U.S. Department of Labor

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

BRB No. 14-0292 BLA

JIMMY D. OWENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 03/24/2015
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

Hall, Acting Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5914) of Administrative Law Judge Joseph E. Kane awarding 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 September 8, 2008.[1]

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

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. Although the Director, Office of Workers' Compensation Programs (the Director), has not filed a substantive response brief, he notes that, should the Board remand this case for

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[1] Claimant filed three previous claims on December 22, 1987, January 25, 1994, and July 26, 2002. Director's Exhibits 1-3. Claimant's 2002 claim was finally denied because claimant did not establish any element of entitlement. Director's Exhibit 3.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[3] Claimant's most recent coal mine employment was in Virginia. Director's Exhibit 3; Hearing Transcript at 14. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

further consideration, the administrative law judge may take official notice of several documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations. Employer replies that "the Director's comment should be ignored," since the documents are "both unlawful and inconsistent with the medical evidence presented in this claim." Employer's Reply Brief at 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. 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).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5]

The record contains four new pulmonary function studies conducted on October 16, 2008, February 26, 2009, November 9, 2009, and January 18, 2012. The administrative law judge initially noted that Dr. Fino invalidated all of the pulmonary function studies, including the February 26, 2009 study that was associated with his own examination. Although the administrative law judge determined that the February 26, 2009 pulmonary function study was invalid and, therefore, entitled to "no probative weight," he found that "substantial evidence . . . support[ed] the validity" of the other new pulmonary function studies. Decision and Order at 11-12.

The administrative law judge next considered whether the remaining new pulmonary function studies were qualifying. A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge initially resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height for purposes of the studies

[5] The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 18, 20.

was 64.5 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983); Decision and Order at 11. The administrative law judge next considered claimant's age at the time that the studies were conducted. Claimant was 75 years old at the time of the October 16, 2008 pulmonary function study; 76 years old at the time of the November 9, 2009 pulmonary function study; and 78 years old at the time of the January 18, 2012 pulmonary function study. Director's Exhibit 13; Claimant's Exhibit 6; Employer's Exhibit 1. The Board has held that pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Under this standard, the administrative law judge characterized claimant's October 16, 2008, November 9, 2009, and January 18, 2012 pulmonary function studies as qualifying.[6] Decision and Order at 19. The administrative law judge, therefore, found that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge committed numerous errors in finding that the new pulmonary function study evidence established total disability. Employer initially contends that the administrative law judge failed to properly consider evidence demonstrating that the pulmonary function study results did not represent a totally disabling pulmonary impairment. In the case of a miner older than 71 years, the Board has held that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Meade*, 24 BLR at 1-47. In this case, employer submitted such evidence. Utilizing the "Knudson equations,"[7] Dr. Fino extrapolated qualifying values for the pulmonary function studies,

[6] Employer contends that the administrative law judge mischaracterized the 2008, 2009 and 2012 pulmonary function studies as qualifying. We disagree. Using a height of 64.5 inches, the administrative law judge accurately determined that these pulmonary function studies are qualifying for a miner who is 71 years old.

[7] In promulgating the regulations at 20 C.F.R. Part 718, the Department of Labor (DOL) derived predicted normal values for FEV1, FVC and MVV by gender, height, and age from a study published in *The American Review of Respiratory Disease*. 43 Fed. Reg. 17,729-31 (Apr. 25, 1978), *citing* R.J. Knudson, *et al*., *The Maximal Expiratory Flow-volume Curve: Normal Standards, Variability, and Effects of Age*, 113 Am. Rev. Respir. Dis. 587-660 (May 1976). The DOL determined that an acceptable benchmark for establishing total disability would be if a miner's pulmonary capacity was no more than 60% of these values. 45 Fed. Reg. 13,711 (Feb. 29, 1980). Accordingly, the DOL created tables of values that were 60% of the predicted normal for FEV1, FVC, and MVV, according to gender, height, and age, with 71 being the maximum age for which figures are reported. 20 C.F.R. Part 718, Appendix B. No changes were made to the

and opined that the 2008, 2009, and 2012 studies did not demonstrate a disabling pulmonary impairment. Employer's Exhibit 2 at 14-16. Dr. Rosenberg, in reliance upon the Knudson predicted values, similarly opined that the 2008 and 2009 pulmonary function studies did not produce qualifying values. Employer's Exhibits 1, 2.

Although the administrative law judge acknowledged that employer presented evidence challenging whether the new pulmonary function study evidence represented a totally disabling pulmonary impairment, he rejected employer's evidence, determining that it was based upon an improper attempt to extrapolate values based upon the miner's advanced age. Decision and Order at 19. We agree with employer that the administrative law judge erred in dismissing the opinions of Drs. Fino and Rosenberg. While the Board has recognized that it is improper for an administrative law judge to, *sua sponte*, select and apply a mathematical formula to extrapolate values for a miner over 71 years old, the Board has recognized that an administrative law judge may properly consider evidence "*like the Knudson equations*" in determining whether pulmonary function studies that yield qualifying values for a 71 year old miner are actually indicative of total disability. *Meade*, 24 BLR at 1-47-48 (emphasis added). In this case, the opinions of Drs. Fino and Rosenberg, that the new pulmonary function studies do not represent a totally disabling pulmonary impairment, are based upon their application of the Knudson equations. Consequently, on remand, the administrative law judge must reconsider the opinions of Drs. Fino and Rosenberg in assessing the pulmonary function study evidence.[8]

Employer also argues that the administrative law judge failed to properly consider Dr. Fino's invalidation of claimant's October 16, 2008 pulmonary function study. Dr. Fino indicated that he invalidated the October 16, 2008 pulmonary function study for the same reasons that he invalidated the February 26, 2009 pulmonary function study associated with his own examination; namely, (1) a premature termination to exhalation; (2) a lack of reproducibility in the expiratory tracings; and (3) a lack of an abrupt onset to exhalation. Director's Exhibit 16. Based upon a review of the tracings, Dr. Fino opined that there was "a lot of hesitancy" and that claimant "never exhaled all of his air." Employer's Exhibit 5. The administrative law judge found that Dr. Fino's invalidation of the October 16, 2008 pulmonary function study was "unpersuasive" because the doctor

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Appendix B table values when the regulations were revised. *See* 65 Fed. Reg. 79,920, 79,953 (Dec. 20, 2000).

[8] We note that Dr. Fino's specific testimony as to whether a particular test is qualifying or nonqualifying is based on the heights as reported on the pulmonary function studies, and not on claimant's height as found by the administrative law judge (64.5 inches). Employer's Exhibit 5 at 20-23.

failed to specify how the study failed to conform to the regulatory quality standards, and because the technician who administered the study indicated that claimant put forth good cooperation and effort. Decision and Order at 12. Contrary to the administrative law judge's characterization, the record reflects that Dr. Fino adequately explained his basis for invalidating the study. Moreover, we agree with employer that the administrative law judge erred in failing to explain why he credited the assessment of a technician, that claimant provided good effort during October 16, 2008 pulmonary function study, over the uncontradicted invalidation of the study by Dr. Fino, a Board-certified pulmonologist. *See Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992). Consequently, on remand, the administrative law judge is instructed to re-assess the validity of the October 16, 2008 pulmonary function study.[9] In light of the above-referenced errors, we vacate the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and remand the case for further consideration.

Because the administrative law judge's findings with regard to the pulmonary function study evidence pursuant to Section 718.204(b)(2)(i) influenced his credibility determinations with regard to the medical opinions of record,[10] *see* Decision and Order at

[9] The administrative law judge should also reconsider Dr. Fino's invalidation of the November 9, 2009 and January 18, 2012 pulmonary function studies. Employer's Exhibit 5 at 22-24.

[10] In finding the medical opinion evidence sufficient to establish total disability, the administrative law judge credited Dr. Forehand's opinion, that claimant is totally disabled from a pulmonary standpoint, over the conflicting opinions of Drs. Fino and Rosenberg. Decision and Order at 21-22. In crediting Dr. Forehand's opinion, the administrative law judge noted that the doctor based his assessment, in part, upon the results of claimant's October 16, 2008 pulmonary function study. In light of our holding that the administrative law judge failed to properly consider Dr. Fino's invalidation of the October 16, 2008 pulmonary function study, we cannot affirm the administrative law judge's crediting of Dr. Forehand's opinion regarding the extent of claimant's pulmonary impairment. Moreover, we agree with employer that the administrative law judge erred in discrediting Dr. Fino's opinion, that claimant is not totally disabled from a pulmonary impairment, because the doctor relied upon the results of the invalid February 26, 2009 pulmonary function study. Decision and Order at 21-22. Although Dr. Fino invalidated the pulmonary function study because of poor effort, he noted that the values reflected "at least the minimal lung function that [claimant] could perform." Employer's Exhibit 5 at 20. Moreover, Dr. Fino based his assessment on additional evidence, including a physical examination, and his review of the evidence of record. Director's Exhibit 16; Employer's Exhibit 5.

21, we must also vacate his finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). However, in the interest of judicial economy, we will address employer's contention that the administrative law judge erred in not considering the entirety of the evidence regarding the exertional requirements of claimant's usual coal mine work.

Employer contends that the administrative law judge erred in not considering conflicting evidence regarding the duties that claimant was required to perform as a scoop operator. In connection with his initial 1987 claim, claimant completed Form CM-913, a "Description of Coal Mine Work and Other Employment." Claimant indicated that his last job as a scoop operator involved sitting for eight hours, as well as the pushing and pulling of levers and buttons. Director's Exhibit 1. Claimant, however, noted that he had performed additional jobs for at least one year, including roof bolter, coal drill operator, shuttle buggy operator, and coal shooter. *Id.* During a hearing on August 15, 1989, claimant clarified that his job as scoop operator required additional duties, including the lifting of one hundred pounds or more. Director's Exhibit 1 (1989 Hearing Transcript at 30). Claimant further testified that his last coal mine job required bending, stooping, lifting, pushing and pulling. *Id.*

In pursuing his 1994 claim, claimant again indicated that his last coal mine job was as scoop operator. However, in describing the duties of his last coal mine job, claimant also listed: "cutting machine helper, shuttle car operator, scoop operator, mobile drill operator, shot fireman, and general laborer." Director's Exhibit 2. After filing for benefits in 2002, claimant indicated that, in addition to sitting for eight hours, his position as a scoop operator required him to lift eighty pounds three to four times a day (depending on what he was doing), and to carry eighty to ninety pounds 500 to 600 feet ten to eleven times a day. Director's Exhibit 3. Finally, in connection with the current claim, claimant indicated that his job as a scoop operator required him to sit for five to six hours, crawl 100 feet, and lift and carry 200 pounds. Director's Exhibit 7. Claimant explained that while employed as a scoop operator, he would "relieve miners for lunch." *Id.* During the May 2, 2012 hearing, claimant testified that, although he most often worked on the bolt machine, he would "run anything they had inside of the mines." 2012 Hearing Transcript at 14. Claimant explained that he would fill in for other miners until they came back, noting that it "could be working on a belt line, running a bolt machine, coal drill, . . . running the shuttle buggy or running a cut machine." *Id.* at 15.

In finding that claimant's usual coal mine employment required heavy manual labor, the administrative law judge stated:

> Claimant testified that he held various coal mining jobs, but worked most often on the bolt machine. He said that his day could involve "working on a beltline, running a bolt machine, coal drill . . . shuttle buggy . . . or [a] cut

> machine." Claimant reported to Dr. Rosenberg that, as a scoop operator, he was required to lift bags of rock dust that weighed approximately fifty pounds, and cement bags that weighed ninety pounds. Claimant also reported that the belt structure was "quite heavy," and "multiple men" were needed to move it. Claimant reported to Dr. Fino that he worked primarily as a scoop operator. In addition, usually twice a week, he would perform other jobs, such as running a bolt machine and assisting on the cutting machine. Claimant's usual coal mine employment involved various jobs, ranging from light manual labor to heavy manual labor. However, even if [c]laimant only worked as a roof bolter two days per week, his employment would require him to perform heavy manual labor. Therefore, I find that, based on his testimony, his application for benefits, and the work descriptions he gave to the physicians, his usual coal mine employment required heavy manual labor.

Decision and Order at 21 (exhibit references omitted).

Contrary to employer's characterization of claimant's testimony as "conflicting," the record demonstrates that claimant consistently indicated that his last coal mine position required him to perform various jobs. The administrative law judge reasonably determined that claimant's usual coal mine work regularly required him to perform tasks requiring heavy manual labor, such as roof bolting. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's usual coal mine employment required heavy manual labor. *See Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-21 (4th Cir. 1991); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539-40 (1982).

In light of our decision to vacate the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv), we also vacate his finding that the new evidence establishes total disability at 20 C.F.R. §718.204(b)(2). On remand, should the administrative law judge find that the new evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), the administrative law judge must weigh all the relevant new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding that the new evidence established total disability, we also vacate his finding that claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309, and his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. The Department of Labor's (DOL's) regulations provide that if claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 24-31.

Employer asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 18-19. Contrary to employer's argument, the administrative law judge correctly explained that, because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order at 24. Moreover, the implementing regulations require the party opposing entitlement in a miner's claim to 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." 20 C.F.R. §718.305(d)(1)(ii). Thus, we reject employer's argument that the administrative law judge applied an improper rebuttal standard.

Employer next contends that the administrative law judge erred in finding that employer failed to disprove the existence of clinical pneumoconiosis. Initially, the administrative law judge considered the x-ray evidence. Because claimant's October 16, 2008, November 9, 2009, September 23, 2011, and January 18, 2012 x-rays were interpreted as both positive and negative for pneumoconiosis by the best qualified physicians of record, the administrative law judge permissibly found that the x-ray evidence was inconclusive and, therefore, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 26-27. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence does not assist employer in disproving the existence of clinical pneumoconiosis.

Employer also submitted the opinions of Drs. Fino and Rosenberg in support of its burden to disprove the existence of clinical pneumoconiosis. Although Drs. Fino and

Rosenberg opined that claimant does not suffer from clinical pneumoconiosis, the administrative law judge permissibly found that the x-rays that Drs. Fino and Rosenberg relied upon as negative for pneumoconiosis were inconclusive for the existence of the disease, thus calling into question the reliability of their opinions that claimant does not have clinical pneumoconiosis.[11] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 27-28. Since employer makes no additional contentions of error regarding the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis,[12] this finding is affirmed. *Id.*

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption, by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Employer specifically contends that the opinions of Drs. Fino and Rosenberg are sufficient to establish this second means of

[11] Dr. Fino opined that Dr. Forehand's interpretation of claimant's October 16, 2008 x-ray, as having a profusion of 1/1 and s/t opacities, was not indicative of coal workers' pneumoconiosis because Dr. Forehand did not find any opacities classified as p, q, and r, and because Dr. Forehand found opacities in only the two lower lung zones. Employer's Exhibit 16. The administrative law judge was "unpersuaded" by Dr. Fino's opinion that the presence of only irregular opacities and/or only opacities in the lower lung zones rules out a diagnosis of clinical pneumoconiosis. Decision and Order at 28. Moreover, in weighing the interpretations of claimant's October 16, 2008 x-ray, the administrative law judge did not rely on Dr. Forehand's positive interpretation. The administrative law judge determined that the October 16, 2008 x-ray was inconclusive as to the presence of pneumoconiosis, as it was read as positive by Dr. Miller and as negative by Dr. Wiot, both physicians who are dually-qualified as B readers and Board-certified radiologists. (The administrative law judge noted that Dr. Forehand was only a B reader.) *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984). Notably, Dr. Miller, in rendering a positive interpretation of the October 16, 2008 x-ray, identified size p opacities. Claimant's Exhibit 5.

[12] Employer's specific arguments regarding the administrative law judge's consideration of the medical opinion evidence focus upon the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. In light of our affirmance of the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis, we need not address employer's contentions of error regarding the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino and Rosenberg, that claimant's pulmonary impairment did not arise out of his coal mine employment, because neither physician diagnosed claimant with clinical pneumoconiosis. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal.

In summary, if the administrative law judge, on remand, finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption, and cannot establish entitlement under 20 C.F.R. Part 718. However, if the administrative law judge, on remand, finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, claimant will be entitled to benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur in the result only.

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JUDITH S. BOGGS
Administrative Appeals Judge