BRB No. 12-0218 BLA

JAMES E. MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BENCOAL MINING, INCORPORATED	)	
	)	DATE ISSUED: 01/30/2013
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 on Remand of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (07-BLA-6026) of Administrative Law Judge Alan L. Bergstrom awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(Supp. 2011) (the Act). This case, involving a subsequent claim filed on August 25, 2006,[1] is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with twenty-four years of coal mine employment,[2] and found that the new evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge also found that claimant established that an applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

On initial appeal, the Board noted that Congress had enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010)

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[1] Claimant's three previous claims, filed on February 21, 1990, March 5, 1997, and January 13, 2003, were finally denied because claimant failed to establish any element of entitlement. Director's Exhibits 1-3.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction 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] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). 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).

(codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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).

In reviewing the administrative law judge's decision, the Board vacated the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Mullins v. Bencoal Mining, Inc.*, BRB No. 09-0490 BLA (May 27, 2010) (unpub.). Consequently, the Board vacated the administrative law judge's award of benefits,[4] and remanded the case to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer could rebut the presumption. *Id.*

Applying Section 411(c)(4) on remand,[5] the administrative law judge found that, because 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),[6] claimant invoked the rebuttable presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge found that claimant is entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

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[4] In light of its determination to vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv), the Board also vacated the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Mullins v. Bencoal Mining, Inc.*, BRB No. 09-0490 BLA (May 27, 2010) (unpub.). The Board further vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), 718.204(c). *Id.*

[5] In light of the applicability of amended Section 411(c)(4), the administrative law judge reopened the record on remand, and allowed the parties an opportunity to submit additional evidence. In response, claimant submitted a 2010 deposition from Dr. Baker, a 2011 medical report from Dr. Baker, and Dr. Alexander's interpretation of a December 7, 2010 digital x-ray. Employer submitted a 2010 medical report from Dr. Fino, and a 2011 medical report from Dr. Hippensteel. The administrative law judge admitted all of this evidence into the record. Decision and Order on Remand at 3-4; Claimant's Exhibits 3-5; Employer's Exhibits 8, 9.

[6] Based on his finding that 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 pursuant to 20 C.F.R. §725.309(d). Decision and Order on Remand at 30-33.

On appeal, employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.[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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis or was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 3. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing either that he suffers from pneumoconiosis or that he is totally disabled. 20 C.F.R. §725.309(d).

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

Employer argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2),[8] and, therefore, erred in finding that claimant invoked the

[7] We reject employer's assertion that the retroactive application of amended Section 411(c)(4) is unconstitutional. *See Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011); s*ee also Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010). Moreover, employer's argument, that this claim could be affected by constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[8] Because employer does not challenge the administrative law judge's determination that claimant established over fifteen years of underground coal mine

rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Section 718.204(b)(2)(i)

Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge considered three new pulmonary function studies conducted on October 9, 2006, March 1, 2007, and December 7, 2010.

Employer specifically contends that the administrative law judge erred in relying upon a height of 67.3 inches in determining whether claimant's pulmonary function studies are qualifying.[9] Where there are substantial differences in the recorded heights among the pulmonary function studies of record, an administrative law judge must make a factual finding to determine a claimant's actual height. *See Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). In this case, the administrative law judge found that the "medical examinations and [c]laimant's testimony place the [c]laimant at 67.3 [inches] tall." Decision and Order on Remand at 26. In making this calculation, the administrative law judge considered claimant's various reported heights of 66.75, 67, and 68 inches (Director's Exhibit 17), 68 inches (Director's Exhibit 41), and 67 inches (Employer's Exhibit 3). Decision and Order on Remand at 26 n.23. Averaging these five heights yields a measurement of 67.35 inches, which the administrative law judge rounded off to 67.3 inches.

Employer argues that the administrative law judge failed to consider Dr. Hippensteel's measurement of claimant's height as 66 inches. Employer's Exhibit 9. However, averaging in Dr. Hippensteel's recorded height of 66 inches with the five heights considered by the administrative law judge would only lower claimant's average height from 67.35 inches to 67.125, a height that would not affect the qualifying nature of any of the new pulmonary function studies.[10] Consequently, the administrative law

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employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] 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, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

[10] Regardless of which height is utilized, the pre-bronchodilator studies conducted on October 9, 2006 and December 7, 2010 are qualifying, Director's Exhibit 17; Employer's Exhibit 9, while the pre-bronchodilator study conducted on March 1, 2007 is

judge's failure to consider Dr. Hippensteel's recorded height was harmless.[11] *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1984).

Employer, however, correctly contends that the administrative law judge erred in failing to provide a valid reason for finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). We agree. In finding that the new pulmonary function study evidence established total disability, the administrative law judge noted the qualifying nature of claimant's pre-bronchodilator pulmonary function studies taken on October 9, 2006, and December 7, 2010. The administrative law judge, however, did not explain why these studies were entitled to greater weight than the non-qualifying studies conducted on March 1, 2007, and December 7, 2010. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's finding that the new

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non-qualifying. Director's Exhibit 41. Similarly, regardless of which height is used, the two post-bronchodilator studies conducted on March 1, 2007 and December 7, 2010, are non-qualifying. Director's Exhibit 41; Employer's Exhibit 9.

[11] Employer asserts that, because the table values listed at 20 C.F.R. Part 718, Appendix B, end at age 71, and the miner was 73 years old at the time he performed the December 7, 2010 pulmonary function study, the administrative law judge erred in not considering whether claimant's pulmonary function could be expected to decrease as he continued to age. Employer's Exhibit at 14. Employer's contention has no merit. 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.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). In the case of older miners, an opposing party 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. *Id.* In this case, employer did not present any evidence that the pre-bronchodilator portion of the December 7, 2010 study was normal or otherwise did not represent a totally disabling pulmonary impairment. Consequently, the administrative law judge properly characterized the miner's most recent pulmonary function study, conducted on December 7, 2010, as producing qualifying values before the administration of a bronchodilator, and non-qualifying values after the administration of a bronchodilator.

pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On remand, the administrative law judge must weigh the qualifying and non-qualifying pulmonary function studies, and explain his determination of whether the pulmonary function study evidence establishes total disability.

Section 718.204(b)(2)(iv)

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[12] The administrative law judge considered the new medical opinions submitted by Drs. Baker, Fino and Hippensteel. Dr. Baker opined that claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 17; Claimant's Exhibits 1, 3, 4. Conversely, Drs. Fino and Hippensteel each opined that, from a respiratory standpoint, claimant is not totally disabled from performing his usual coal mine employment. Employer's Exhibits 8, 9.

In his consideration of whether the medical opinion evidence established total disability, the administrative law judge noted that Dr. Baker interpreted the qualifying results of the October 9, 2006 pulmonary function study as revealing a "Class 3" pulmonary impairment, an impairment that he opined precluded claimant from performing the work of a coal miner. Decision and Order on Remand at 28; Director's Exhibit 17. The administrative law judge further noted that Dr. Baker also interpreted the non-qualifying results of Dr. Fino's March 1, 2007 pulmonary function study as revealing a "Class 3" pulmonary impairment. Decision and Order on Remand at 28-29; Claimant's Exhibit 1 at 38. Finally, the administrative law judge noted that Dr. Baker interpreted the results of Dr. Hippensteel's qualifying pre-bronchodilator pulmonary function study conducted on December 7, 2010 as supportive of a totally disabling pulmonary impairment. Decision and Order on Remand at 29; Claimant's Exhibit 4. The administrative law judge attributed less weight to Dr. Fino's opinion because the doctor did not review the results of Dr. Hippensteel's December 7, 2010 pulmonary function study. Decision and Order on Remand at 29; Director's Exhibit 41. Finally, the administrative law judge noted that Dr. Hippensteel interpreted the December 7, 2010 pulmonary function study as suggestive of possible mild obstruction and restriction. *Id.*; Employer's Exhibit 9. The administrative law judge found that Dr. Hippensteel's opinion, that claimant retained the pulmonary capacity to perform his prior coal mine employment, was not well-reasoned because the doctor failed to consider whether the

[12] Because no party challenges the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

mild pulmonary impairment that he diagnosed would prevent claimant from performing his prior coal mine employment. *Id.* The administrative law judge, therefore, found that the preponderance of the medical opinion evidence established that claimant is totally disabled from performing the heavy to very heavy labor required by his coal mine employment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 30.

Employer argues that the administrative law judge erred in crediting Dr. Baker's opinion, that claimant suffers from a totally disabling pulmonary impairment, over the contrary opinions of Drs. Fino and Hippensteel. Employer's argument has merit. The administrative law judge accorded less weight to Dr. Hippensteel's opinion because Dr. Baker interpreted the results of the December 7, 2010 pulmonary function study as supporting a finding of a totally disabling respiratory impairment. However, employer accurately notes that Dr. Baker, in finding that the results of the December 7, 2010 pulmonary function study supported a finding of total disability, relied only upon the results of the qualifying pre-bronchodilator values without addressing the significance of the non-qualifying post-bronchodilator values. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Moreover, the administrative law judge erred in failing to explain why Dr. Baker's interpretation of the results of the December 7, 2010 pulmonary function study was entitled to greater weight than Dr. Hippensteel's interpretation. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165. The administrative law judge also erred in failing to address Dr. Hippensteel's criticism of the pulmonary function study results obtained by Dr. Baker on October 9, 2006.[13] *Id.*

Moreover, contrary to the administrative law judge's characterization, Dr. Hippensteel addressed whether claimant's mild pulmonary impairment is disabling, opining that claimant's possible mild obstruction and restriction would not preclude him from returning to his previous coal mine work involving "heavy manual labor." Employer's Exhibit 9. Although the administrative law judge accurately noted that a physician's assessment of a mild pulmonary impairment, if credited, can support a finding of total disability, depending upon the exertional requirements of a claimant's usual coal mine employment, *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), a physician is not required to find that a mild pulmonary impairment renders a claimant totally disabled. In this case, Dr. Hippensteel, reviewed all of the objective evidence, including the non-qualifying post-bronchodilator pulmonary function studies, and opined that claimant's possible mild pulmonary impairment did not render

[13] Dr. Hippensteel noted that it took Dr. Baker eight efforts to get any replicable pulmonary function study results. Employer's Exhibit 9.

him totally disabled.[14] Employer's Exhibit 9.

Moreover, employer correctly argues that the administrative law judge did not provide a valid reason for discounting Dr. Fino's opinion. The administrative law judge provided no support for his finding that Dr. Fino based his opinion, that there is no respiratory impairment present, on "his belief that there was no objective evidence of pneumoconiosis." Decision and Order on Remand at 29. The record reflects that Dr. Fino based his disability assessment on the fact that he found "no objective evidence of any respiratory impairment present." Director's Exhibit 41 at 12. Despite what Dr. Fino characterized as "sub-maximal effort," claimant produced non-qualifying values both before and after the administration of a bronchodilator during his March 1, 2007 pulmonary function study. *Id.* Moreover, the administrative law judge did not explain why Dr. Fino's opinion was undermined by his failure to consider the results of claimant's December 7, 2010 pulmonary function study, given that Dr. Hippensteel opined that the results of that study did not support a diagnosis of a totally disabling pulmonary impairment. *See* 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the new medical opinion evidence established the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). On remand, when considering whether the new medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge should address the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

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), 725.309(d). 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

[14] Dr. Hippensteel reviewed all three of the new pulmonary function studies, including the non-qualifying pre-bronchodilator study conducted by Dr. Fino on March 1, 2007 and the non-qualifying post-bronchodilator studies conducted on March 1, 2007 and December 7, 2010, and found that the "[a]bnormalities on individual pulmonary tests [were not] consistent or permanent." Employer's Exhibit 9.

BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate 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, should the administrative law judge, on remand, again find the Section 411(c)(4) presumption invoked, 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. 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); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011). The administrative law judge found that employer did not establish rebuttal by either method. Decision and Order on Remand at 34-39.

Employer argues that the administrative law judge, in considering whether employer disproved the existence of clinical pneumoconiosis, failed to consider two x-ray interpretations contained in claimant's treatment records (Dr. Kendall's interpretation of a June 8, 2010 x-ray and Dr. Sherman's interpretation of a July 29, 2010 x-ray). Employer's Exhibit 7. Because the two x-ray interpretations contain no mention of pneumoconiosis, employer asserts that they should be considered negative for clinical pneumoconiosis. We agree with employer that the administrative law judge erred in not addressing this x-ray evidence, and that he must consider it, on remand, if reached. *See* 30 U.S.C. §923(b); 5 U.S.C. §557(c)(3)(A); *Wojtowicz*, 12 BLR at 1-165. We note that, contrary to employer's contention, the significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Since it is the administrative law judge's duty to make factual determinations, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and remand this case to the administrative law judge for him to reconsider this issue, if necessary. *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Accordingly, the administrative law judge's Decision and Order on Remand 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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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge