BRB No. 13-0227 BLA

RALPH C. WRIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OHIO VALLEY COAL COMPANY	)	
	)	DATE ISSUED: 02/27/2014
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington & Lee School of Law), Lexington, Virginia, for claimant.

John C. Artz (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-BLA-5349) of Administrative Law Judge Richard A. Morgan rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012). This case involves a subsequent claim filed on January 22, 2009.[1] Director's Exhibit 4.

[1] Claimant's initial claim, filed on October 2, 1987, was denied by the district director on December 14, 1987, because claimant did not establish any element of entitlement. Director's Exhibit 1.

In a Decision and Order dated January 25, 2013, the administrative law judge credited claimant with "at least" fifteen years of underground coal mine employment, pursuant to the parties' stipulation.[2] Decision and Order at 3; Hearing Transcript at 59. The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] However, the administrative law judge found that employer rebutted the presumption by establishing that claimant does not have pneumoconiosis. In so finding, the administrative law judge discounted the medical opinion of Dr. Houser, that claimant suffers from both clinical and legal pneumoconiosis,[4] and accorded greatest weight to the opinion of Dr. Bellotte,

[2] The record indicates that claimant's last coal mine employment was in Ohio. Director's Exhibit 24. Accordingly, the Board 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).

[3] 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) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id*. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013, Federal Register. Unless otherwise indicated, the relevant version of all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[4] Clinical pneumoconiosis is defined as "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). Legal pneumoconiosis "includes any chronic

that claimant suffers from restrictive and obstructive impairments that are due solely to heart disease and obesity.[5] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in refusing to allow him to respond to supplemental medical reports from Drs. Bellotte and Fino that employer sent to claimant twenty days before the hearing, exactly upon the deadline for the submission of evidence under 20 C.F.R. §725.456(b).[6] Claimant further asserts that the administrative law judge erred in his analysis of the medical opinion evidence when he found that employer rebutted the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal. Claimant has filed a reply brief reiterating his arguments on appeal.[7]

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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989)(en banc).

Procedural Issue

Claimant contends that the administrative law judge erred by failing to allow him to submit a supplemental report by his physician, Dr. Houser, in response to reports from

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lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[5] The administrative law judge found that Dr. Fino's medical opinion corroborated Dr. Bellotte's "more comprehensive opinion." Decision and Order at 26.

[6] Section 725.456(b)(2) provides that any medical evidence not submitted to the district director may be received in evidence, subject to objection of any party, if that evidence is sent to the other parties at least twenty days before the hearing. 20 C.F.R. §725.456(b)(2).

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Drs. Fino and Bellotte, which employer sent to claimant exactly twenty days before the hearing. Claimant's Brief at 4. To resolve this issue, we will summarize the development of the medical evidence, and set forth the administrative law judge's evidentiary rulings.

Claimant was first examined, on behalf of the Department of Labor, by Dr. Scattaregia, on February 10, 2009. Director's Exhibit 18. Dr. Scattaregia diagnosed claimant with both clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic bronchitis due to thirty-eight years of coal and rock dust exposure, with a lesser contribution from claimant's history of smoking one-half pack of cigarettes a day between the ages of nineteen and twenty-two. *Id*. On July 17, 2009, Dr. Bellotte examined and tested claimant, and reviewed Dr. Scattaregia's medical report and testing. Director's Exhibit 21. Dr. Bellotte opined that claimant does not have clinical or legal pneumoconiosis, but has restrictive and obstructive impairments that developed years after he left the mines in 1986, and which are due to cardiac disease, obesity, diabetes, and hypertension. *Id*.

After considering those two medical reports and their associated objective testing, the district director awarded benefits in a Proposed Decision and Order issued on August 23, 2009. Director's Exhibit 28. Employer requested a hearing, which was initially scheduled for September 29, 2010, but which was later continued, at employer's request, and rescheduled for April 28, 2011.

After the hearing was rescheduled, employer submitted an April 4, 2011 report from Dr. Fino, in which he reviewed the medical evidence of record, and concluded that claimant has neither clinical nor legal pneumoconiosis. Employer's Exhibit 1. Dr. Fino indicated that he agreed with Dr. Bellotte that claimant's restrictive and obstructive impairments are due to heart disease and obesity, but noted further that claimant's irreversible obstruction could also represent "true" obstructive lung disease which, if present, is not due to coal dust but is "most consistent with" asthma. Employer's Exhibit 1 at 15.

Thereafter, claimant obtained counsel who requested and was granted a continuance, and the hearing was rescheduled for June 14, 2012. Thus, the twenty-day deadline for the submission of evidence was May 25, 2012. *See* 20 C.F.R. §725.456(b)(2).

On January 30, 2012, Dr. Houser reviewed the medical evidence of record on behalf of claimant, including Dr. Bellotte's June 20, 2009 report, and Dr. Fino's April 4, 2011 report. Claimant's Exhibit 1. Dr. Houser concluded that claimant suffers from both clinical pneumoconiosis, and legal pneumoconiosis, in the form of fixed airway obstruction, diminished vital capacity, and hypoxemia, all due to approximately thirty-

nine years of underground coal mine dust exposure. Claimant's Exhibit 1 at 5. In response to Dr. Bellotte's opinion that it would be unlikely for claimant to develop pneumoconiosis years after he left the mines in 1986, Dr. Houser noted that 1987 objective test results in the record indicated that claimant was already developing diminished vital capacity and exercise-induced hypoxemia. Claimant's Exhibit 1 at 3. Dr. Houser also discussed medical literature supporting the principle that pneumoconiosis is a latent and progressive disease. *Id*. Dr. Houser further opined that obesity and heart disease were not "plausible explanations of [claimant's] obstructive airway disease," because those two conditions generally cause a restrictive impairment. Claimant's Exhibit 1 at 4. In view of claimant's years of coal mine dust exposure, and his "minimal" smoking history, Dr. Houser opined that coal mine dust exposure was the "substantial or sole cause" of claimant's obstructive airway disease. Claimant's Exhibit 1 at 4-5. Additionally, Dr. Houser opined that, even assuming claimant has asthma, his coal mine dust exposure contributed to it. *Id*. Claimant sent Dr. Houser's report to employer approximately fifty days before the hearing.[8]

On May 25, 2012, employer sent to claimant medical reports from Drs. Bellotte and Fino, dated May 23, in which they reviewed Dr. Houser's report. In an evidence summary sent on the same day, employer designated these two reports as rehabilitative evidence. Dr. Fino stated that the review did not change his opinion, but noted that he did not intend to imply that claimant's obstruction is due to heart disease and obesity. Employer's Exhibit 6. He opined that asthma is "a possible cause of the obstruction," while claimant's restrictive defect "is probably related to the heart disease and obesity. . . ." Employer's Exhibit 6 at 3. Dr. Bellotte set forth a more detailed discussion, in which he took issue with Dr. Houser's reasoning, and further explained his own opinion. Employer's Exhibit 5. For example, Dr. Bellotte opined that the medical findings in this case do not fit the profile of a slow progressive respiratory decline, but rather, reflect an abrupt decline based on cardiac dysfunction. Employer's Exhibit 5 at 2. Further, citing and discussing recent medical literature from an American Thoracic Society (ATS) conference he had just attended, Dr. Bellotte opined that obesity may cause an obstructive impairment, and that claimant does not meet ATS criteria for a diagnosis of work-related asthma. Employer's Exhibit 5 at 3-4. Dr. Bellotte reiterated that claimant does not have an impairment related to coal mine dust exposure, but suffers from

[8] The record does not disclose exactly when claimant sent Dr. Houser's report to employer. The record contains evidence summaries that claimant sent to employer fifty days before the hearing and twenty-one days before the hearing, but these documents do not indicate when Dr. Houser's report was sent. Later, in a Motion to Exclude Excess Evidence filed with the administrative law judge, claimant stated that employer received Dr. Houser's report by May 3, 2012. Employer did not dispute that statement.

impairments "readily explained by" obesity, cardiac disease, and other medical problems. Employer's Exhibit 5 at 4.

On June 10, 2012, claimant moved to exclude the reports of Drs. Bellotte and Fino, arguing that they were not admissible under the evidentiary limitations of 20 C.F.R. §725.414, because they did not constitute "rehabilitative" reports under 20 C.F.R. §725.414(a)(3)(ii). Alternatively, claimant requested permission to submit a supplemental report, in which Dr. Houser could address the reports of Drs. Bellotte and Fino. Claimant pointed out that, because he received their reports from employer exactly upon the twenty-day deadline, he was unable to submit a supplemental report from Dr. Houser before the expiration of the twenty-day deadline. Employer responded that, notwithstanding its designation of the reports as rehabilitative evidence, they were admissible as supplemental reports based on review of the admissible evidence of record.

By Order dated July 9, 2012, the administrative law judge ruled that the reports of Drs. Bellotte and Fino were admissible as supplemental medical reports, in compliance with the evidentiary limitations. Order at 1-2, citing *C.L.H.* [*Hill*] *v. Arch on the Green, Inc*., BRB No. 07-0133 (Oct. 31, 2007)(unpub.). The administrative law judge further found that claimant did not establish "'good cause' for the further submission of . . . medical reports," because "[c]laimant's physician has already commented on the [initial] reports of both of employer's physicians." Order at 2.

Claimant contends that the administrative law judge erred by failing to allow him to respond to the supplemental reports from Drs. Fino and Bellotte. Claimant's Brief at 4. Claimant argues that because the exchange of this evidence occurred exactly twenty days before the hearing, he was foreclosed from responding to it prior to the expiration of the twenty-day deadline imposed by 20 C.F.R. §725.456. Claimant notes that Dr. Bellotte's supplemental report introduced new medical issues and reasoning, and that the administrative law judge relied heavily on Dr. Bellotte's opinion to find that employer disproved the existence of pneumoconiosis.

Claimant's contentions have merit. While the administrative law judge has broad discretion in procedural matters, "the administrative law judge is obliged to insure a full and fair hearing on all the issues presented." *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(en banc). Where a party would be denied the full presentation of its case if unable to respond to evidence submitted just prior to or upon the twenty-day deadline, due process as incorporated into the Administrative Procedure Act (APA) requires the opportunity to respond.[9] *Bethlehem*

[9] Section 556(d) of the Administrative Procedure Act provides that "[a] party is entitled to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full

Mines Corp. v. Henderson, 939 F.2d 143, 148-49, 16 BLR 2-1, 2-5 (4th Cir. 1991); *North Am. Coal Co. v. Miller*, 870 F.2d 948, 951-52, 12 BLR 2-222, 2-228-29 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990).

Here, the record reflects that claimant timely developed and exchanged his evidence with employer, but received the supplemental medical reports from employer exactly upon the twenty-day deadline. Although, as the administrative law judge noted, claimant's physician, Dr. Houser, reviewed the initial reports of Drs. Bellotte and Fino, from 2009 and 2011, he could not address their May 2012 supplemental reports, which were exchanged too late for claimant to submit a timely response. Considering that Dr. Bellotte further developed his medical reasoning in his supplemental report, and that the administrative law judge found Dr. Bellotte's opinion to be dispositive, we conclude that claimant's ability to have Dr. Houser review employer's initial medical reports did not obviate the need for him to respond to the supplemental reports. *See Henderson*, 939 F.2d at 148-49, 16 BLR at 2-5; *Miller*, 870 F.2d at 951-52, 12 BLR at 2-228-29 The administrative law judge therefore erred in refusing to allow claimant a reasonable opportunity to submit evidence in response. *See Shedlock*, 9 BLR at 1-200.

In light of the foregoing, we must vacate the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption, and remand this case for the administrative law judge to reopen the record and allow claimant the opportunity to respond to the supplemental medical reports submitted by employer exactly upon the twenty-day deadline. On remand, the administrative law judge must then reconsider whether employer has rebutted the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we will also address claimant's arguments regarding the administrative law judge's weighing of the medical opinion evidence relevant to the existence of pneumoconiosis. Because claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifted 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); To rebut the Section 411(c)(4) presumption by disproving the existence of

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and true disclosure of the facts." 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a).

pneumoconiosis, employer must affirmatively prove the absence of both clinical and legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995).

After finding that employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered whether the medical opinion evidence disproved the existence of legal pneumoconiosis. As noted earlier, the administrative law judge discounted Dr. Houser's opinion,[10] and credited Dr. Bellote's opinion, as supported by that of Dr. Fino, to find that employer disproved legal pneumoconiosis.

We agree with claimant that substantial evidence does not support the administrative law judge's reasons for discounting Dr. Houser's opinion that claimant suffers from legal pneumoconiosis. Claimant's Brief at 6-10. The administrative law judge discounted Dr. Houser's opinion primarily because he found that Dr. Houser's statement, that obesity and heart disease do not explain claimant's obstructive lung disease because they cause restriction, was "undermine[d]" by a failure to consider relevant medical data. Decision and Order at 25. Specifically, the administrative law judge found that Dr. Houser failed to recognize that Drs. Scattaregia and Bellotte interpreted claimant's pulmonary function studies as reflecting restriction. Decision and Order at 25. Substantial evidence does not support this finding because, as claimant contends, Dr. Houser reviewed the objective evidence and was aware that claimant has both restrictive and obstructive impairments. Claimant's Exhibit 1 at 1-3. Moreover, the administrative law judge has not explained how the fact that other physicians confirmed that claimant has a restrictive impairment undermines Dr. Houser's opinion that obesity and heart disease would be expected to cause such an impairment. Nor has the administrative law judge explained how the confirmed existence of a restrictive impairment undermines Dr. Houser's opinion that heart disease and obesity do not cause claimant's obstructive impairment, which is due to coal mine dust exposure. The administrative law judge's decision, therefore, does not comply with the APA, which requires that every adjudicatory decision 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. . . .". 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Further, the administrative law judge inaccurately found that Dr. Houser did not review any of claimant's medical records between 1987 and 2009. Decision and Order at

[10] The administrative law judge also discounted Dr. Scattaregia's opinion. Decision and Order at 25. On appeal, claimant has not challenged this aspect of the administrative law judge's decision.

25; *see* Claimant's Exhibit 1 at 1. Finally, the administrative law judge stated that Dr. Houser "believed the x-ray evidence showed CWP [coal workers' pneumoconiosis] contrary to my findings." Decision and Order at 25. The record reflects, however, that Dr. Houser did not rely on positive x-rays to diagnose claimant with legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Claimant's Exhibit 1 at 5. Because the administrative law judge provided invalid reasons for discounting Dr. Houser's opinion of legal pneumoconiosis, on remand he should reconsider Dr. Houser's opinion, weigh it against the opinions of employer's physicians in determining whether employer has met its burden to disprove the existence of legal pneumoconiosis, and explain the rationale for his findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Further, we agree with claimant's contention that the administrative law judge did not adequately address whether employer submitted medical opinions that are sufficiently reasoned to affirmatively establish that claimant does not have legal pneumoconiosis. Claimant's Brief at 10-19. The administrative law judge found that Dr. Bellotte "authored the most comprehensive report" and better "integrated all of the objective evidence" in reaching his conclusion that claimant's impairments are due to obesity and heart disease. Decision and Order at 25, 26. As claimant contends, the administrative law judge has not explained how he determined that Dr. Bellotte's integration of the objective evidence demonstrated that claimant's more than fifteen years of coal mine dust exposure was not a contributing cause of claimant's restrictive and obstructive impairments. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Additionally, the administrative law judge, on remand, should specifically address the credibility of Dr. Bellotte's reasoning, that it is unlikely for claimant to have pneumoconiosis because his impairments developed years after he ceased coal mine employment, in light of the regulation recognizing pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[11] 20 C.F.R. §718.201(c); *see Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009).

The administrative law judge also relied on Dr. Fino's opinion, finding that it corroborated Dr. Bellote's opinion. Claimant argues, however, that Dr. Fino ultimately disagreed with Dr. Bellotte's opinion that heart disease and obesity explain claimant's

[11] In a footnote, the administrative law judge stated that the opinions of Drs. Bellotte and Fino regarding "latency and progressivity differ substantially from the discredited physician opinions noted in *Greene v. King James Coal Mining, Inc*., 575 F.3d 628 (6th Cir. 2009) and *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486 (7th Cir. 2004)." Decision and Order at 25 n.44. The administrative law judge, however, did not set forth his reasoning for reaching that conclusion.

obstructive impairment, because Dr. Fino changed his opinion after reviewing Dr. Houser's report, and stated that he did not intend to suggest that claimant's obstructive impairment is due to heart disease and obesity. The administrative law judge, on remand, should consider claimant's argument that employer's experts do not agree on the cause of claimant's obstructive impairment, in determining the extent to which their opinions support each other. Further, in light of employer's rebuttal burden, the administrative law judge, on remand, should reconsider whether Dr. Fino's opinion that asthma is "a possible cause of" claimant's obstruction, and that his restriction is "probably related to heart disease and . . . obesity," Employer's Exhibit 6 at 3, meets employer's burden to affirmatively establish that claimant does not have legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1059 (6th Cir. 2013); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Therefore, on remand, the administrative law judge must assess the reasoning of Drs. Bellotte and Fino to determine whether their opinions affirmatively establish that claimant does not have legal pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In determining whether their opinions are sufficient to meet employer's rebuttal burden, the administrative law judge should consider them in light of the contrary conclusions of Dr. Houser. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. If the administrative law judge, on remand, determines that employer has not disproved the existence of pneumoconiosis, he must then consider whether employer has established that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment.[12] 30 U.S.C. §921(c)(4).

[12] The implementing regulation that was promulgated after the administrative law judge issued his decision requires the party opposing entitlement in a miner's claim to establish that "no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in § 718.201." 78 Fed. Reg. at 59115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)).

Accordingly, the administrative law judge's Decision and Order Denying 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge