U.S. Department of Labor

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

BRB No. 15-0022 BLA

EMMA SUE DALMAN (Widow of and on behalf of MICHAEL J. DALMAN)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY/CONSOL ENERGY INCORPORATED c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 10/30/2015
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 Granting Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

Joseph E. Allman (Macey, Swanson & Allman), Indianapolis, Indiana, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

Jeffrey S. Goldberg (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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2012-BLA-05013) of Administrative Law Judge Stephen R. Henley, rendered on a miner's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (the Act). The administrative law judge found that the miner worked for thirty-seven years in surface coal mine employment in conditions that were substantially similar to those in an underground mine. Based on those findings, the filing date of the claim, and his determination that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Further, the administrative law judge found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits. On appeal, employer asserts that the 2013 regulations are impermissibly retroactive and should not have been applied to this case. Employer further contends that the administrative law judge erred in determining that the miner had fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the amended Section 411(c)(4) presumption. Employer also asserts that the administrative law judge did not apply the proper legal standard in evaluating the evidence on rebuttal, and did not give proper weight to the opinions of its physicians. Claimant responds, urging affirmance of the award of benefits. The Director, Office of

[1] The miner filed this claim for benefits on December 30, 2010. A hearing was held before the administrative law judge on October 23, 2013, at which time the miner and claimant testified. Director's Exhibit 2. While the case was pending, the miner died on July 11, 2014. Decision and Order at 1 n.1. Claimant, the widow of the miner, is pursuing the claim on his behalf. *Id.*

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis where the record 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), as implemented by 20 C.F.R. §718.305.

Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments relating to invocation of the presumption. Further, the Director asserts that the administrative law judge applied the proper legal standard in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Employer has filed a reply brief to both the Director's and claimant's responses, reiterating its arguments on appeal.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Application of the 2013 Regulations

Employer argues that the administrative law judge erred in retroactively applying the revised regulation at 20 C.F.R. §718.305, which became effective on October 25, 2013, as this claim was filed on December 30, 2010. Contrary to employer's assertion, the revised regulation at 20 C.F.R. §718.305 is applicable "to all claims filed after January 1, 2005, and pending on or after March 23, 2010." 20 C.F.R. §718.305(a). We also reject employer's assertion that 20 C.F.R. §718.305(b)(2)[5] is impermissibly retroactive because it changes existing law and "no longer requires a comparison of the miner's testimony of the surface mining condition with conditions known to prevail in the [underground] mines." Employer's Brief in Support of Petition for Review at 7, *citing Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). The preamble to the 2013 regulations explains that 20 C.F.R. §718.305(b)(2) merely codifies the Department of Labor's existing interpretation of the "substantially similar" language of the statute, and is consistent with existing legal precedent set forth in

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was 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).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, because the miner's coal mine employment was in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[5] 20 C.F.R. §718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."

Leachman. *See* 77 Fed. Reg. 19,461 (Mar. 30, 2012) ("The proposed standard reflects the Director's longstanding interpretation of the 'substantially similar' language, and one that has been adopted by the Court of Appeals for the Seventh Circuit[.]"); Director's Brief at 6. Two United States Courts of Appeals have also rejected challenges to 20 C.F.R. §718.305(b)(2) identical to those presented by employer in this appeal. *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1341-42, 25 BLR 2-549, 2-563-64 (10th Cir. 2014); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014). Consequently, we reject employer's assertion that the "substantial similarity" standard set forth in 20 C.F.R. §718.305(b)(2) is not applicable on the ground that it is impermissibly retroactive.[6]

Additionally, employer contends that 20 C.F.R. §718.305 improperly provides a miner with a presumption that he or she suffers from legal pneumoconiosis, contrary to the 2001 regulations, which required that "the disease would not be presumed and the [miner] would have to prove all elements" of his or her claim. Employer's Brief in Support of Petition for Review at 9. We disagree. The Director notes correctly that employer's "argument is specious" because it ignores the fact that the legal landscape governing entitlement under the Act has changed since the enactment of the 2001 regulations. Director's Brief at 8. Congress specifically changed the entitlement criteria when it amended Section 411(c)(4), as implemented by 20 C.F.R. §718.305, and reinstated a presumption of total disability due to clinical and legal pneumoconiosis for certain claims, such as this one, filed after January 1, 2005, and pending on or after March 23, 2010. *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 726-27, 25 BLR 2-405, 2-413 (7th Cir. 2013); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011); *Goodin*, 743 F.3d at 1345, 25 BLR at 2-568; *Sterling*, 762 F.3d at 489-90, 25 BLR at 2-642-43. Furthermore, the Director points out correctly that the Seventh Circuit specifically required a party to prove the absence of legal pneumoconiosis in cases where the prior version of the fifteen year presumption was invoked. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *see Barber v. Director, OWCP*, 43 F.3d

[6] Alternatively, employer maintains that the administrative law judge failed to actually apply 20 C.F.R. §718.305(b)(2) and, therefore, the case must be remanded for further consideration. Employer's Reply to the Director's Brief at 2-3. Contrary to employer's argument, it is not necessary to remand this case, as the administrative law judge's analysis is consistent with 20 C.F.R. §718.305, and the law of the Seventh Circuit, for the reasons set forth *infra*, slip op. at 6-7. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Director's Brief at 7. Thus, employer's challenges to the validity of 20 C.F.R. §718.305 are rejected.

II. Invocation of the Amended Section 411(c)(4) Presumption

In order to invoke the amended Section 411(c)(4) presumption, claimant must establish that the miner worked for at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4).

The administrative law judge found, and employer does not dispute, that all of the miner's coal mine employment took place in surface coal mine employment.[7] Decision and Order at 8. The regulations provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The administrative law judge summarized both the miner's testimony and the claimant's testimony relevant to the miner's dust exposure as follows:

> Miner testified that he worked in several different positions, including: driller, truck driver, and mechanic, all of which he credibly described as real dusty jobs. He explained that he was exposed to coal mine dust every day. When he drilled to expose coal, dust was produced. When he hauled the gob from the tipple, he was exposed to dust. When he was a mechanic, he was exposed to dust. Miner spent the bulk of his thirty-seven years as a mechanic. He testified that every day the shop was covered in dust, because it was located next to the pile of coal and the coal would blow into the shop. Claimant further testified concerning Miner's clothing,

[7] Employer asserts that the administrative law judge erred in finding that claimant established thirty-seven years of surface coal mine employment. As the administrative law judge noted, employer stipulated to at least twenty-nine years in surface coal mine employment. Decision and Order at 8; Hearing Transcript at 7. Moreover, on appeal, employer concedes that the miner's Social Security Administration records "revea[l], at most, 32.5 years of coal mine employment." Employer's Brief in Support of Petition for Review at 12. We decline to address this argument because employer has not explained how its allegation of an inflated length of coal mine employment would affect the outcome of the case. *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."); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

> explaining that his work clothes were covered in dust and she washed them in separate machines. She also explained that the dust would even be on his undergarments.

Decision and Order at 8; *see* Hearing Transcript at 16-23, 28-29, 32-33. Noting that the testimony of the miner and the claimant was "unrefuted," the administrative law judge found that their descriptions establish that the miner's "aboveground duties were sufficiently dusty and similar to conditions known to prevail underground." Decision and Order 8.

In determining whether the miner's coal mine employment was "substantially similar" to underground mining, employer argues that the administrative law judge failed to comply with the holding of *Leachman* by comparing the miner's testimony with the actual dust conditions in underground mines. Employer's Brief in Support of Petition for Review at 13. Contrary to employer's argument, the Seventh Circuit upheld, in *Summers*, an administrative law judge's "finding of [substantial] similarity" because it "was supported by [a miner's] *unrefuted* testimony about his employment conditions." 272 F.3d at 479, 22 BLR at 2-275 (emphasis added) (explaining that "in [*Leachman*], we held that a surface or 'strip' miner was not required to directly compare his work environment to conditions underground"). Furthermore, in the preamble to the 2013 revised regulations, the Department of Labor clarifies how to establish substantial similarity, as follows:

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

78 Fed. Reg. at 59,102, 59,105 (Sept. 25, 2013).

In this case, the administrative law judge acted within his discretion in crediting the miner's uncontradicted hearing testimony regarding his dust exposure in his surface

coal mine work, and the testimony of claimant, as corroborating evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). We reject employer's argument that the administrative law judge failed to consider or analyze the miner's "length, location and job duties" in reaching his determination of substantial similarity. Employer's Brief in Support of Petition for Review at 14. The administrative law judge specifically addressed employer's allegation that the miner "did not work in substantially similar conditions because it was 'sporadic or incidental coal mine dust.'" Decision and Order at 8 *quoting* Employer's Post-Hearing Brief at 31. However, the administrative law judge rationally found that the miner's exposure was not sporadic because he "did not work around a clean mechanic shop, drilling area, or tipple with minimal dust exposure," but rather "worked in close proximity to coal processing, storage, and a large amount of coal where he was exposed to a significant amount of dust on a regular basis." Decision and Order at 8, *citing Leachman*, 855 F.2d at 512-13. Therefore, as the uncontradicted testimony of the miner and claimant are sufficient to establish that the miner's surface mining conditions are "substantially similar" to those in an underground mine under both 20 C.F.R. §718.305 and *Leachman*, we affirm the administrative law judge's finding that claimant established that the miner had at least the fifteen years of qualifying coal mine employment necessary to invoke the amended Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(2); *see Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Leachman*, 855 F.2d at 512-13; Decision and Order at 8-9.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

In order to rebut the amended Section 411(c)(4) presumption, employer must affirmatively establish that the miner did not have legal pneumoconiosis[8] and clinical

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

pneumoconiosis[9] or establish 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."[10] 20 C.F.R. §718.305(d)(1) (i),(ii); *Burris*, 732 F.3d at 733, 25 BLR at 2-424; *Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Multiple United States Courts of Appeals and the Board have held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *W. Va CWP Fund v. Bender*, 782 F.3d 129, 137, BLR (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting) (to rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis.").[11]

[9] 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).

[10] There is no merit to employer's contention that on rebuttal it has only the burden of production and not the burden of persuasion. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011) (the burden of production and persuasion lies on the employer . . . to rebut the presumption of disability due to pneumoconiosis"); *Blakley v. Amax Coal Co*., 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995) ("[t]he burden of proof lies on the employer to rebut the presumption.").

[11] Employer also submits that the regulatory language for establishing rebuttal at 20 C.F.R. §718.305(d)(1)(ii), *i.e.*, with a showing that "no part" of a miner's disability was caused by pneumoconiosis, should be construed as requiring proof that pneumoconiosis is not a "substantially contributing cause" of the miner's disabling impairment because employer's burden on rebuttal can be no greater than claimant's burden of proof in the absence of a presumption. The Board, however, has rejected this identical argument in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015).

The administrative law judge found that employer rebutted the presumption of clinical pneumoconiosis by a preponderance of the x-ray and medical opinion evidence.[12] Decision and Order at 18. In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the medical opinions of Drs. Tuteur, Zaldivar, Istanbouly, and Fozard. *Id.* at 15-21. The administrative law judge rejected the opinions of Drs. Tuteur and Zaldivar, that the miner did not suffer from legal pneumoconiosis, as not well-reasoned and contrary to the regulations and preamble. *Id.* at 19-21. In contrast, the administrative law judge considered the opinions of Drs. Istanbouly and Fozard, that the miner suffered from legal pneumoconiosis, to be "rational" and consistent with the regulations and preamble. *Id.* at 21. Thus, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i). *Id.* Because neither Dr. Tuteur nor Dr. Zaldivar diagnosed legal pneumoconiosis, the administrative law judge further rejected their opinions regarding the cause of the miner's disability. *Id.* at 24. The administrative law judge therefore concluded that employer failed to rebut the amended Section 411(c) presumption by establishing that no part of the miner's respiratory disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). *Id.*

Employer argues that the administrative law judge gave impermissible reasons for rejecting the opinions of its physicians. We disagree. Dr. Tuteur prepared a report dated May 16, 2011, and was deposed on July 2, 2012. Employer's Exhibits 4, 11. Dr. Tuteur indicated that the miner was exposed to sufficient amounts of coal mine dust to produce legal pneumoconiosis. Employer's Exhibit 4. Dr. Tuteur stated that the miner's clinical picture of chronic obstructive pulmonary disease (COPD) is "so similar to that induced by cigarette smoke that one cannot on the basis of history, physical examination,

[12] Employer argues that the administrative law judge mischaracterized the number of CT scans in the record, failed to properly discuss that the CT scans were negative for clinical pneumoconiosis, and did not properly consider the x-rays contained in the miner's treatment record, which also did not show pneumoconiosis. However, because employer successfully disproved that the miner had clinical pneumoconiosis, based on the administrative law judge's weighing of the x-ray and medical opinion evidence, we consider the administrative law judge's error, if any, in failing to weigh all the evidence relevant to clinical pneumoconiosis to be harmless. *Larioni*, 6 BLR at 1-1278; Decision and Order at 21-23. Moreover, the administrative law judge correctly explained that the CT scan evidence and treatment records do not aid employer in disproving the existence of legal pneumoconiosis as they "do not exclude . . . coal mine dust as a potential cause or aggravating factor of [the miner's] emphysema and [chronic obstructive pulmonary disease (COPD)]." Decision and Order at 23; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726-27, 24 BLR 2-97, 2-103-105 (7th Cir. 2008).

pulmonary function testing, or chest radiograph differentiate the two" and, therefore, he was "relegated to . . . statistical analysis." Employer's Exhibit 11 at 19. Dr. Tutuer discussed medical studies comparing FEV1 values of non-smoking miners, miners with a smoking history, and the general population. *Id*. at 22-23. Based on these studies, Dr. Tutuer concluded:

> So what I'm saying then . . . is that yes, coal mine dust may produce a COPD picture in miners, even if they never smoke; but comparing the risk of smoking at about 20 percent and the risk of coal mine dust at around one percent, with reasonable medical certainty in the case of [the miner], who smoked excessively more than average for 52 years and was an above-ground miner and didn't fall into the NIOSH low coal underground mining dust experience, his COPD, his emphysema, his chronic bronchitis, was due to the inhalation of cigarette smoke with reasonable medical certainty.

Id. at 23.

Dr. Zaldivar prepared a medical report on August 3, 2011, and was deposed on June 19, 2012. Employer's Exhibits 5, 12. In his report, Dr. Zaldivar opined that the miner suffered from "hypoxemia with any sort of activity and a very low FEV1 and diffusion capacity." Employer's Exhibit 5 at 5. Like Dr. Tuteur, Dr. Zaldivar cited to several medical studies to support his position that the miner's respiratory impairment was typical of emphysema due to smoking. *Id*. Dr. Zaldivar indicated that the miner did not have legal pneumoconiosis because bullous emphysema is never seen in the absence of radiographic evidence for complicated pneumoconiosis, which the miner did not have. *Id*. Dr. Zaldivar further stated:

> There is no reason to suspect that his work in the mines added or caused the pulmonary impairment which he now has. There is therefore no reason to add a hypothetical disease such as pneumoconiosis of which there is absolutely no anatomic, nor physiological evidence. The mere fact that he worked in the coal mines is not sufficient to implicate it as a cause of [or] aggravating factor of his disease according to what is known about pneumoconiosis in medical literature.

Id. Dr. Zaldivar further testified that the miner's pulmonary impairment is one "typically found in individuals who smoke as much as [the miner] has smoked, and even less," and that the miner's smoking habit "by itself, explains the pulmonary, severe pulmonary disease[.]" Employer's Exhibit 12 at 25-26.

Contrary to employer's assertion, we see no error in the administrative law judge's finding that the opinions of Drs. Tuteur and Zaldivar fail to affirmatively disprove that

the miner had legal pneumoconiosis. The administrative law judge permissibly concluded that the opinions of Drs. Tuteur and Zaldivar were "not well-reasoned and based on generalities" as they "extensively discussed how cigarette smoke induced COPD and emphysema [are] far more likely to occur than coal mine dust induced conditions," but failed to "explain why [the miner] could not [have been] one of the unlikely or rare cases of coal miners who contract pneumoconiosis." Decision and Order at 20; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008) (administrative law judge permissibly rejected a physician's opinion, because "even if the causation is rare, [physician] does not explain why [the miner] could not be one of these 'rare' cases."); *see also Burris*, 732 F.3d at 733, 25 BLR at 2-425 (administrative law judge may reject an opinion that relies on general statistics and not a miner's specific condition); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985). The administrative law judge acted within his discretion in finding that neither Dr. Tuteur, nor Dr. Zaldivar, adequately explained why the miner's COPD was not significantly related to, or substantially aggravated by, his coal mine employment.[13] *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); Decision and Order at 20-21. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing, by a preponderance of the evidence, that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[14] *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d

[13] The administrative law judge found that the miner's smoking history ranged from "1/2 to 1 1/2 packs a day" for forty years, and found that Drs. Tuteur and Zaldivar "grossly overstated" the miner's smoking history as 60-78 pack years. Decision and Order at 19. Although employer challenges the administrative law judge's finding as to the length of the miner's smoking history, we consider any error by the administrative law judge in his calculation of the miner's smoking history to be harmless, as he rationally concluded that Drs. Tuteur and Zaldivar "do not explain how coal mine dust could not contribute to [the miner's] condition if in fact he did smoke the higher range of cigarettes" that they identified in their reports. Decision and Order at 20; *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Larioni*, 6 BLR at 1-1278.

[14] Employer contends that Dr. Fozard's deposition testimony on November 21, 2013, supports rebuttal of the presumption of legal pneumoconiosis and should have been considered on this issue. This argument has no merit. Dr. Fozard's report and his deposition reflect his opinion that miner's COPD/emphysema was caused by coal dust exposure and aggravated by smoking. Claimant's Exhibits 6, 8 at 17.

486, 23 BLR 2-18 (7th Cir. 2004); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990).

Additionally, the administrative law judge rationally determined that the opinions of Drs. Tuteur and Zaldivar were not credible to establish that no part of the miner's total respiratory or pulmonary disability was due to legal pneumoconiosis, as neither physician diagnosed the disease. *See Burris*, 732 F.3d at 735, 25 BLR at 2-425; *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002); *see also Ramage*, 737 F.3d at 1062, 25 BLR at 2-474; *Ogle*, 737 F.3d at 1074, 25 BLR at 2-452; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 23-24. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(ii).[15]

[15] Employer argues that the administrative law judge erred in crediting Dr. Istanbouly's opinion that the miner had legal pneumoconiosis. However, because employer bears the burden of proof on rebuttal, and we affirm the administrative law judge's finding that employer's evidence fails to affirmatively establish that the miner did not have legal pneumoconiosis, it is not necessary that we address employer's arguments regarding the weight accorded claimant's evidence. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *see also Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge