U.S. Department of Labor

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

BRB No. 17-0009 BLA

ROBERT W. PORTH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONESVILLE COAL PREPARATION	)	DATE ISSUED: 11/30/2017
	)	
and	)	
	)	
EAST COAST RISK MANAGEMENT	)	
	)	
Self-Insured	)	
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 Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (Nicholas C. Geale, Acting 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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-5187) of Administrative Law Judge Peter B. Silvain, Jr., rendered on a claim filed on June 12, 2012 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that claimant worked as a miner within the meaning of the Act and that employer is the properly designated responsible operator. The administrative law judge found that claimant established 35.5 years of coal mine employment in conditions substantially similar to those in an underground coal mine and a totally disabling respiratory or pulmonary impairment and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant's work for employer qualifies as the work of a miner under the Act and, therefore, erred in determining that employer is the responsible operator. Employer also asserts that the administrative law judge erred in excluding medical evidence and in determining that claimant established entitlement to benefits. Claimant responds, urging affirmance of employer's designation as the responsible operator and the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, urging the Board to affirm the administrative law judge's findings that claimant worked for employer as a miner and that employer is the properly designated responsible operator.[2]

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,

[1] Pursuant to Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27-29.

and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Responsible Operator

Pursuant to Section 402(d) of the Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The implementing regulation, set forth at 20 C.F.R. §725.202(a), provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner."[4] *See also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the statutory definition of a miner includes a "situs" requirement, i.e., the work was in or around a coal mine or coal preparation facility, and a "function" requirement, i.e., the work was necessary to the extraction or preparation of coal. *Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-31, 13 BLR 2-38, 2-40-41 (6th Cir. 1989).

Claimant was employed at employer's coal preparation facility as a laborer and a diesel mechanic from November 1984 to September 2010. Director's Exhibit 34; Hearing Transcript at 56-57. According to claimant, unprocessed coal from multiple

[3] Because the record reflects that claimant's last coal mine employment was in Ohio, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18; Director's Exhibits 3, 6.

[4] The administrative law judge's finding that claimant worked at a coal preparation facility, Decision and Order at 8, is sufficient to invoke the presumption that claimant's work was that of a miner. 20 C.F.R. §725.202(a). It is unclear, however, whether the administrative law judge properly placed the burden on employer to rebut the presumption "with proof" that claimant "was not engaged in the extraction, preparation or transportation of coal . . . or in the maintenance or construction of the mine site" or that he "was not regularly employed in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a)(1)-(2). Any error, however, is harmless in light of the administrative law judge's findings, which we affirm *infra*, that claimant's credible testimony affirmatively establishes that, "for the duration of his employment with the [e]mployer," claimant's work occurred "in or around a coal mine [or coal preparation facility]" and involved "the preparation and processing" of raw coal. Decision and Order at 7-9.

unrelated coal companies was delivered to employer's coal preparation facility where it was washed, put through sizing screens and shakers, separated into large and small pieces, placed in a pile, and then loaded on a belt to be delivered to employer's power plant. Director's Exhibits 20, 34; Hearing Transcript at 21, 24-25, 46. The coal was supplied solely to Conesville Power Plant to generate electricity. Director's Exhibit 20.

Employer does not dispute that it employed claimant for at least one year.[5] Instead, employer asserts that it did not employ claimant as a miner and therefore cannot be held liable as the responsible operator. In support of its argument, employer asserts that the administrative law judge erred in determining that claimant's work at its coal processing plant met the situs requirement by taking place in or around a coal mine or a coal preparation facility. Employer also argues that the work claimant performed at its coal preparation facility does not satisfy the function requirement, as coal was prepared there for use by the power plant and not for delivery into the stream of commerce. Employer therefore asserts that claimant is not a miner under the Act because his "duties are not essential or vital to the production or extraction of coal." Employer's Brief at 16.

We reject employer's arguments. With respect to the situs requirement, although the term "coal preparation facility" is not formally defined in the Act or the regulations, it is encompassed within the statutory definition of a "coal mine":

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, *and the work of preparing the coal so extracted, and includes custom coal preparation facilities.*

30 U.S.C. §802(h)(2) (emphasis added), as implemented by 20 C.F.R. §725.101(a)(12). A coal preparation facility satisfies the definition of a coal mine even if it is geographically remote from the site where the coal is extracted. *See Petracca*, 884 F.2d at 932, 13 BLR at 2-42. Consistent with these principles, the administrative law judge permissibly determined that the situs requirement was satisfied because the facility where claimant was employed, although not located immediately adjacent to the extraction site, was used for "coal preparation" as defined in 20 C.F.R. §725.101(a)(13), i.e., crushing,

[5] The responsible operator is the operator that most recently employed claimant as a miner for a cumulative period of not less than one year and that is capable of assuming liability for the payment of benefits. 20 C.F.R. §§725.494(c), 725.495(a)(1); *see Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313, 25 BLR 2-521, 2-530 (6th Cir. 2014).

sizing, cleaning, washing, drying and loading coal. Decision and Order at 8, *citing* Hearing Transcript at 20-21. We therefore affirm the administrative law judge's finding that employer's coal preparation plant met the situs requirement.[6] *See Petracca*, 884 F.2d at 932, 13 BLR at 2-42; Decision and Order at 8.

The administrative law judge also permissibly determined that claimant's work satisfies the function requirement, based on claimant's testimony that "the coal with which he worked was in the preparation and processing stage" and that "one of the functions of [claimant's] work site was for the preparation and processing of raw coal."[7] Decision and Order at 8, *citing* Hearing Transcript at 20-21, 24-26; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). In addition, the administrative law judge rationally found that claimant's duties as a laborer and a diesel mechanic were "an integral and necessary part" of the functioning of the preparation plant, as claimant was either directly involved in the processing of the coal or

[6] Employer cites, "as persuasive authority," Administrative Law Judge George P. Morin's dismissal of employer as the responsible operator in *Lambert v. Conesville Coal Preparation Co.*, 97-BLA-1124 (June 29, 1998) (unpub.). Employer's Brief at 16. In that case, Judge Morin found that the coal arriving at the Conesville plant was already processed and in a form consumable by its ultimate user. He therefore concluded that the work of the claimant in that case was not necessary for and related to the extraction and preparation of coal. He based his responsible operator finding on the claimant's failure to satisfy the function test, rather than the situs test. *Lambert*, slip op. at 11. Employer states incorrectly that the Board affirmed Judge Morin's dismissal of employer. Without addressing the function test, the Board vacated employer's dismissal and remanded the case for reinstatement of employer as a party. *Lambert v. Conesville Coal Preparation Co.*, BRB Nos. 98-1645 BLA and 98-1645 BLA-A, slip op. at 5 (May 31, 2000) (unpub.). As asserted by the Director, Office of Workers' Compensation Programs, it appears that employer's status as responsible operator "was never finally resolved." Director's Brief at 3-4 n.2. The miner's claim and a later survivor's claim were denied by Administrative Law Judge Richard Morgan, on the grounds that the claimants failed to establish disability causation and death causation, respectively. Judge Morgan indicated that the responsible operator issue was, therefore, moot. *Lambert v. Conesville Coal Preparation Co.*, Case Nos. 2002-BLA-50 and 2002-BLA-51, slip op. at 4 (Dec. 19, 2002) (unpub.). There is no record of an appeal of this decision to the Board.

[7] Claimant testified: "you take in raw coal, straight out of the pits that's dirty, has rock in it, mud, dirt, and they wash out as much of the impurities as possible and then ship it out as a cleaner product." Hearing Transcript at 20. Claimant also stated that the unprocessed raw coal came from various mines, and that all of the coal washed at the preparation facility where he worked went to the power plant. *Id*. at 21, 24-26.

kept the machinery used for that purpose in working order.[8] *See Forester*, 767 F.3d at 641, 25 BLR at 2-663-64; Decision and Order at 3, 4, 8, *citing* Hearing Transcript at 20-21, 24-26, 46-47.

We reject employer's argument that because the preparation here was carried out exclusively for the ultimate user, rather than for purposes of general distribution and sale, claimant's work did not meet the function requirement of the Act. Employer's Brief at 16. The Sixth Circuit has quoted with approval the holding of the United States Court of Appeals for the Fourth Circuit in *Roberts v. Weinberger*, 527 F.2d 600, 602 (4th Cir. 1975), that "coal is extracted and prepared when it is 'in condition for delivery to distributors and consumers,' and a mine extends 'at least to the point where the coal is processed and loaded for further shipment.'" *Southard v. Director, OWCP*, 732 F.2d 66, 69, 6 BLR 2-26, 2-28 (6th Cir. 1984). Claimant's work, as determined by the administrative law judge, took place around, and was integral to the processing of, raw coal that was being prepared for delivery to the power plant.[9] Accordingly, we affirm the administrative law judge's determination that claimant's work satisfies the function requirement. *See Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42; Decision and Order at 8.

We are not persuaded by employer's contention that the administrative law judge "gave no consideration to the affidavits submitted by employer" to rebut the presumption that claimant was a miner. Employer's Brief at 16. Employer does not explain how these affidavits satisfy its burden of rebutting that claimant is a miner under the Act. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 15-16;

[8] These findings are not contested by employer.

[9] Employer maintains that the function issue can be resolved by reference to the decision of the United States Court of Appeals for the Eleventh Circuit in *Foreman v. Director, OWCP*, 794 F.2d 569, 9 BLR 2-90 (11th Cir. 1986). According to employer, the court held that an individual, "like the claimant who performs work as a coal handler for an ore mine power plant (the ultimate consumer of the coal) was not a 'miner' because his duties were not integral to the preparation of coal." Employer Brief at 15-16. Unlike claimant, however, the miner in *Foreman* worked *at* the power plant, wetting coal dust and shoveling it into the boilers – "tasks related to the consumption of coal[.]" *Foreman*, 794 F.2d at 571, 9 BLR at 2-91. Furthermore, in contrast to the state of the coal at employer's preparation facility, the coal used at the power plant boilers in *Foreman* "had been processed prior to delivery. The plant received only coal dust, indicating that the raw coal from [the] mines had been sifted and sorted prior to delivery." *Id*.

Director's Exhibit 34. Moreover, as the Director maintains, the information in the affidavit from James H. Garrett, Managing Director of Operations and Mining, is consistent with claimant's testimony that unprocessed coal was delivered from coal mines to the preparation plant, where it was processed and subsequently delivered to the power plant. Director's Exhibit 20. We therefore affirm the administrative law judge's findings that claimant's work satisfies the situs and function requirements and, thus, constitutes the work of a miner, and that employer did not rebut the presumption pursuant 20 C.F.R. §725.202(a). *See Forester*, 767 F.3d at 641, 25 BLR at 2-663-64; *Petracca*, 884 F.2d at 931, 13 BLR at 2-41-42; Decision and Order at 8. We consequently affirm the administrative law judge's findings that employer is the responsible operator and that claimant established 35.5 years of coal mine employment under the Act.[10] *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313, 25 BLR 2-521, 2-530 (6th Cir. 2014); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); Decision and Order at 8, 26. We further affirm, as unchallenged on appeal, the administrative law judge's finding that all of claimant's 35.5 years of coal mine employment was qualifying for the purpose of invoking the Section 411(c)(4) presumption.[11] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[10] The administrative law judge accepted the parties' stipulation that claimant was employed by employer for 26 years. Decision and Order at 8. Based on his finding that all of claimant's work for employer was that of a miner, and his acceptance of the parties' stipulation that claimant had an additional 9.5 years of coal mine employment prior to his work for employer, the administrative law judge found that claimant established 35.5 years of coal mine employment under the Act. *Id*. at 8-9; Hearing Transcript at 56.

[11] The administrative law judge found that claimant's 35.5 years of surface coal mine employment took place "in conditions 'substantially similar' to an underground coal mine" based on claimant's testimony "regarding the consistent presence of a substantial level of coal dust (even under the best circumstances while working for the [e]mployer)." Decision and Order at 26; *see* 20 C.F.R. §718.305(b)(1)(i), (2).

II. Evidentiary Ruling – The Exclusion of Dr. Meyer's Report

Prior to the hearing, employer submitted Dr. Meyer's negative interpretations of five CT scans as affirmative case evidence at 20 C.F.R. §§718.107(b), 725.414(a)(3)(i). Employer's Exhibits 1, 2, 4, 14, 15. Claimant submitted five positive interpretations of the same CT scans by Dr. Miller as affirmative case evidence at 20 C.F.R. §§718.107(b), 725.414(a)(2)(i). Director's Exhibit 29; Claimant's Exhibits 4-8. Subsequently, claimant submitted a report dated September 25, 2015, in which Dr. Miller criticized Dr. Meyer's negative interpretations of the CT scans and provided additional explanations for his positive interpretations. Claimant's Exhibit 10. Shortly before the hearing, employer objected in writing to the admission of Dr. Miller's report, arguing that it was a medical report and, therefore, exceeded the evidentiary limit of two affirmative case medical reports because claimant had already submitted medical reports from Drs. Cohen and Feicht. *See* Claimant's Exhibits 11, 14. After the parties briefed this issue, the administrative law judge determined, by order dated April 1, 2016, that Dr. Miller's report constituted a "medical report" and was therefore inadmissible as CT scan evidence pursuant 20 C.F.R. §718.107(b):

> I find that Dr. Miller's September 25, 2015 report is a medical report under 20 C.F.R. §725.414(a)(1) "by definition," as it is not an assessment of a single objective test, but it rather is an assessment and analysis of five separate CT scans which includes the rationale for his diagnosis, which appears to be based, at least in part, on his knowledge of the [c]laimant's background and work history.

Order Regarding the Employer's Objections to Evidence at 4. Because claimant had already submitted two medical reports from Dr. Cohen and Dr. Feicht, the maximum number allowed under the evidentiary limitations, the administrative law judge gave claimant ten days "to determine which medical report shall be excluded[.]" *Id*. Claimant submitted an amended Evidence Summary Form dated April 7, 2016, withdrawing Dr. Feicht's report, designating the reports of Drs. Miller and Cohen as affirmative case medical reports, and continuing to designate Dr. Miller's CT scan readings as affirmative case "other medical evidence."

After the briefs had been filed on employer's objection to Dr. Miller's report, but before the administrative law judge issued his ruling on the issue, employer submitted as "rehabilitative evidence" a report from Dr. Meyer dated November 16, 2015, addressing Dr. Miller's September 25, 2015 report and responding to Dr. Miller's criticisms of his CT scan readings. Employer's Exhibit 21; November 17, 2015 Letter from employer to administrative law judge (submitting Dr. Meyer's November 16, 2015 report as "rehabilitative evidence"). In his Decision and Order on the merits of the claim, the

administrative law judge ruled that Dr. Meyer's November 16, 2015 report was inadmissible, stating:

> Presumably in response to the medical report from Dr. Miller, the [e]mployer submitted, but did not designate, a similar report from Dr. Meyer, addressing the findings and discussion in Dr. Miller's report concerning the [c]laimant's CT scans. As I determined in my prior Order that Dr. Miller's discussion of his overall findings in report form constituted a medical report for purposes of the [c]laimant's evidentiary limitations, I similarly find that Dr. Meyer's discussion of his overall findings in report form constitute[s] a medical report for purposes of the [e]mployer's evidentiary limitations. Given that the [e]mployer also chose not to designate said report as one of its admissible medical reports, and Dr. Meyer did not author an initial medical report to which his report could be considered rehabilitative, I find that Dr. Meyer's November 16, 2015, report ([Employer's Exhibit] 21) is inadmissible[.]

Decision and Order at 16 n.47.

Employer argues that the administrative law judge violated its due process rights by excluding Dr. Meyer's report without advance notice or the opportunity to respond to its exclusion. Employer also asserts that the administrative law judge erred in finding that Dr. Meyer's report exceeded the evidentiary limitations. Employer further contends that Dr. Meyer's report is admissible as rehabilitative evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii), submitted in response to Dr. Miller's interpretations of the same five CT scans that Dr. Meyer initially interpreted.

Claimant responds, asserting that "[h]aving thus persuaded the [administrative law judge] that [claimant] submitted a third medical report in excess of the evidence limitations, the [e]mployer has conspicuously failed to apply that same standard to its own experts." Claimant's Response Brief at 20. Claimant also maintains that employer's due process arguments should be rejected because employer has not shown that it was prejudiced by this ruling. In its reply brief, employer asserts that whether a report constitutes rehabilitative evidence "does not turn on the number of CT scans discussed within that report." Employer's Reply Brief at 3.

Because we hold that any error committed by the administrative law judge in these regards is harmless, we deny employer's request that the case be remanded for inclusion of Dr. Meyer's report. When weighing the conflicting interpretations of the CT scans dated March 23, 2012, July 20, 2012, February 13, 2013, February 17, 2014, and February 10, 2015, the administrative law judge found that they "are all inconclusive as to the presence or absence of clinical pneumoconiosis as Drs. Miller and Meyer, both

dually-qualified, provided conflicting interpretations of each CT scan." Decision and Order at 31. In giving equal weight to the physicians' CT scan interpretations, it is apparent that the administrative law judge did not discredit Dr. Meyer's interpretations based on Dr. Miller's September 25, 2015 report explaining his disagreements with Dr. Meyer's findings. *Id.* The excluded November 16, 2015 report by Dr. Meyer was offered to reinforce the credibility of his initial interpretations of the CT scans, and did not opine that Dr. Miller's CT scan readings were not credible. *See* Employer's Exhibit 21. Consequently, because the administrative law judge did not discredit Dr. Meyer's CT scan readings based on Dr. Miller's criticisms, employer has not shown how it was disadvantaged by the administrative law judge's exclusion of Dr. Meyer's "rehabilitative" report. Thus, any error by the administrative law judge in excluding Dr. Meyer's November 16, 2015 report is harmless, based on his ultimate determination that the CT scan readings by Dr. Meyer and Dr. Miller are entitled to equal weight and are, thus, inconclusive. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Decision and Order at 31. In light of this holding, we also reject employer's assertion that remand is required so that employer can re-designate its evidence given the exclusion of Dr. Meyer's report. *Id.*

Further, the administrative law judge's findings with respect to the CT scan evidence were made solely in the context of his analysis of whether employer rebutted the existence of clinical pneumoconiosis. As explained *infra*, the administrative law judge properly determined that employer did not rebut that claimant has legal pneumoconiosis or the causal relationship between legal pneumoconiosis and his totally disabling respiratory impairment. Employer has not alleged that the administrative law judge's findings with respect to the CT scan evidence affected his determination on the issue of legal pneumoconiosis, and employer's failure to rebut the existence of legal pneumoconiosis precludes a finding that claimant does not have pneumoconiosis. Consequently, error, if any, in the administrative law judge's evidentiary rulings with respect to the CT scan evidence is harmless. *See Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-278. Accordingly, we reject employer's request that this case be remanded to the administrative law judge for further evidentiary procedures.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, 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)(i), (ii); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge determined that employer failed to establish rebuttal by either

method. Decision and Order at 29-37. Employer challenges the administrative law judge's findings under both methods of rebuttal.

In determining whether employer established that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i)(A), the administrative law judge considered the medical opinions of Drs. Grodner and Zaldivar. Dr. Grodner stated that claimant suffers from a mild restrictive impairment with "no evidence of significant obstructive airway disease" most likely due to cigarette smoking and non-specific interstitial fibrosis. Director's Exhibit 31; Employer's Exhibits 17, 20. Dr. Zaldivar diagnosed a restrictive impairment, non-specific interstitial fibrosis, and emphysema without any obstructive impairment. Employer's Exhibits 1, 5, 19. He concluded that none of these conditions is related to dust exposure in coal mine employment. *Id*. The administrative law judge found that the opinions of Drs. Grodner and Zaldivar were not well-reasoned, as neither physician provided a valid explanation for his exclusion of coal dust exposure as a causal factor in claimant's impairment. Decision and Order at 32-36.

Employer asserts that the administrative law judge "misinterpreted" the physicians' opinions and therefore erroneously determined that they did not provide adequate rationales for their conclusions on the existence of legal pneumoconiosis.[12] We disagree. The administrative law judge permissibly accorded little weight to the opinion of Dr. Grodner because he failed to adequately explain why coal dust exposure did not exacerbate the miner's respiratory or pulmonary impairment. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-741 (6th Cir. 2015); Decision and Order at 33. Furthermore, Dr. Grodner's conclusion that he cannot definitively state to a reasonable degree of medical probability that the miner *has* a significant impairment attributable to pneumoconiosis does not meet employer's burden to show that the miner's impairment is *not* significantly related to or substantially aggravated by the miner's exposure to coal dust. 20 C.F.R. §718.201(b); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Employer does not contest the administrative law judge's finding in this respect, nor does employer show that Dr. Grodner's opinion was to the contrary. In essence, Dr. Grodner focuses on the wrong probability (i.e., the probability that claimant has pneumoconiosis rather than the probability that claimant does not have pneumoconiosis) and accordingly, the administrative law judge permissibly discredited his opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002).

[12] Employer also contends that the administrative law judge should have discredited the opinions of Drs. Miller and Cohen, who diagnosed legal pneumoconiosis. We need not address employer's allegation, as these opinions do not support employer's burden on rebuttal.

The administrative law judge also permissibly found that Dr. Zaldivar did not sufficiently explain why the improvement in claimant's respiratory capacity following treatment with steroids necessarily excludes a contribution from coal dust exposure and does not address "the fixed portion of the Claimant's impairment that does not benefit from steroid treatment." Decision and Order at 35; Employer's Exhibits 18, 19; *see* 20 C.F.R. §718.201(a)(2); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 321, 25 BLR 2-255, 2-260 (4th Cir. 2013); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012). We therefore affirm the administrative law judge's finding that the opinions of Drs. Grodner and Zaldivar are insufficient to rebut the presumed existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[13] *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

We further reject employer's argument that it established rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii) based on the opinions of Drs. Grodner and Zaldivar that the sole cause of claimant's totally disabling respiratory impairment is his cigarette smoking. The administrative law judge permissibly discounted their disability causation opinions because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has the disease.[14] *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir.

[13] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Grodner and Zaldivar, we need not address employer's remaining arguments with respect to the administrative law judge's weighing of their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983). Additionally, in light of employer's failure to rebut the presumed existence of legal pneumoconiosis, we need not address employer's remaining arguments concerning rebuttal of the presumed existence of clinical pneumoconiosis, as the party opposing entitlement must establish that claimant has neither legal nor clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

[14] Neither physician offered an opinion on disability causation that rests on premises compatible with the administrative law judge's determination that legal pneumoconiosis was established by failure to rebut the presumption at 20 C.F.R. 718.305(d)(1)(i)(A).

2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). Thus, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption pursuant to either 20 C.F.R. §718.305(d)(1)(i) or (ii). *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-154-56.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge