, and in his mouth. Claimant said he was also exposed to dust daily as a mechanic, especially when he had to blow out filters with air hoses, which created a lot of coal dust. Again, he said he was covered in dust after a shift. Finally, he said his supervisory work did not shield him from exposure to dust because he had to take the places of men who missed their shifts. In this capacity, he operated a drill and loaded coal, which was dusty work.

Id. (internal citations omitted). The administrative law judge stated, "based on my knowledge of the conditions found in underground mines . . . the work described by [c]laimant constitutes the equivalent of underground coal mining." *Id*.

Employer argues that the administrative law judge erred in determining that claimant's surface mine employment was comparable to underground coal mine employment, "based on [her] knowledge of the conditions found in underground mines." Employer's Brief at 18, *quoting* Decision and Order at 15. Employer contends that this violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), because "[t]he [administrative law judge's] 'knowledge' is not something that employer can know and therefore reliance on it precludes a defense." *Id*. Employer also asserts that the administrative law judge's determination is incorrect because there are no standards in the statute or the regulations for establishing comparability and that, to the extent that there is case law on this issue, the current decision conflicts with this case law.

Employer's allegations are without merit. For employment at a surface mine to be treated as qualifying coal mine employment under amended Section 411(c)(4), a claimant must prove that the conditions "were substantially similar to those in an underground mine." 30 U.S.C. §921(c)(4). In so doing, a claimant is not required to present evidence of the conditions in an underground mine, but must establish comparable conditions by showing that the miner was exposed to sufficient coal mine dust at the surface mine. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). The administrative law judge must then render factual findings by comparing the surface mining conditions established by claimant to the conditions known to prevail in underground mines. *Id*. Contrary to employer's contention, the administrative law judge properly considered the miner's unrefuted testimony regarding the conditions in his aboveground coal mine employment, and compared that with her knowledge of conditions that prevail in underground coal mine employment. *See Leachman*, 855 F.2d at 512; *Muncy*, 25 BLR at 1-29. Therefore, the administrative law judge's finding, that claimant worked for thirty-one years in a surface mine in dust conditions substantially similar to those in an underground mine, is affirmed, as it is rational, supported by substantial evidence, and in accordance with the law.

III. Invocation of the Presumption – Total Disability

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge concluded that the pulmonary function studies are insufficient to establish that claimant has a totally disabling impairment, as the preponderance of valid studies is nonqualifying.[7] Decision and Order at 9; Director's Exhibits 17, 23; Claimant's Exhibit 1; Employer's Exhibit 3. The administrative law judge noted, however, that the pulmonary function study evidence "indicates [c]laimant's condition has worsened over the years, as the values have steadily decreased" and "the pulmonary function test evidence strongly suggests that [c]laimant is totally disabled from a pulmonary perspective, but is not alone conclusive." Decision and Order at 9. The administrative law judge also determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iii), because all of the blood gas studies are nonqualifying and there is no evidence that claimant has cor pulmonale with right-sided congestive heart failure. *Id*. at 9-10. Under 20 C.F.R. §718.204(b)(2)(iv), the

[7]A "qualifying" pulmonary function study or blood gas study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

administrative law judge found that the medical opinion evidence, "coupled with the strong suggestion of disability found in the pulmonary function evidence," establishes that claimant is totally disabled from a respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id*. at 13.

Employer argues that the administrative law judge erred in finding that total disability was established at 20 C.F.R. §718.204(b)(2), as she did not explain why the medical opinion evidence outweighed the nonqualifying pulmonary function study and arterial blood gas study evidence. Employer contends that, although the administrative law judge indicated that the opinions in which Drs. Alam, Baker, and Jarboe found that claimant is unable to perform the work of a miner, were based on objective evidence, this is unsupported by the record. Employer alleges that Drs. Alam and Baker based their opinions on the assumption that claimant's last coal mine employment involved heavy manual labor, which employer indicates is in error, as claimant last worked as an auger operator. Employer also maintains that the administrative law judge should have addressed the fact that Dr. Jarboe identified a non-respiratory component of claimant's totally disabling impairment. Finally, employer asserts that the administrative law judge erred in finding that Dr. Rosenberg did not fully address the issue of whether claimant is totally disabled.

Employer's allegation of error regarding the administrative law judge's weighing of the opinions of Drs. Jarboe and Rosenberg are without merit. Contrary to employer's contention, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Jarboe diagnosed a totally disabling respiratory impairment, as Dr. Jarboe stated, claimant "is totally and permanently disabled from a ventilatory standpoint" and "no longer retains the functional respiratory capacity to do his last coal mining job or one of similar physical demand in a dust free environment." Decision and Order at 12, *quoting* Employer's Exhibit 3; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002). In addition, the administrative law judge rationally gave less weight to Dr. Rosenberg's opinion, that claimant does not have a disabling respiratory impairment, because Dr. Rosenberg "based his opinion solely on how [c]laimant's functionality compared to predicted values, but he did not consider whether [c]laimant would nevertheless be able to perform mining jobs despite his reduced lung function." Decision and Order at 13; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989).

Employer is correct, however, in maintaining that the administrative law judge did not render a definitive finding as to the nature of claimant's last coal mine job and, therefore, did not consider whether the diagnoses of a totally disabling respiratory impairment were based on an accurate understanding of the exertional requirements of this job. Pursuant to 20 C.F.R. §718.204(b)(1), the administrative law judge is required

to determine the exertional requirements of claimant's usual coal mine work and consider them in conjunction with the medical reports assessing disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Claimant's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

In the present case, claimant reported that his last coal mine job was as an auger operator for A&T, the company that he owned. Director's Exhibits 1 at 37, 2 at 82, 23, 50 at 18. Claimant indicated, on forms filed in conjunction with his claims, that this work required him to stand from eight to ten hours per day. Director's Exhibits 1 at 38, 2 at 83. He left blank the sections pertaining to crawling, lifting and carrying. *Id*. The medical reports reflect varying accounts of claimant's last coal mine job. According to Dr. Rosenberg, who determined that claimant is not totally disabled, claimant reported that his last job as an auger operator only occasionally involved heavy lifting and that he had a helper. Employer's Exhibits 3, 6 at 8. Dr. Alam, who stated that claimant could not perform heavy manual labor, reported that claimant operated and maintained an auger, and was required to lift and carry heavy loads. Director's Exhibit 17. Drs. Baker and Jarboe both stated, without elaboration, that claimant operated an auger. Claimant's Exhibit 1; Employer's Exhibits 3, 6 at 8. Dr. Baker opined that claimant cannot do his usual coal mine work on a sustained basis, while Dr. Jarboe determined that claimant cannot perform the work of a miner. *Id*. Although the administrative law judge stated that claimant's last coal mine work involved operating an auger and that claimant had previously been a mechanic, which required heavy labor, she did not render findings as to which job constituted claimant's usual coal mine work or as to the exertional requirements of claimant's job as an auger operator. Decision and Order at 3, 5.

Because the administrative law judge did not make the requisite findings or perform the requisite comparison, and there is conflicting evidence regarding the exertional requirements of claimant's work as an auger operator, we must vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2) and invocation of the amended Section 411(c)(4) presumption. *See Martin*, 400 F.3d at 306, 23 BLR at 2-285; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. On remand, the administrative law judge must identify claimant's usual coal mine work and determine the exertional requirements of that work. She must then assess whether, in light of these exertional requirements, the medical opinions of Drs. Rosenberg, Alam, Baker and Jarboe contain reasoned and documented diagnoses on the issue of total disability. If the administrative law judge again determines that the opinions of Drs. Alam, Baker and Jarboe are sufficient to

establish total disability at 20 C.F.R. §718.204(b)(2)(iv), she must consider whether their opinions outweigh the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i), (ii).[8]

If the administrative law judge finds that claimant has established total disability under 20 C.F.R. §718.204(b)(2), claimant will have again invoked the amended Section 411(c)(4) presumption. If claimant does not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), an award of benefits is precluded. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

IV. Rebuttal of the Presumption

Although the administrative law judge may not reach the issue of rebuttal on remand, we will address employer's allegations of error in the interests of promoting judicial efficiency. Concerning the existence of legal pneumoconiosis, employer contends that the administrative law judge applied the wrong standard in discrediting the opinions of Drs. Rosenberg and Jarboe, as a physician "does not need to rule out the existence of legal pneumoconiosis completely to establish rebuttal."[9] Employer's Brief at 25. Employer alleges that the administrative law judge mischaracterized Dr. Rosenberg's opinion when she claimed that he changed his diagnosis, without explanation, after considering Dr. Jarboe's opinion. Employer also argues that the administrative law judge relied on her own opinion to find that Dr. Jarboe stated incorrectly that claimant's pulmonary function was normal when he left coal mine employment.

We hold that the administrative law judge's finding, that the opinions of Drs. Rosenberg and Jarboe are insufficient to rebut the amended Section 411(c)(4) presumption, is supported by substantial evidence. The administrative law judge acted within her discretion in determining that Dr. Rosenberg's opinion did not rebut the

[8] In this regard, we note that employer is incorrect in suggesting that an administrative law judge cannot accord probative weight to a diagnosis of a totally disabling respiratory or pulmonary impairment if it is based on nonqualifying objective studies. As long as the administrative law judge determines that the physician has explained how the objective studies support his or her opinion, the opinion can be credited. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

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

presumption that claimant has pneumoconiosis, as he did not unequivocally rule out the presence of legal pneumoconiosis.[10] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Dr. Rosenberg also indicated that claimant's impairment did not completely reverse after bronchodilator administration due to airway remodeling, but he did not explain why coal dust could not have contributed to the fixed impairment. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Employer's Exhibit 16. The administrative law judge also rationally determined that Dr. Jarboe's opinion did not rebut the presumption that claimant has legal pneumoconiosis, as Dr. Jarboe did not adequately explain why an impairment due to asthma and an impairment due to coal dust exposure were mutually exclusive, and his extensive discussion about asthma and airway remodeling "did not rule out an additional component . . . caused by coal mine dust." Decision and Order at 34; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Therefore, we affirm the administrative law judge's determination that employer cannot rebut the amended Section 411(c)(4) presumption by proving that claimant does not have legal pneumoconiosis. Based on this holding, it is not necessary to address employer's arguments concerning the administrative law judge's determination that employer did not disprove the existence of clinical pneumoconiosis. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Furthermore, because the administrative law judge rationally found that the opinions of Drs. Rosenberg and Jarboe were insufficient to establish that claimant does not have legal pneumoconiosis, i.e., an impairment related to coal dust exposure, we also affirm the administrative law judge's finding that employer cannot rebut the amended Section 411(c)(4) presumption by showing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011). Thus, in the event that the administrative law judge finds that claimant has established invocation of the amended Section 411(c)(4) presumption on remand, claimant is entitled to benefits as a matter of law.

[10] Dr. Rosenberg recognized that some of claimant's impairment could be related to legal pneumoconiosis, but stated that claimant's impairment was most likely due to hyperactive airways or asthma based on claimant's response to bronchodilators. Employer's Exhibits 7, 8, 16.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge