U.S. Department of Labor

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

BRB No. 16-0089 BLA

RALPH E. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCOTTIE COAL COMPANY, INCORPORATED	)	
	)	
	)	DATE ISSUED: 11/15/2016
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5916) of Administrative Law Judge Steven D. Bell awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on June 25, 2010.[1]

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

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer also argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's

[1] Claimant's initial claim, filed on March 19, 2007, was denied by the district director on February 20, 2008, because claimant failed to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] Because the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

identification of employer as the responsible operator. In a reply brief, employer reiterates its previous contentions.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

Employer, Scottie Coal Company (Scottie Coal), challenges its designation as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[6] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The regulations also provide 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. 20 C.F.R. §725.495(d). 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

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

coverage or authorization to self-insure for those operators. *Id.*

The district director designated Scottie Coal as the responsible operator because claimant's more recent employer, Miller Coal Corporation (Miller Coal), was uninsured in September of 1995, the date of claimant's last employment with it. 20 C.F.R. §725.495(a)(3); Director's Exhibit 29. The record contains the required statement from the Office of Workers' Compensation Programs that a search of its files indicated that Miller Coal was uninsured and lacked authorization to self-insure at the time of claimant's last employment. Director's Exhibit 19. Moreover, the district director in this claim reiterated in the Proposed Decision and Order that Miller Coal was uninsured at the time of claimant's last employment with the company.[7] Director's Exhibit 29.

The administrative law judge found that there was "no evidence . . . showing that there was any coverage on the last day [that] [c]laimant worked for Miller Coal in September 1995." Decision and Order at 8. The administrative law judge further found that, based upon his review of all the evidence, employer failed to satisfy its burden of showing that Miller Coal "possesses sufficient assets to secure the payment of benefits" to claimant. *Id., quoting* 20 C.F.R. §725.495(c)(2). The administrative law judge, therefore, found that Miller Coal could not be designated the responsible operator. *Id.*

Scottie Coal argues that the administrative law judge erred in determining that Miller Coal, which employed claimant more recently than Scottie Coal for more than one year, is not financially capable of assuming its liability for benefits and, thus, is not the proper responsible operator in this case. Specifically, employer asserts that, in determining that Miller Coal was not insured on claimant's last date of employment, the administrative law judge failed to consider the hearing testimony of claimant, Mr. Ralph Miller, that he was the owner of Miller Coal and that he carried compensation insurance for his employees "at all times," including when he last worked for Miller Coal. Hearing Transcript at 49. Scottie Coal contends that this testimony establishes that Miller Coal

---

[7] In declining to identify Miller Coal Company (Miller Coal) as the responsible operator, the district director explained that:

> The claimant was employed by Miller Coal from 1990 to September 1995. This company filed chapter 11 bankruptcy on March 25, 1997 and is no longer a viable entity. According to the [Section 725.495] statement in [the] file the company did not have insurance. Therefore we find that the company is not financially capable of paying the claim.

Director's Exhibit 29.

was insured on Mr. Miller's last date of employment with the company. Employer's Brief at 12-15. The Director disagrees, arguing that Mr. Miller's testimony regarding insurance coverage could not be considered by the administrative law judge because Scottie Coal did not designate Mr. Miller as a "liability witness." Director's Brief at 8 n.4. We agree with the Director.

The regulations require that while the claim is before the district director "all parties shall notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). The regulations further explicitly provide that in the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator *shall not* be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to *extraordinary circumstances*."[8] 20 C.F.R. §725.414(c) (emphasis added). The administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (evidentiary limitations set forth in the regulations are mandatory and, as such, they are not subject to waiver).

The record does not contain any evidence that Scottie Coal identified Mr. Miller as a potential hearing witness relevant to the liability of Miller Coal while this claim was pending before the district director. Scottie Coal, nevertheless, contends that it satisfied the notification requirement when it requested, in an April 27, 2011 letter, that the district director consider Mr. Miller's May 20, 2009 hearing testimony in another case, *Whited v. Dominion Coal Co.*, Case No. 2008-BLA-5405.[9] Director's Exhibit 27. Contrary to its

[8] Section 725.457(c)(1) similarly provides that "[i]n the case of a witness offering testimony relevant to the liability of a responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director." 20 C.F.R. §725.457(c)(1).

[9] In the case that was cited by Scottie Coal in its request to the district director, Administrative Law Judge Linda S. Chapman found that Mr. Miller's hearing testimony, along with other evidence, established that the miner in that case, Mr. Whited, was last employed by Miller Coal from September through December 1994, at a time when Miller Coal had federal black lung insurance. *Whited v. Dominion Coal Co.*, Case No. 2008-BLA-5405, slip op. at 7 (Aug. 1, 2011). As requested by Scottie Coal, the district director in this case considered whether the *Whited* decision supported a finding that Miller Coal had insurance coverage at the time of Mr. Miller's last day of coal mine

assertion, Scottie Coal's request that the district director consider Mr. Miller's testimony in another case does not constitute notice that it was intending to rely on additional testimony from Mr. Miller at the hearing in this case to contest its designation as the responsible operator. It was not until the August 13, 2014 hearing that Mr. Miller provided testimony that contradicted the statement from the Office of Workers' Compensation Programs that Miller Coal was uninsured at the time of Mr. Miller's last employment. Because Scottie Coal did not identify Mr. Miller as a potential liability witness, his hearing testimony could be considered only if Scottie Coal established "extraordinary circumstances" to justify its admission into the record. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting) (recognizing the Department's intent that operators be required to submit "any evidence" relevant to the liability of another party while the case is before the district director).

As the Director accurately notes, Scottie Coal did not argue before the administrative law judge that its failure to provide notice should be excused due to extraordinary circumstances. Director's Brief at 8-9 n.4. Moreover, employer does not currently allege that extraordinary circumstances exist to excuse its failure to provide the required notification. Thus, Mr. Miller's hearing testimony pertaining to Miller Coal's insurance coverage was inadmissible.[10] *See* 20 C.F.R. §§725.414(c), 725.457(c)(1).

---

employment. In a Proposed Decision and Order dated April 19, 2012, the district director found that Scottie Coal's reliance upon the *Whited* decision was misplaced. Director's Exhibit 27. The district director noted that while Mr. Whited's employment with Miller Coal ended in 1994, at a time when the company still had insurance coverage, Mr. Miller's employment with Miller Coal continued until September of 1995. *Id.* Because the Department's records showed that Miller Coal's insurance coverage ended in June of 1995, the district director found that, unlike the claimant in *Whited*, Mr. Miller's last day of coal mine employment with Miller Coal occurred during a period of time when Miller Coal did not have insurance coverage. *Id.*

[10] In *Whited*, the case relied upon by employer to contest its designation as the responsible operator, Judge Chapman found that extraordinary circumstances justified her consideration of Mr. Miller's hearing testimony regarding the designation of the responsible operator. *Whited*, slip op. at 6. Specifically, Judge Chapman noted that while that case was before the district director, employer had asked three times for an extension of time to develop evidence pertaining to its liability as the responsible operator. *Id.* at 5. Judge Chapman found that the district director's summary denial of employer's request made "no sense," as it did not provide any reason for the denial. *Id.* In contrast, no such showing of extraordinary circumstances was made or attempted in

Accordingly, the administrative law judge did not err in declining to consider it. *See Weis*, 23 BLR at 1-188-89. Because claimant's hearing testimony cannot assist Scottie Coal in demonstrating that Miller Coal was insured on claimant's last day of employment with the company, we affirm the administrative law judge's determination that Scottie Coal failed to satisfy its burden to establish that Miller Coal is a potentially liable operator.[11] 20 C.F.R. §725.495(c)(2).

Employer next argues that the administrative law judge erred in determining that Eastern Energy Corporation (Eastern Energy), as the lessor of the mine worked by Miller Coal (lessee), was not liable for the payment of benefits.[12] The regulations provide that "[i]n any claim in which the operator which directed, controlled or supervised the miner is a lessee, the lessee shall be considered primarily liable for the claim, unless "the lessee is unable to provide for the payment of benefits to a successful claimant." 20 C.F.R. §725.493(b)(3). The administrative law judge found, for the reasons already discussed, that Miller Coal is unable to provide for the payment of benefits to a successful claimant. Decision and Order at 8. The administrative law judge noted that, in such circumstances, the regulations provide that Eastern Energy, as the lessor, could be designated the responsible operator if it could be concluded that the lease "empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or

---

this case.

[11] Employer notes that Mr. Miller was subject to a civil penalty if he failed to maintain the necessary insurance. Employer's Reply Brief at 2. 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. §726.300.

[12] After the hearing, claimant submitted a lease between Eastern Energy Corporation and Miller Coal. The Director, Office of Workers' Compensation Programs (the Director), objected to its admission, arguing that no "extraordinary circumstances" had been shown to exist that prevented Scottie Coal from submitting the lease to the district director. Although the administrative law judge acknowledged that the record was not well-developed as to whether "extraordinary circumstances" existed for the admission of this lease, he declined to disturb Administrative Law Judge Richard T. Stansell-Gamm's ruling at the hearing that the lease would be admitted if timely produced. Decision and Order at 7. The administrative law judge, therefore, admitted the lease into the record over the Director's objection. *Id.*

prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced." *Id.*, citing 20 C.F.R. §725.493(b)(3)(i).

The administrative law judge found that the facts of this case did not allow him to conclude that the lease "governed the relationship of the parties at any time after Miller Coal stopped mining at Eastern Energy in 1993." Decision and Order at 9. Moreover, upon review of the terms of the lease between Eastern Energy and Miller Coal, *see* Unmarked Post-Hearing Exhibit, the administrative law judge found that Eastern Energy did not exert sufficient control over Miller Coal to be named the responsible operator. Decision and Order at 9.

Scottie Coal argues that the administrative law judge erred in determining that Eastern Energy did not exert sufficient control over Miller Coal to be named the responsible operator. We disagree. The administrative law judge found that, under the terms of the lease, Eastern Energy did not retain the power "to make decisions with respect to the terms and conditions under which coal [was] to be extracted or prepared." Decision and Order at 9. The administrative law judge, citing paragraph 9 of the lease, noted that the lease required Miller Coal to:

> remove the mineable and merchantable coal from the designated premises in a proper and skillful manner and in compliance with all laws and regulations of the State of West Virginia and the United States . . . and . . . employ only approved methods of mining coal so that all the coal subject to this Agreement which can be economically mined shall be mined and removed.

Decision and Order at 9.

The administrative law judge found that this provision demonstrated that Miller Coal had the responsibility for determining "how coal would be extracted at the Eastern Energy mine." Decision and Order at 9. Because it is supported by substantial evidence,[13] we affirm the administrative law judge's finding that Eastern Energy did not

[13] The Director accurately notes that under the terms of the lease, Miller Coal (identified as an "independent contractor" in the lease) was also responsible for:

> hiring, paying, and supervising its employees; obtaining and paying for black lung insurance; personal injuries and property damage; paying and withholding taxes; workers' compensation; fines and penalties; safety training; engineering; electricity; loading and hauling coal; unemployment benefits; making surveys; and determining elevations.

retain sufficient control over Miller Coal to qualify as the responsible operator.[14] 20 C.F.R. §725.493(b)(3)(i)-(iii). We, therefore, affirm the administrative law judge's designation of employer, Scottie Coal, as the responsible operator in this claim.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[15] 20 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 [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer argues that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence, including interpretations of analog x-rays taken on January 6, 2011, February 2, 2011, June 16, 2011, June 22, 2011, May 12, 2012, May 15, 2012, and April 4, 2013, as well as interpretations of a digital x-ray taken on April 24, 2013.

Drs. Alexander and Ahmed, each dually-qualified as a B reader and Board-certified radiologist, interpreted the January 6, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibits 5, 10, while Drs. Adcock, DePonte, and Meyer,

---

Director's Brief at 11-12.

[14] In light of our affirmance of the administrative law judge's determination that Eastern Energy is not liable for benefits based upon its status as a lessor, we need not address the Director's contention that the administrative law judge erred in admitting the lease between Eastern Energy and Miller Coal into the record. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

[15] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

three dually-qualified physicians, interpreted the x-ray as negative for the disease. Director's Exhibit 16; Employer's Exhibits 5, 11. Because the January 6, 2011 x-ray was interpreted as both positive and negative for pneumoconiosis by equally qualified physicians, the administrative law judge found that this x-ray was "inconclusive." Decision and Order at 20-21.

Dr. Alexander interpreted the February 2, 2011 x-ray as positive for pneumoconiosis. Claimant's Exhibit 3. Because there are no other interpretations of this x-ray in the record, the administrative law judge found that this x-ray is positive for pneumoconiosis. Decision and Order at 21.

Dr. DePonte interpreted the June 16, 2011 x-ray as negative for pneumoconiosis, Director's Exhibit 17, and Dr. Poulos, a dually-qualified physician, interpreted the June 22, 2011 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Because there are no other interpretations of these two x-rays in the record, the administrative law judge found that both x-rays are negative for pneumoconiosis. Decision and Order at 21.

Dr. Adcock, a dually-qualified physician, interpreted the May 12, 2012 x-ray as negative for pneumoconiosis. Employer's Exhibit 14. Because there are no other interpretations of this x-ray in the record, the administrative law judge found that this x-ray is negative for pneumoconiosis. Decision and Order at 21.

Dr. Miller, a dually-qualified physician, rendered the only interpretation of the May 15, 2012 x-ray, finding it to be positive for pneumoconiosis. Decision and Order at 21; Claimant's Exhibit 1. The administrative law judge, therefore, found this x-ray to be positive for pneumoconiosis. *Id.*

While Dr. Adcock interpreted the April 4, 2013 x-ray as negative for pneumoconiosis, Employer's Exhibit 13, Dr. Alexander interpreted the x-ray as positive for the disease. Claimant's Exhibit 2. Because the April 4, 2013 x-ray was interpreted as both positive and negative for pneumoconiosis by equally qualified physicians, the administrative law judge found that the x-ray was "inconclusive." Decision and Order at 21.

Finally, the administrative law judge considered interpretations of a digital x-ray taken on April 24, 2013. While Dr. Miller interpreted the digital x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, Dr. Tarver, also a dually-qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 9. Because the April 4, 2013 x-ray was interpreted as both positive and negative for pneumoconiosis by equally qualified physicians, the administrative law judge found that the x-ray was "inconclusive." Decision and Order at 21.

Although the administrative law judge noted that a "slight majority" of the x-rays overall was negative for pneumoconiosis, he found that the most recent x-ray evidence (the interpretations of the analog x-rays taken on May 12, 2012, May 15, 2012, and April 4, 2013, and the digital x-ray taken on April 24, 2013) was inconclusive, and, therefore, insufficient to carry employer's burden to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 21-22.

Employer argues that the administrative law judge erred in not weighing the negative interpretations of earlier x-rays taken on June 16, 2011 and June 22, 2011, along with the most recent x-ray evidence. Employer's Brief at 21. We disagree. The administrative law judge considered all of the x-ray evidence of record, but reasonably relied upon the more recent evidence, which he found more accurately reflects claimant's current condition, to conclude that the evidence was inconclusive for the presence or absence of pneumoconiosis. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 21. The administrative law judge, therefore, permissibly found that the x-ray evidence was insufficient to carry employer's burden to establish that claimant does not have clinical pneumoconiosis. Decision and Order at 21-22. Because this finding is supported by substantial evidence, it is affirmed.

Employer next contends that the administrative law judge erred in his consideration of the medical opinion evidence. Employer submitted the medical opinions of Drs. Fino and Rosenberg in support of its burden to disprove the existence of clinical pneumoconiosis. The administrative law judge permissibly discredited Dr. Fino's opinion because he found that "Dr. Fino's conclusion that [c]laimant does not have clinical pneumoconiosis is not supported by the inconclusive x-ray evidence." Decision and Order at 23; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Employer's Exhibits 7, 15. The administrative law judge also permissibly discredited Dr. Rosenberg's opinion that claimant does not have clinical pneumoconiosis because the doctor did not address the significance of the most recent x-ray evidence, which the administrative law judge found to be inconclusive regarding the existence of clinical pneumoconiosis. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 23-24; Employer's Exhibits 3, 16. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence fails to establish that claimant does not have clinical pneumoconiosis.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have clinical

pneumoconiosis. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[16] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also asserts that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer specifically contends that the opinions of Drs. Fino and Rosenberg are sufficient to establish this second means of rebuttal. We disagree. The administrative law judge rationally discounted the opinions of Drs. Fino and Rosenberg that claimant's disability is not due to pneumoconiosis because neither doctor diagnosed clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[17] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). As the administrative law judge permissibly discounted the opinions of Drs. Fino and Rosenberg, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

[16] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[17] Employer argues that Dr. Fino salvaged the credibility of his disability causation opinion when he stated that he would have reached the same conclusion even assuming that claimant has clinical pneumoconiosis. Employer's Brief at 25. However, the Fourth Circuit has held that it is not enough for an expert simply to recite, without more, that his causation opinion would not change if a claimant had pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015). Rather, the Fourth Circuit has held that "such an alternative causation analysis, like any causation opinion, must be accompanied by some reasoned explanation - in this context, an explanation of *why* the expert would continue to believe that pneumoconiosis was not the cause of a miner's disability, even if pneumoconiosis were present." *Id.* In this case, a review of the record reflects that Dr. Fino provided no such explanation. Employer's Exhibit 7 at 29.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge