BRB Nos. 14-0096 BLA
and 14-0096 BLA-A

PHYLLIS SHARP (o/b/o CHARLES O. SHARP, deceased)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
PHOENIX RESOURCES, INCORPORATED	)	
and	)	
WEST VIRGINIA CWP FUND	)	DATE ISSUED: 11/07/2014
Employer/Carrier-Respondents Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Kathleen H. Kim (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:

Claimant[1] appeals, and employer/carrier (employer) cross-appeals, the Decision and Order of Administrative Law Judge Drew A. Swank denying 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 miner's subsequent claim filed on October 31, 2011.[2]

The administrative law judge initially credited the miner with twenty-one years of coal mine employment,[3] and found that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). After finding that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge next considered whether the evidence established that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Because the administrative law judge found that the miner established at least fifteen years of qualifying coal mine employment, and that he had a

[1] The miner died on November 13, 2011. Director's Exhibit 14. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[2] The miner initially filed a claim for benefits on February 10, 1997. Director's Exhibit 1. In a Decision and Order dated December 30, 1998, Administrative Law Judge George P. Morin found that the miner suffered from pneumoconiosis, and had a totally disabling pulmonary impairment. *Id.* Judge Morin, however, found that the evidence did not establish that the miner's total disability was due to pneumoconiosis. *Id.* Accordingly, Judge Morin denied benefits. *Id.* The miner filed a second claim on August 8, 2003. Director's Exhibit 2. In a Decision and Order dated March 22, 2007, Administrative Law Judge Daniel L. Leland found that the evidence established that the miner suffered from a totally disabling respiratory impairment, but the evidence did not establish the existence of pneumoconiosis. *Id.* Accordingly, Judge Leland denied benefits. The miner took no further action until he filed the current subsequent claim.

[3] The miner's coal mine employment was in West Virginia. Director's Exhibit 6. 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, 1-202 (1989) (en banc).

totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge determined that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4). The administrative law judge, however, found that employer rebutted the Section 411(c)(4) presumption by establishing that the miner's clinical pneumoconiosis was not a substantially contributing cause of his total disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption. Employer responds in support of the administrative law judge's denial of benefits. In its cross-appeal, employer argues that the administrative law judge erred in finding that employer was properly designated as the responsible operator. Employer also contends that the administrative law judge erred: in finding that the miner had sufficient qualifying employment to invoke the Section 411(c)(4) presumption; in finding that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2); and in discrediting Dr. Bellotte's opinion regarding the cause of the miner's total disability. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that it is not the responsible operator.[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).

[4] 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 of total disability 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 to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because we are unable to affirm the administrative law judge's finding that employer established rebuttal of the Section 411(c)(4) presumption, *see* discussion *infra*, and therefore, unable to affirm the administrative law judge's denial of benefits, we will initially address employer's contentions raised in its cross-appeal regarding (1) its designation as the responsible operator; and (2) the administrative law judge's finding that the miner established invocation of the Section 411(c)(4) presumption.

Responsible Operator

Employer challenges its designation as the responsible operator. Section 725.495 addresses the burden of proof of the parties with regard to the criteria for determining the responsible operator, and specifically provides that the Director bears the burden of proving that the responsible operator initially found liable for the payment of benefits is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a), (b). The regulation also provides that in any case in which the designated responsible operator is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. To set forth a prima facie case that the most recent operators are incapable of paying benefits, the district director need only include within the record a statement that the Office of Workers' Compensation Programs has searched its files and found no record of insurance coverage or authorization to self-insure for those operators. 20 C.F.R. §725.495(d).

The district director designated employer as the responsible operator because the miner's two more recent employers, National Construction and D & R Trucking, were uninsured at the time of the miner's last employment with them. 20 C.F.R. §725.495(a)(3); Director's Exhibits 25, 38. Employer argues that the record does not contain the required statement from the Office of Workers' Compensation Programs that D & R Trucking was uninsured and lacked authorization to self-insure at the time of the miner's last employment. We disagree. As the Director points out, the Office of Workers' Compensation Programs provided such a statement regarding D & R Trucking in the miner's previous claim, and the evidence submitted in connection with that claim is part of the record in this claim.[6] 20 C.F.R. §725.309(c)(2); Director's Exhibit 2. Moreover, the district director in this claim reiterated in the Schedule for the Submission of Additional Evidence and the Proposed Decision and Order that D & R Trucking was

[6] The record in this claim contains a statement from the Office of Workers' Compensation Program that *employer* was not insured or authorized to self-insure on the date of the miner's last employment with it, in *1992*. Director's Exhibit 24. The statement appears to be a clerical error, mistakenly naming employer instead of D & R Trucking. Employer does not contend that it lacked insurance when it employed the miner, or that it, rather than D & R Trucking, last employed the miner in 1992.

uninsured at the time of the miner's last employment with the company, and employer did not contend otherwise. Director's Exhibits 32, 38. Employer does not offer any evidence to meet its burden as the designated responsible operator, under 20 C.F.R. §725.495(c), of proving that either D & R Trucking or National Construction are potentially liable operators, pursuant to 20 C.F.R. §725.494. We, therefore, affirm the administrative law judge's designation of employer as the responsible operator in this claim.[7]

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

Turning to the merits of the case, employer argues that the administrative law judge erred in determining that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that the miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "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 the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). In this case, the miner worked in underground coal mines, and at strip mines.[8]

Employer contends that the administrative law judge erred in failing to determine how long the miner worked at underground mines and at aboveground strip mines, and in failing to determine whether the conditions of the miner's strip mining were substantially similar to those in an underground mine. Employer's Brief at 19-22. We agree. In determining the length of the miner's coal mine employment, the administrative law judge noted that Administrative Law Judge Daniel L. Leland, in his adjudication of the

[7] In light of our affirmance of the administrative law judge's designation of employer as the responsible operator, we need not consider employer's argument that the district director was required to proceed against the corporate officers of D & R Trucking and National Construction. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[8] The miner indicated on his employment history form that he worked in both "deep mines" and "strip mining." Director's Exhibit 6. In the adjudication of his 2003 claim, the miner testified that he had "pretty close to seven" years of underground coal mine employment. Director's Exhibit 2 (Hearing Transcript at 21). At the hearing in the current claim, claimant testified that the miner spent more time working at strip mines than he did at underground coal mines. Hearing Transcript at 12.

miner's previous claim, credited the miner with twenty-one years of coal mine employment. Decision and Order at 4. The administrative law judge then adopted that finding, and credited the miner with twenty-one years of coal mine employment. *Id*. at 4-5. The administrative law judge subsequently found, without further analysis, that "the miner had fifteen (15) years or more of qualifying coal mine employment," and that claimant, therefore, invoked the Section 411(c)(4) presumption. *Id*. at 16-17. Notably, neither Judge Leland, nor the administrative law judge, made any specific findings regarding the length of time that the miner spent in underground coal mine employment, or whether the miner's work as a strip miner occurred in conditions that were "substantially similar to conditions in an underground mine." Consequently, we must vacate the administrative law judge's determination that the miner established the requisite fifteen years of qualifying coal mine employment for invocation of the Section 411(c)(4) presumption, and remand the case for the administrative law judge to make specific findings regarding the length of the miner's underground coal mine employment, and whether claimant established that any of the miner's strip mining occurred in conditions that were "substantially similar" to conditions in an underground mine.[9] 20 C.F.R. §718.305(b)(2); *see Leachman*, 855 F.2d at 512-13.

Because we have vacated the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment, we also vacate his determination that the miner invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). On remand, should the administrative law judge determine that the miner had fifteen years of qualifying coal mine employment, the miner will have established invocation of the Section 411(c)(4) presumption, and a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d).

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

We next address the parties' arguments regarding the administrative law judge's consideration of whether employer established rebuttal of the Section 411(c)(4) presumption. Under the implementing regulation, employer may rebut the presumption by establishing that the miner did not have either clinical or legal pneumoconiosis,[10] 20

[9] We note that claimant must prove that the miner's dust exposure in aboveground coal mine employment is substantially similar to that in underground coal mine employment only when his aboveground employment is at a strip mine, not when he is employed aboveground at an underground mine. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59, 25 BLR 2-453, 2-468 (6th Cir. 2013).

[10] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). Because he found that the autopsy evidence established the existence of clinical pneumoconiosis, the administrative law judge determined that employer failed to rebut the presumption by disproving the existence of pneumoconiosis. Decision and Order at 9-11, 17. However, the administrative law judge found that employer rebutted the presumption by establishing that pneumoconiosis was not a "substantially contributing cause" of the miner's totally disabling impairment. *Id.* at 17-19.

We initially address employer's contention that the administrative law judge erred in finding that the autopsy evidence established the existence of clinical pneumoconiosis.[11] The administrative law judge considered the autopsy reports of Drs. Franyutti, Caffrey, and Oesterling.[12] Dr. Franyutti conducted the miner's autopsy. Upon microscopic examination, Dr. Franyutti described "anthracotic pigment deposits" in the miner's lung tissue slides. Director's Exhibit 17 at 5. Additionally, Dr. Franyutti described "lymph nodes with extensive fibrosis with anthraco-silicotic nodules," and "lymph nodes replaced by dense fibrotic tissue containing multiple anthraco-silicotic nodules with central hyalinization. . . ." Director's Exhibit 17 at 8. Among his "Pathological Diagnoses," Dr. Franyutti included "[f]ocal mild [p]neumoconiosis and anthracosilicosis of lymph nodes." Director's Exhibit 17 at 2.

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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).

[11] The administrative law judge noted that the record contained no new x-ray evidence regarding the existence of clinical pneumoconiosis. Decision and Order at 9. The administrative law judge did not consider any medical opinion evidence regarding the existence of clinical pneumoconiosis, or make any finding regarding the existence of legal pneumoconiosis.

[12] All three physicians listed above diagnosed the miner with lung cancer and emphysema based on his autopsy findings. Director's Exhibit 17; Employer's Exhibits 2, 4. Dr. Franyutti did not address the cause of the lung cancer and emphysema; Drs. Caffrey and Oesterling opined that both diseases were due to smoking and were unrelated to the miner's coal mine dust exposure. In the text above, we summarize more fully the doctors' opinions regarding whether the miner also suffered from clinical pneumoconiosis.

Dr. Caffrey reviewed the miner's autopsy slides, and stated that he was not able to make a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 2. Specifically, Dr. Caffrey indicated that he saw no "lesions of coal workers' pneumoconiosis within the lung tissue on these slides," and explained that, in order "[f]or a diagnosis of coal workers' pneumoconiosis to be made, anthracotic pigment must stimulate the production of reticulin and/or collagen within lung tissue." *Id*. Although Dr. Caffrey noted that the slides showed emphysema, he concluded that "the very mild amount of anthracotic pigment in these sections of lung tissue . . . would not have caused the degree of emphysema [seen]." *Id*.

Dr. Oesterling also reviewed the miner's autopsy slides, and concluded that the evidence of the miner's coal dust inhalation was "limited to minor deposits of anthracotic pigment with some sclerosis of the hilar lymph nodes." Employer's Exhibit 4 at 7. In particular, Dr. Oesterling stated that the concentration of coal dust in a lymph node resulted in "collagen, i.e.[,] scar tissue," but explained that this change was not diagnostic of coal workers' pneumoconiosis because it did not appear within the miner's lung:

> The lymph nodes . . . filter lymphatic fluids leaving the lung[,] including tumor. In this node coal dust has been concentrated resulting in this sclerotic change. Photo 54 confirms the pink substance is collagen, i.e. scar tissue. Had we seen this type of tissue response due to coal deposits in the remainder of the lung, this would have qualified for a diagnosis of nodular coal workers' disease. However, none was present nor was there any evidence of significant interstitial macular disease.

Employer's Exhibit 4 at 6.

In weighing the autopsy evidence, the administrative law judge noted that Dr. Franyutti found "lymph nodes replaced by dense fibrotic tissue containing multiple anthraco-silotic nodules with central hyalinization and containing brownish-black pigment deposit[s]," and noted further that Dr. Franyutti's "credentials, in comparison to [those of] the other physicians, are unknown." Decision and Order at 11. Additionally, the administrative law judge summarized Dr. Caffrey's opinion that there was no evidence of coal workers' pneumoconiosis because Dr. Caffrey "did not detect any place where anthracotic pigment stimulated the production of reticulin and/or collagen within lung tissue." *Id*. The administrative law judge then stated that "Dr. Oesterling, however, found what Dr. Caffrey stated was needed: collagen present in the lymph nodes due to coal dust infiltration." *Id*. The administrative law judge acknowledged that Dr. Oesterling dismissed the significance of the collagen in the miner's lymph nodes because it was not present in the rest of the lung, and thus did not warrant a diagnosis of "nodular coal workers' disease." *Id.* Citing the Board's decision in *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA (July 30, 2002) (unpub.), the administrative law judge stated that

"the presence of anthracosis in the lymph nodes may be sufficient to establish the existence of pneumoconiosis."[13] *Id*. The administrative law judge concluded that, because "Drs. Franyutti and Oesterling found in the lymph nodes what Dr. Caffrey stated was necessary," and because autopsy evidence is "the most reliable method of ascertaining the existence of pneumoconiosis," the preponderance of the autopsy evidence established the existence of "coal workers' pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)." *Id*.

Employer argues that the administrative law judge mischaracterized Dr. Caffrey's opinion. We disagree. Viewing the administrative law judge's Decision and Order as a whole, we conclude that the administrative law judge accurately summarized Dr. Caffrey's opinion that there was no evidence of coal workers' pneumoconiosis because anthracotic pigment did not stimulate "the production of reticulin and/or collagen *within lung tissue.*" Decision and Order at 11 (emphasis added). In the next sentence, which may have been inartfully drafted, the administrative law judge stated that Dr. Oesterling found collagen due to coal dust infiltration in the lymph nodes, the feature that "Dr. Caffrey stated was needed" in the lung tissue for a diagnosis of coal workers' pneumoconiosis. Taking the administrative law judge's two sentences together, we do not view the administrative law judge as concluding that Dr. Caffrey believed that collagen in the lymph nodes would be diagnostic of pneumoconiosis.

However, there is merit in employer's argument that the administrative law judge did not adequately explain his finding that the autopsy evidence established the existence of clinical coal workers' pneumoconiosis. Employer's Brief at 28-30. Whether "anthracosis in the hilar lymph nodes is pneumoconiosis is a finding of fact to be made by the administrative law judge based on the evidence before him." *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984); *see also Daugherty v. Dean Jones Coal Co*., 895 F.2d 130, 132, 13 BLR 2-134, 2-140 (4th Cir. 1989)(holding that "an analysis of such tissue may be sufficient to sustain a determination of the presence or absence of anthracosis"). The autopsy evidence before the administrative law judge in this case conflicted regarding whether the changes that were detected in the miner's lymph nodes established the existence of pneumoconiosis. As summarized by the administrative law

[13] In the unpublished decision cited by the administrative law judge, the Board cited and discussed published case law holding that anthracosis in lymph nodes may be sufficient to support a determination of the existence of pneumoconiosis, but that whether it actually does so is a factual determination for the administrative law judge based on all the evidence before him. *Taylor v. Director, OWCP*, BRB No. 01-0837 BLA, slip op. at 5 (July 30, 2002) (unpub.), *citing, inter alia, Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984). We conclude that the administrative law judge intended to apply the published case law referenced in *Taylor*, not *Taylor* itself.

judge, Dr. Franyutti diagnosed the miner with "pneumoconiosis and anthracosilicosis of lymph nodes," while Drs. Caffrey and Oesterling opined that the miner did not have pneumoconiosis because there were no changes related to coal dust in his lungs, but in the lymph nodes only. In finding the existence of pneumoconiosis established, the administrative law judge credited the opinion of Dr. Franyutti over those of Drs. Caffrey and Oesterling, but without adequately explaining his basis for doing so. By citing *Taylor*, the administrative law judge referenced the principle that evidence of anthracosis in lymph nodes is relevant and may support a finding of pneumoconiosis. *See Daugherty*, 895 F.2d at 132, 13 BLR at 2-140. However, the administrative law judge also needed to recognize that in any such case, the administrative law judge must make a finding of fact based on the evidence that is before him. *Bueno*, 7 BLR at 1-340. Here, the administrative law judge did not explain how he resolved the conflict in the particular evidence before him and determined that it established the existence of pneumoconiosis. Thus, this aspect of the administrative law judge's decision does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that an administrative law judge set forth the rationale underlying his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Therefore, we must vacate the administrative law judge's finding that the autopsy evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), and remand the case for reconsideration of the autopsy evidence regarding the existence of clinical pneumoconiosis. On remand, the administrative law judge must consider all of the relevant evidence of record, and determine whether it establishes that the miner had "a chronic dust disease of the lung" under 20 C.F.R. §718.201(a).[14] In determining whether the autopsy reports are sufficiently documented and reasoned, the administrative law judge should take into consideration the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Because we have vacated the administrative law judge's finding that the autopsy evidence established the existence of clinical pneumoconiosis, we also vacate the administrative law judge's finding, in regard to rebuttal of the Section 411(c)(4) presumption, that employer failed to disprove the existence of pneumoconiosis.

[14] The Board uses the word "establish" above only to address the administrative law judge's specific finding in this case, that claimant first affirmatively established the existence of pneumoconiosis, and then invoked the Section 411(c)(4) presumption.

Next, we address claimant's argument that the administrative law judge erred in finding that employer rebutted the Section 411(c)(4) presumption by establishing that pneumoconiosis was not a "substantially contributing cause" of the miner's impairment. In considering the cause of the miner's disabling pulmonary impairment, the administrative law judge considered the opinions of Drs. Bellotte and Rosenberg. Dr. Bellotte opined that the miner's disability was not caused, in whole or in part, by coal workers' pneumoconiosis or any chronic lung disease arising out of coal mine employment. Employer's Exhibit 6. Dr. Rosenberg opined that the miner's disabling pulmonary impairment "did not relate to his past coal mine dust exposure and the presence of [coal workers' pneumoconiosis]." Employer's Exhibit 8.

The administrative law judge discredited Dr. Bellotte's opinion because the doctor found, contrary to the administrative law judge's determination, that the miner did not suffer from clinical pneumoconiosis,[15] and because the doctor "did not give any reasons in support of his conclusions or explanation as to why he reached his conclusions." Decision and Order at 18. However, the administrative law judge concluded that Dr. Rosenberg's opinion was "persuasive for the reason why Dr. Bellotte's is not – Dr. Rosenberg explained the basis for each of his conclusions, supporting his conclusions with references to medical studies." *Id*. at 19. The administrative law judge, therefore, found that the Section 411(c)(4) presumption was rebutted, explaining that:

> The question in this case . . . becomes whether [employer's] experts' medical opinions overcome the presumption as established by 20 C.F.R. §718.305 that the miner's clinical coal workers' pneumoconiosis is a "substantially contributing cause" to the miner's pulmonary disability. Based upon the thoroughness of Dr. Rosenberg's report, with his explanations and citations to medical studies in support of his conclusions, the undersigned finds that the presumption established by 20 C.F.R. §718.305 is rebutted, and [c]laimant has not proven that the miner's clinical coal workers' pneumoconiosis was a "substantially contributing cause" of the miner's total disability. 20 C.F.R. §718.204(c)(1). Without this element, the claim for benefits must be denied.

[15] As the administrative law judge noted, Drs. Bellotte and Rosenberg both concluded that the miner did not have clinical pneumoconiosis. Decision and Order at 18; Employer's Exhibits 6, 8. The administrative law judge discredited Dr. Bellotte's opinion because his conclusion was contrary to the administrative law judge's finding that the miner had clinical pneumoconiosis, but the administrative law judge did not apply the same reasoning to discredit Dr. Rosenberg's disability causation opinion. Decision and Order at 18.

Decision and Order at 19.

As an initial matter, we agree with claimant that the administrative law judge erred to the extent that he placed the burden of proving that the miner's disability was due to pneumoconiosis on claimant. Once the administrative law judge found that the miner invoked the Section 411(c)(4) presumption, the miner was entitled to a presumption that the miner's disabling impairment was due to pneumoconiosis, and employer bore the burden of rebutting it. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d); *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345, 25 BLR 2-549, 2-556 (10th Cir. 2014); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1069, 25 BLR 2-431, 2-446-47 (6th Cir. 2013).

We also agree with claimant that the administrative law judge applied an incorrect rebuttal standard. The administrative law judge appears to have considered whether pneumoconiosis was a "substantially contributing cause" of the miner's totally disabling impairment. Decision and Order at 19. As the administrative law judge noted, a miner seeking to affirmatively establish total disability due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), must show that pneumoconiosis is a "substantially contributing cause" of his or her impairment. *Id.* at 15. The regulations, however, impose a different standard on an employer seeking to rebut the Section 411(c)(4) presumption of disability causation, requiring the employer to establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis . . . ." 20 C.F.R. §718.305(d)(1)(ii). In revising the regulations to implement amended Section 411(c)(4), the Department of Labor made clear that the "no part" standard of 20 C.F.R. §718.305(d)(1)(ii) is different, and more favorable to claimants, than the "substantially contributing cause" standard for disability causation at 20 C.F.R. §718.204(c). 78 Fed. Reg. 59,102, 59,106-07 (Sept. 25, 2013); *see also Rose*, 614 F.2d at 939, 2 BLR at 2-43-44 (requiring employer to "rule out the possibility" of a connection between the miner's disabling impairment and his pneumoconiosis or coal mine employment). Because the administrative law judge failed to apply the proper rebuttal standard, we vacate his finding that employer established rebuttal of the Section 411(c)(4) presumption.

In light of the above-referenced errors, we must remand this case to the administrative law judge for further consideration. On remand, the administrative law judge is instructed to initially determine whether the miner had the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. If the miner invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), under the regulations promulgated by the Department of Labor, the burden of proof shifts to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis, or by establishing that no part of the miner's pulmonary or respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1). Thus, if

the administrative law judge finds that the miner qualifies to invoke the presumption, the administrative law judge must consider whether the opinions of Drs. Bellotte and Rosenberg are reasoned and documented, and rebut the presumption, applying the proper standard.[16]

However, if the administrative law judge finds, on remand, that claimant does not establish that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption, he must consider whether claimant has established that the miner was entitled to benefits pursuant to 20 C.F.R. Part 718, by establishing the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R.§§718.202(a), 718.203, and by establishing that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).[17]

[16] Claimant contends that Dr. Rosenberg's opinion, that the miner's disabling pulmonary impairment was unrelated to coal mine dust exposure, is inconsistent with scientific studies cited by the Department of Labor in the preamble to the amended regulations. *See J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *see also Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, BLR (6th Cir. 2014). Employer, meanwhile, contends that the administrative law judge erred in discrediting Dr. Bellotte's opinion because his conclusion, that the miner did not have clinical pneumoconiosis, conflicted with the autopsy evidence. Employer also contends that the administrative law judge erred in finding that Dr. Bellotte did not give any reasons in support of his conclusions. On remand, the administrative law judge should consider these contentions when addressing the credibility of the doctors' opinions.

[17] If claimant establishes that the miner suffered from pneumoconiosis, claimant will have established a change in the applicable condition of entitlement at 20 C.F.R. §725.309(d).

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

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