U.S. Department of Labor

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

BRB No. 15-0353 BLA

JOHN T. MAY Claimant-Petitioner v. MOUNTAINEER COAL DEVELOPMENT and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/27/2016 DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

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

Michelle S. Gerdano (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:

Claimant appeals the Decision and Order on Remand (12-BLA-5618) of Administrative Law Judge Drew A. Swank denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on August 24, 2010, and is before the Board for the second time.[1]

In his initial decision, applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with twenty-five and one-half years of qualifying coal mine employment,[3] and found that the 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 of total disability due to pneumoconiosis set forth at Section 411(c)(4). Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final, pursuant to 20 C.F.R.

[1] Claimant filed two prior claims, each of which was denied. Director's Exhibits 1, 2. Claimant's more recent prior claim, filed on December 16, 2004, was denied by Administrative Law Judge Michael P. Lesniak on April 10, 2007, because claimant did not establish any element of entitlement. Director's Exhibit 2. On appeal, Judge Lesniak's denial of benefits was affirmed by the Board on May 30, 2008, and by the United States Court of Appeals for the Fourth Circuit on August 17, 2009. *Id*.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

[3] Claimant's last coal mine employment was in West Virginia. Director's Exhibit 5; Hearing Transcript at 18. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

§725.309.[4] The administrative law judge further found, however, that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have legal or clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).[5] *May v. Mountaineer Coal Dev.*, BRB No. 13-0427 BLA (June 30, 2014) (unpub.). Relevant to the existence of legal pneumoconiosis, the Board vacated the administrative law judge's determination that Dr. Rasmussen's statement, that it is impossible to differentiate between impairments caused by smoking and coal mine dust exposure, rendered his opinion "fundamentally flawed" and not sufficient to support a finding of legal pneumoconiosis. *Id.* at 5-6. The Board held that because Dr. Rasmussen attributed claimant's disabling obstructive respiratory disease to the combination of claimant's smoking history and his coal mine employment, and specifically stated that claimant's chronic obstructive pulmonary disease (COPD) is "significantly related" to coal dust exposure, Dr. Rasmussen's opinion is sufficient to support a finding that claimant has legal pneumoconiosis. *Id.* at 6.

The Board further held that the administrative law judge erred in crediting the medical opinions of Drs. Rosenberg and Zaldivar, that claimant does not suffer from legal pneumoconiosis, without identifying the specific explanations that he found to be "compelling" and by not discussing how the diagnostic testing and medical literature cited by employer's physicians supports their conclusions that coal dust exposure did not contribute to claimant's respiratory disability. *Id.* at 7. Moreover, the Board held that to the extent the administrative law judge appeared to credit Dr. Rosenberg's explanation, that it is possible to distinguish between impairments caused by smoking and coal mine dust exposure based on the FEV1/FVC ratio, the administrative law judge erred in failing to consider whether Dr. Rosenberg expressed views that are inconsistent with the medical science credited by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations.[6] *Id.* Further, the Board held that the administrative law judge erred in

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language previously set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[5] The Board affirmed the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *May v. Mountaineer Coal Dev.*, BRB No. 13-0427 BLA (June 30, 2014) (unpub.).

[6] We note that the Board's prior instruction to the administrative law judge was inartfully worded. Whether to evaluate a physician's opinion in conjunction with the

failing to address whether Drs. Rosenberg and Zaldivar credibly explained why they concluded that coal mine dust exposure is not a causative factor for claimant's irreversible respiratory impairment. *Id*. Therefore, the Board remanded the case for the administrative law judge to determine if the opinions of Drs. Rosenberg and Zaldivar are reasoned and documented, and affirmatively establish that claimant does not have legal pneumoconiosis. *Id.* at 7-8.

The Board also vacated the administrative law judge's determination that claimant failed to establish the existence of clinical pneumoconiosis based on the x-ray evidence, and instructed him to reweigh the x-ray evidence with the burden of proof on employer to establish that claimant does not have clinical pneumoconiosis. *Id.* at 4-5. Consequently, the Board vacated the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption, and remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge again found that employer rebutted the Section 411(c)(4) presumption. Accordingly, he denied benefits.

On appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the denial of benefits should be vacated, and that the case should be remanded for reconsideration of the evidence relevant to whether employer has rebutted the Section 411(c)(4) presumption.

Department of Labor's (DOL) discussion of prevailing medical science in the preamble to the revised regulations is a matter within the discretion of the administrative law judge. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-2, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). However, the Board's instruction, that "the administrative law judge erred in failing to consider" whether Dr. Rosenberg expressed views that are inconsistent with the scientific views endorsed by the DOL in the preamble, was appropriate, in that it reflected claimant's arguments in his brief to the administrative law judge, which the judge failed to address in his original decision and order. *May v. Mountaineer Coal Dev.*, BRB No. 13-0427 BLA, slip op. at 7 (June 30, 2014) (unpub.); Claimant's May 13, 2013 Brief at 26-27.

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).

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,[7] 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). The administrative law judge found that employer established rebuttal by both methods.[8]

A. Legal Pneumoconiosis

On remand, the administrative law judge considered the medical opinions of Drs. Rasmussen, Rosenberg, and Zaldivar as to whether employer disproved the existence of legal pneumoconiosis. Dr. Rasmussen diagnosed legal pneumoconiosis, in the form of COPD, emphysema and chronic bronchitis, due, in part, to coal mine dust exposure. Director's Exhibit 11 at 4; Claimant's Exhibit 3 at 12-13, 30-32. In contrast, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but has COPD/asthmatic bronchitis due to smoking, and not coal mine dust exposure. Director's Exhibit 12 at 4, 6-7; Employer's Exhibit 6 at 28, 34. Similarly, Dr. Zaldivar opined that

[7] "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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

[8] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that no part of the miner's totally disabling respiratory impairment was due to pneumoconiosis. Decision and Order on Remand at 11-12.

claimant does not have legal pneumoconiosis, but has an obstructive pulmonary impairment, in the form of chronic bronchitis and bullous emphysema with an asthmatic component, due to smoking, and not coal mine dust exposure. Employer's Exhibit 1 at 5-7; Employer's Exhibit 7 at 33-35, 38, 42-43.

Noting the Board's holding that Dr. Rasmussen's opinion is sufficient to support a finding of legal pneumoconiosis, the administrative law judge stated that "although the undersigned still believes that Dr. Rasmussen's opinion is deeply flawed, the undersigned must abide by the Board's order. Accordingly, the undersigned gives Dr. Rasmussen's opinion substantial weight . . . ." Decision and Order on Remand at 11-12. The administrative law judge found that, while flawed, Dr. Rosenberg's opinion still merited "moderate weight." *Id*. at 9-10. Finally, the administrative law judge accorded "substantial" weight to Dr. Zaldivar's opinion, finding it well-documented and well-reasoned. *Id*. at 10. Weighing the opinions together, the administrative law judge found that Dr. Rasmussen's "lone opinion" diagnosing legal pneumoconiosis was outweighed by the opinions of Drs. Rosenberg and Zaldivar. Therefore, the administrative law judge found that employer successfully established that claimant does not have legal pneumoconiosis. *Id.* at 11.

Claimant and the Director assert that the administrative law judge erred in finding that the opinions of Drs. Rosenberg and Zaldivar outweighed the opinion of Dr. Rasmussen. Claimant's Brief at 19-31; Director's Brief at 1-2. We agree. Considering Dr. Rosenberg's opinion on remand, the administrative law judge noted that the physician provided four reasons for eliminating coal mine dust exposure as a source of claimant's COPD: 1) claimant's FEV1/FVC ratio showed a significant decrease during pulmonary function studies which, in Dr. Rosenberg's opinion, is a pattern of impairment that is not consistent with coal-mine dust-related disease; 2) claimant had a significant response to the administration of bronchodilators which, Dr. Rosenberg stated, is also not consistent with the permanent effects of coal-mine dust-related disease; 3) claimant's chest x-ray showed signs of diffuse emphysema which, Dr. Rosenberg opined, is a form of emphysema that is related to smoking and not coal mine dust exposure; and 4) claimant had an elevated cotinine level, from which Dr. Rosenberg concluded that claimant was still using tobacco products. Decision and Order on Remand at 8, 10, *referencing* Director's Exhibit 12; Employer's Exhibit 6 at 19, 27-28.

The administrative law judge initially found that Dr. Rosenberg's reliance on the FEV1/FVC ratio to eliminate coal mine dust as a source of claimant's impairment was in conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203,

210-11 (6th Cir. 2012); Decision and Order on Remand at 10. The administrative law judge found, however, that while Dr. Rosenberg's reliance on the FEV1/FVC ratio reduced the persuasive value of his opinion, it still had merit, stating:

> Nonetheless, Dr. Rosenberg's opinion still deserves moderate weight because he did not base his conclusions solely on the decrease in [c]laimant's FEV1/FVC ratio. As noted *supra*, Dr. Rosenberg gave several reasons why he believed that smoking alone caused [c]laimant's total disability. Thus, even though Dr. Rosenberg's statement regarding [c]laimant's FEV1/FVC ratio is unpersuasive, his other explanations still merit some weight in establishing that a coal-dust related disease did not cause [c]laimant's impairment. Accordingly, the undersigned gives Dr. Rosenberg's opinion moderate weight.

Decision and Order on Remand at 10.

As claimant and the Director assert, in crediting Dr. Rosenberg's opinion because he gave three additional bases for his conclusions, the administrative law judge did not discuss the credibility of these additional reasons, as instructed by the Board. *May*, BRB No. 13-0427 BLA, slip op. at 7; Claimant's Brief at 19-24; Director's Brief at 2. Rather, the administrative law judge simply accepted Dr. Rosenberg's additional reasons at face value. Specifically, the administrative law judge appeared to credit Dr. Rosenberg's explanation that the reversibility of claimant's impairment after the administration of bronchodilators implicated a non-coal mine dust-related disease. However, the administrative law judge did not address whether Dr. Rosenberg credibly explained why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the irreversible portion of his obstructive impairment.[9] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *May*, BRB No. 13-0427 BLA, slip op. at 7.

Further, the administrative law judge found that Dr. Rosenberg's explanation that the presence of diffuse emphysema on claimant's x-ray, which he stated is not caused by coal mine dust exposure, supports Dr. Rosenberg's conclusion that coal mine dust exposure did not contribute to claimant's respiratory impairment. However, the

[9] We note that Dr. Zaldivar similarly relied, in part, on the reversibility seen on the pulmonary function studies to exclude coal mine dust exposure as a cause of claimant's totally disabling respiratory or pulmonary impairment. *See* Employer's Exhibit 7 at 36.

administrative law judge did not consider the extent to which Dr. Rosenberg's opinion conflicts with Dr. Rasmussen's opinion that "Dr. Rosenberg assumes that the emphysema from coal mine dust is different from the emphysema from cigarette smoking and there is no basis for that assumption and so that argument just doesn't hold," and that the "mechanisms by which cigarette smoke and coal mine dust cause emphysema are identical."[10] Claimant's Exhibit 3 at 17; *see also* Claimant's Exhibit 3 at 18-20, 21-22; Director's Exhibit 11 at 4. Thus, as claimant contends, the administrative law judge did not resolve the conflict between his determination to credit Dr. Rosenberg's opinion, that the presence of diffuse emphysema negates coal mine dust as a cause of claimant's impairment, and the contrary opinion of Dr. Rasmussen, whom the administrative law judge accorded "substantial weight".

Additionally, the administrative law judge did not explain why Dr. Rosenberg's opinion that claimant's elevated cotinine level indicated that claimant still used tobacco products necessarily supported Dr. Rosenberg's conclusion that coal mine dust did not also contribute to claimant's respiratory or pulmonary impairment. *See* Director's Exhibit 12 at 6; Claimant's Brief at 24.

The administrative law judge similarly credited Dr. Zaldivar's opinion without the requisite analysis, stating:

> [Dr. Zaldivar's] opinion is also well-reasoned because he uses diagnostic evidence, [c]laimant's medical history, and medical literature to support his conclusions. For instance, Dr. Zaldivar noted that [c]laimant's diffusion capacity remained normal or near normal, and that he had not been treated extensively for asthma, which suggested that [c]laimant probably has asthma and not a coal dust-related disease. [Employer's Exhibit] 1. He also cited several studies which showed that smoking causes asthma because the pathways that produce bronchospasm are activated by cigarette smoke. [*Id*.] Accordingly, the undersigned finds that Dr. Zaldivar's opinion must receive substantial weight in establishing that pneumoconiosis did not cause [c]laimant's totally disabling respiratory or pulmonary impairment.

[10] Claimant correctly asserts that the preamble to the 2001 revised regulations states that coal dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms. *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); Claimant's Brief at 23. Additionally, the preamble cites with approval a study finding that centrilobular emphysema – a diffuse form of emphysema – is "significantly more common" among miners than non-miners. 65 Fed. Reg. at 79,941.

Decision and Order on Remand at 10.

As claimant asserts, to the extent the administrative law judge appears to credit Dr. Zaldivar's explanation that claimant's near normal diffusion capacity implicated smoking-related asthma, and not coal mine dust exposure, as a cause of claimant's impairment, the administrative law judge erred in failing to consider Dr. Rasmussen's contrary opinion that chronic bronchitis also causes a normal or near normal diffusion capacity, and that a normal or near normal diffusion capacity does not exclude coal mine dust exposure as a cause of claimant's respiratory or pulmonary impairment.[11] *See* Claimant's Exhibit 3 at 27. Nor did the administrative law judge explain how Dr. Zaldivar's reliance on medical studies that establish that smoking may cause asthma necessarily supported Dr. Zaldivar's conclusion that coal mine dust did not contribute, along with cigarette smoking and asthma, to claimant's impairment. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); Director's Brief at 2.

Whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). However, as claimant and the Director assert, in crediting the opinions of Drs. Rosenberg and Zaldivar as well-reasoned, the administrative law judge failed to address whether the explanations they provided, and the testing upon which they relied, supported their conclusions that coal mine dust exposure did not contribute to, or aggravate, along with claimant's cigarette smoke exposure and asthma, his respiratory impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Moreover, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We, therefore, vacate the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis.

[11] Dr. Rasmussen stated that, "[t]he normal diffusion capacity would certainly raise a question about whether this was asthma or not, but you could also have plenty of chronic bronchitis with a normal diffusion capacity as well." Claimant's Exhibit 3 at 27. Moreover, Dr. Rasmussen testified that a "normal diffusion capacity [would not] rule out coal mine dust exposure as a contributing factor" to claimant's totally disabling respiratory or pulmonary impairment. *Id.*

On remand, because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinions of Drs. Rosenberg and Zaldivar are credible, and affirmatively establish that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Clark*, 12 BLR at 1-155. The administrative law judge must then resolve any conflicts among the medical opinions and explain his findings. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Wojtowicz*, 12 BLR at 1-165. Because we have vacated the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis, we also vacate the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

B. Clinical Pneumoconiosis

Claimant next argues that the administrative law judge erred in his evaluation of the x-ray evidence and, thus, in finding that employer disproved the existence of clinical pneumoconiosis. Claimant's Brief at 15-17. The administrative law judge considered seven readings of three x-rays dated June 1, 2011, September 22, 2011, and June 27, 2012, and considered the physicians' radiological qualifications. Decision and Order on Remand at 4-7. Dr. Miller, a Board-certified radiologist and B reader, interpreted the June 1, 2011 x-ray as positive for pneumoconiosis. Director's Exhibit 11. Dr. Wheeler, a Board-certified radiologist and B reader, and Dr. Rasmussen, a B reader, interpreted the same x-ray as negative for pneumoconiosis. *Id*. Based on the preponderance of the negative readings, the administrative law judge found that this x-ray is negative for pneumoconiosis. Decision and Order on Remand at 6.

Dr. Alexander, a Board-certified radiologist and B reader, interpreted the September 22, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. West, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 12. Finding the positive and negative readings to be in equipoise, the administrative law judge found that this x-ray is inconclusive as to the existence of pneumoconiosis. Decision and Order on Remand at 6.

Dr. Miller interpreted the June 27, 2012 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, while Dr. Wolfe, a Board-certified radiologist and B reader, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Finding the positive and negative readings to be in equipoise, the administrative law judge found that this x-ray is also inconclusive as to the existence of pneumoconiosis. Decision and Order on Remand at 6. Having found the June 1, 2011 x-ray to be negative for pneumoconiosis, and the September 22, 2011 and June 27, 2012 x-rays to be inconclusive, the administrative law judge concluded that the weight of the x-ray evidence is negative for pneumoconiosis. *Id*.

Claimant argues that the administrative law judge erred in finding that the weight of the x-ray evidence is negative for clinical pneumoconiosis. Claimant's Brief at 15-17. Claimant asserts that the recent investigation by the Center for Public Integrity and ABC News, and the DOL's issuance of Black Lung Benefits Act (BLBA) Bulletin No. 14-09,[12] call into question the credibility of Dr. Wheeler's x-ray readings. Thus, claimant contends, Dr. Wheeler's negative x-ray reading should not have been given any weight.[13] Claimant's Brief at 17. Employer responds, asserting that claimant is essentially asking the Board to instruct the administrative law judge to take official notice of the items pertaining to the credibility of Dr. Wheeler's x-ray interpretations, and objects to claimant's request. We decline to address this issue in the first instance, as there is no indication that claimant raised his argument before the administrative law judge.[14] *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1989). However, as claimant may raise this argument before the administrative law judge on remand, we decline to affirm the administrative law judge's finding regarding the x-ray evidence at this juncture.

C. Disability Causation

Because we have vacated the administrative law judge's reliance on the opinions of Drs. Rosenberg and Zaldivar to find that employer disproved the existence of pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), we must vacate the administrative law judge's related finding that their opinions also establish that no part of claimant's respiratory or pulmonary disability is caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order on Remand at 11. On remand, if the administrative law judge again finds that employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not

[12] The BLBA Bulletin No. 14-09, issued by the Department of Labor on June 2, 2014, instructs district directors not to credit Dr. Wheeler's negative readings for pneumoconiosis in the absence of persuasive evidence rehabilitating his readings.

[13] Claimant asserts that if Dr. Wheeler's negative reading is removed from consideration, Dr. Rasmussen's negative reading would be outweighed by the positive reading by Dr. Miller, based on Dr. Miller's superior qualifications. Thus, claimant contends, the June 11, 2011 x-ray would be positive. Claimant's Brief at 17.

[14] The record before the Board contains the administrative law judge's April 7, 2015 Order granting claimant an extension of time to file his brief on remand. However, the record does not contain claimant's brief, assuming one was filed.

reach the issue of disability causation. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015) (Boggs, J., concurring & dissenting); *see also West Virginia CWP Fund v. Bender*, 782 F.3d 129, 143-44, BLR (4th Cir. 2015).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge