BRB No. 11-0559 BLA

EVA PANNIER[1] (o/b/o WILMER F. GRAUL, deceased)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 07/17/2012
and	)	
WELLS FARGO DISABILITY MANAGEMENT	)	
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Cully & Wissore), Carbondale, Illinois, for claimant.

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

[1] The miner died on July 3, 2011, while his claim was pending before the Board. On September 19, 2011, the miner's counsel requested that Eva Pannier, the executrix of the miner's estate, be substituted as a party-in-interest. By Order dated June 6, 2012, the Board granted the motion, and amended the caption to include Eva Pannier as a party to the case. *Pannier v. Consolidation Coal Co.*, BRB No. 11-0559 BLA (June 6, 2012) (Order) (unpub.).

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5505) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on March 21, 2008.[2]

In considering the miner's subsequent claim, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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 the miner was totally disabled due to pneumoconiosis. 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 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);); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 847, 24 BLR 2-385, 2-395 (7th Cir. 2011).

Applying amended Section 411(c)(4), the administrative law judge found that the miner established that he had "a little over" twenty-two years of coal mine employment in surface mining,[3] but did not establish that any of his coal mine employment took place

[2] The miner's previous claim, filed on September 3, 1988, was finally denied because he failed to establish any element of entitlement. Director's Exhibit 1.

[3] The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United

in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that the miner did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge also considered whether the miner could establish entitlement to benefits, without the assistance of the Section 411(c)(4) presumption. The administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). However, the administrative law judge found that the new medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). After finding that the miner was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). In light of these findings, the administrative law judge found that the miner established that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in excluding Dr. Wiot's interpretation of a December 28, 2007 CT scan from the record. Employer also contends that that the administrative law judge erred in finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer further argues that the administrative law judge erred in not addressing whether the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. If the Board does not affirm the award of benefits, claimant asserts that the administrative law judge erred in finding that the miner failed to establish the requisite fifteen years of qualifying coal mine employment required to invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with claimant that the administrative law judge erred in finding that the miner failed to establish the requisite fifteen years of qualifying coal mine employment pursuant to Section 411(c)(4).[4]

States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding of twenty-two years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.203(b), 718.204(b), and 725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Exclusion of Evidence

Employer initially argues that the administrative law judge erred in excluding Dr. Wiot's interpretation of a December 28, 2007 CT scan from the record. Employer submitted Dr. Wiot's interpretation of the December 28, 2007 CT scan on August 20, 2010, twenty-four days before the September 13, 2010 hearing. At the hearing, the miner objected to the admission of this evidence, arguing that employer failed to disclose this evidence pursuant to a discovery request made by the miner on June 3, 2010. Hearing Transcript at 13. Noting that Dr. Wiot interpreted the December 28, 2007 CT scan on July 1, 2009, the miner asserted that employer improperly withheld this evidence until just prior to the twenty day deadline set forth at 20 C.F.R. §725.456. *Id.* Employer responded that, at the time of the miner's request, a hearing had not yet been scheduled, and employer, therefore, had not yet developed its "Evidence Summary Form." *Id.* at 14. The administrative law judge found merit in the miner's objection, and excluded Dr. Wiot's interpretation of the December 28, 2007 CT scan from the record. *Id.* at 16; Employer's Exhibit 6 (excluded). In his decision, the administrative law judge reiterated that he excluded Dr. Wiot's CT scan interpretation from the record based on employer's failure to timely surrender the evidence in response to the miner's discovery request. Decision and Order at 1.

Employer contends that the administrative law judge erred in excluding this evidence because the "record does not contain any evidence of a formal discovery request, or a motion to compel compliance with any discovery request." Employer's Brief at 5. We disagree. Claimant accurately notes that employer has not disputed that the miner, on June 3, 2010, made a written request for evidence developed by employer. Claimant's Brief at 7. Although employer provided some of the requested evidence three days later, employer did not include Dr. Wiot's interpretation of the December 28, 2007 CT scan. Moreover, although the miner's June 3, 2010 discovery request does not appear

in the record, the record contains a second discovery request by the miner, on August 5, 2010, wherein the miner requested any "additional medical evidence" developed by employer. Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in excluding Dr. Wiot's interpretation of a December 28, 2007 CT scan from the record.[5] *See Clark*, 12 BLR at 1-153.

Section 718.202(a)(4)

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of clinical pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(4).[7] In considering whether the medical opinion evidence established the existence of pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Istanbouly, Houser, and Repsher.[8] Drs. Istanbouly and Houser diagnosed clinical pneumoconiosis. Director's Exhibit 11; Claimant's Exhibits 3, 4. Dr. Repsher, however, opined that the miner did not suffer from clinical pneumoconiosis.

[5] Although the administrative law judge excluded Dr. Wiot's interpretation of a December 28, 2007 CT scan, he admitted two interpretations of an October 8, 2008 CT scan, including one rendered by Dr. Wiot. Claimant's Exhibit 2; Employer's Exhibit 5.

[6] "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).

[7] In his consideration of whether the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered two x-rays taken on June 27, 2008 and October 28, 2008. The administrative law judge found that the interpretations of both of these x-rays were "in equipoise" as to the existence of pneumoconiosis. Decision and Order at 17-18; Director's Exhibits 11, 25; Claimant's Exhibit 1; Employer's Exhibits 1-3. The administrative law judge also accurately noted that the record does not contain any biopsy evidence under 20 C.F.R. §718.202(a)(2). Decision and Order at 19.

[8] The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with the miner's 1988 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected the miner's condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 21.

Employer's Exhibits 4, 7, 8, 12. Dr. Repsher opined that the miner suffered from usual interstitial pneumonitis/idiopathic pulmonary fibrosis (UIP/IPF), unrelated to his coal mine dust exposure. *Id.*

Dr. Houser questioned Dr. Repsher's diagnosis of UIP/IPF because, he explained, the medical literature indicates that patients suffering from UIP/IPF have only a "20% to 50% five-year survival [rate]." Claimant's Exhibit 3. Relying upon x-ray abnormalities detected in 1992, Dr. Houser explained that the miner's sixteen-year survival, from 1992 to 2008 would, in and of itself, make a diagnosis of UIP/IPF "quite implausible." *Id.* Dr. Houser further explained that a publication from the American Thoracic Society sets forth four major and four minor criteria for a diagnosis of IUP. Claimant's Exhibit 4. Dr. Houser noted that the publication provides that: "In the immune-competent adult, the presence of all of the major diagnostic criteria as well as at least 3 of the 4 minor criteria increases the likelihood of a correct clinical diagnosis of IPF." *Id.* Dr. Houser opined that the miner failed to meet two of the four major criteria, namely, (1) that other known causes of interstitial lung disease, such as environmental exposures, be excluded, and (2) that a transbronchial lung biopsy show no features to support an alternative diagnosis. *Id.*

Dr. Repsher responded to Dr. Houser's criticism of his diagnosis. Dr. Repsher indicated that, because the miner's x-ray was "so classic" for UIP/IPF, a surgical biopsy was not indicated. Employer's Exhibit 12. Dr. Repsher also took issue with Dr. Houser's reliance upon a sixteen year survival rate to exclude a diagnosis of UIP/IPF, noting that "the natural history of . . . UIP/IPF can be highly variable," with death occurring "from respiratory failure within a few weeks to many years."[9] *Id.* Dr. Repsher opined that the miner's x-rays and CT scans "are classic for UIP/IPF, [and] did not suggest in any way [coal workers' pneumoconiosis]." Employer's Exhibit 8. Dr. Repsher explained that the linear opacities primarily in the bases of the miner's lungs were characteristic of UIP/IPF. Employer's Exhibit 7 at 15. Dr. Repsher further explained that "[c]oal workers' pneumoconiosis produces rounded opacities primarily in the upper zones." *Id.* at 22. Dr. Repsher also noted that subpleural honeycombing in the bases, revealed by the x-ray and CT scan evidence, was a characteristic feature of IUP/IPF. *Id.* at 23.

In a supplemental report, Dr. Houser disagreed with Dr. Repsher's reliance upon the lack of rounded opacities to exclude a diagnosis of coal workers' pneumoconiosis, citing a study that showed that "30.7% of the individuals with classifiable disease had irregular opacities." Claimant's Exhibit 4. Because coal workers' pneumoconiosis is not

[9] During a 2009 deposition, Dr. Repsher, however, acknowledged that usual interstitial pneumonitis/idiopathic pulmonary fibrosis (UIP/IPF) "usually results in death in two to five years." Employer's Exhibit 7 at 20.

limited to the upper zone, Dr. Houser opined that the location of the opacities "should not be used to include or exclude an individual from having the disease process." *Id.*

In evaluating the conflicting evidence, the administrative law judge found that Dr. Houser's opinion was entitled to greater weight than that of Dr. Repsher. Based upon the evidence of record, the administrative law judge was persuaded by Dr. Houser's opinion that the miner's survival rate was inconsistent with a diagnosis of UIP/IPF. The administrative law judge noted that the miner was alive at the time of the September 13, 2010 hearing, despite the fact that Dr. Repsher had noted x-ray changes of classic UIP/IPF on a September 29, 2003 x-ray. The administrative law judge found the miner's survival rate of over seven years to be inconsistent with a diagnosis of UIP/IPF, given Dr. Repsher's acknowledgement that UIP/IPF usually results in death in two to five years. Decision and Order at 21; Employer's Exhibit 7 at 20.

The administrative law judge also questioned Dr. Repsher's opinion because he did not provide specific medical literature references to support his opinion that coal workers' pneumoconiosis does not manifest itself as linear opacities in the lower lobes. Decision and Order at 22. The administrative law judge noted that the regulations do not foreclose a diagnosis of clinical pneumoconiosis when the opacities are irregular in shape, and are in the lower, rather than the upper, zones. *Id.*

The administrative law judge provided other bases for according less weight to Dr. Repsher's opinion, including that fact that he failed to review all of the evidence admitted in this case. Decision and Order at 21-22. The administrative law judge also found that, to the extent that Dr. Repsher's opinion was based upon his doubt that pneumoconiosis is a latent and progressive disease, it was inconsistent with the regulations.[10] *Id.* at 22. Finally, the administrative law judge questioned Dr. Repsher's reliance upon the finding of a restrictive impairment to exclude a diagnosis of clinical pneumoconiosis. *Id.* at 22-23. By contrast, the administrative law judge found that Dr. Houser's diagnosis of clinical pneumoconiosis was well-reasoned, and supported by the entirety of the medical evidence. *Id.* at 22-23. The administrative law judge, therefore, found that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 23.

Employer contends that the administrative law judge erred in according less weight to Dr. Repsher's opinion. We disagree. The administrative law judge permissibly found that the miner's survival rate of at least seven years cast doubt on the credibility of

[10] The administrative law judge, however, noted that he did not discredit Dr. Repsher's opinion entirely on this basis, since the doctor did not completely rule out the possibility of latency. Decision and Order at 22.

Dr. Repsher's diagnosis of UIP/IPF, given Dr. Repsher's acknowledgement that UIP/IPF usually results in death in two to five years. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-358 (7th Cir. 1990); Decision and Order at 21; Employer's Exhibit 7 at 20. Additionally, the administrative law judge accorded less weight to Dr. Repsher's opinion because the doctor relied upon the presence of a restrictive impairment to exclude a diagnosis of clinical pneumoconiosis. Decision and Order at 22-23. The administrative law judge noted that such a view is inconsistent with the regulations, which define pneumoconiosis as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* at 23; *see* 20 C.F.R. §718.201. Because employer does not challenge these reasons for according less weight to Dr. Repsher's opinion, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge also permissibly questioned Dr. Repsher's opinion because the doctor failed to provide support for his view that clinical pneumoconiosis does not present itself as irregular opacities in the lower lobes of the lung.[11] *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order at 22. The administrative law judge accurately noted that the regulations do not foreclose such opacities supporting a finding of pneumoconiosis.[12] *Id.* The administrative law judge also permissibly found that Dr. Houser's opinion was well-reasoned, and sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[13] *See Beeler*, 521 F.3d at

[11] Dr. Houser provided support for the administrative law judge's finding, explaining that, "Although frequently the radiographic appearance of coal workers' pneumoconiosis consists of rounded opacities which tend to occur in the upper lung zone . . . , extensive medical literature exists which demonstrate [sic] that irregular opacities are fairly common as well as disease in the mid and lower lung zone." Claimant's Exhibit 4.

[12] Because the administrative law judge provided three valid reasons for according less weight to Dr. Repsher's opinion, we need not address employer's remaining arguments regarding the weight he accorded to Dr. Repsher's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[13] Employer accurately notes that the administrative law judge did not weigh Dr. Istanbouly's opinion, along with the opinions of Drs. Repsher and Houser, at 20 C.F.R. §718.202(a)(4). However, the administrative law judge's error is harmless since Dr. Istanbouly diagnosed clinical pneumoconiosis, thereby supporting, rather than undermining, Dr. Houser's diagnosis of clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We also reject employer's contention that the administrative law judge erred in not weighing the CT scan evidence, along with

726, 24 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Section 718.204(c)

Employer argues that the administrative law judge erred in failing to address whether the medical evidence establishes that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We agree. The administrative law judge's Decision and Order contains no finding as to the cause of the miner's total disability, a necessary element of entitlement. *See Trent*, 11 BLR at 1-27. Consequently, we must vacate the administrative law judge's award of benefits, and remand the case to the administrative law judge with instructions to address whether the evidence establishes that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Section 411(c)(4) Presumption

Finally, we agree with claimant and the Director that the administrative law judge erred in finding that the miner failed to establish that he worked for fifteen years in a surface mine with dust conditions substantially similar to those found in underground mines, and therefore erred in determining that the miner could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[14] The administrative law judge found that the miner failed to prove that, during his twenty-two years as a surface miner, he was exposed to dust conditions substantially similar to those existing

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the medical opinion evidence, at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the CT scan evidence, noting the conflicting interpretations of an October 28, 2008 CT scan rendered by Drs. Smith and Wiot. Decision and Order at 7-8, 20. The administrative law judge also noted that Drs. Houser and Repsher each reviewed the CT scan evidence in formulating their medical opinions. *Id.* at 21.

[14] The arguments in the response briefs of claimant and the Director, Office of Workers' Compensation Programs, are in support of another method by which the administrative law judge may reach the same result and award benefits. Therefore, those arguments are properly before the Board. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 133, 10 BLR 2-62, 2-67 (3d Cir. 1987); *Whiteman v. Boyle Land & Fuel Co.*, 15 BLR 1-11, 1-18 (1991) (en banc); *King v. Tenn. Consolidated Coal Co.*, 6 BLR 1-87, 1-92 (1983).

underground:

> The only evidence that [c]laimant] has presented regarding his coal dust exposure is his testimony that he was exposed to "rock and coal dust" on a "daily basis." With no evidence of how much coal dust versus other types of dust and an idea of the amount of coal dust, I cannot find his work to be substantially similar to underground mining conditions. Therefore, I do not credit the [c]laimant with at least fifteen years of underground or substantially similar coal mine and the [Section 411(c)(4)] presumption . . . does not apply.

Decision and Order at 20.

The United States Court of Appeals for the Seventh Circuit has held that, while a claimant bears the burden of establishing comparability, he is "required only to produce sufficient evidence of the surface mining conditions under which he worked." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). As summarized by the administrative law judge, the miner testified that, during his employment at Peabody Coal Company, he worked as a maintenance man, performing repairs at the tipple, where he was exposed to coal and rock dust on a daily basis. Decision and Order at 4. The administrative law judge further noted that the miner testified that he continued to work at the tipple after he began working for employer, a job that required him to put coal in different bins, causing him to be exposed to dust. *Id.* The administrative law judge further noted that claimant testified that he subsequently worked as a driller, where he was exposed to "coal and rock dust that would come up during the drilling." *Id.* Contrary to the administrative law judge's analysis, this uncontradicted testimony regarding the miner's working conditions, if credited, is sufficient under *Leachman* to satisfy the "substantially similar" requirement of Section 411(c)(4). *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 480, 22 BLR 2-265, 2-276 (7th Cir. 2001).

Moreover, the Director accurately notes that the administrative law judge erred in his implicit finding that exposure to rock dust should not be considered in determining whether the comparability requirement is satisfied. The Board has defined "coal dust" and "coal mine dust" as "airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine." *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91, 1-93 (1985); *see also* 65 Fed. Reg. 79,920, 79,958 (Dec. 20, 2000) (recognizing the "Department's long-held position that the occupational dust exposure at issue under the [Act] is the total exposure arising from coal mining and not only exposure to coal dust itself"). We, therefore, vacate the administrative law judge's finding that the miner failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. We instruct the administrative law judge,

on remand, that if he finds that the evidence does not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), he must reconsider whether the miner had fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. If the administrative law judge finds that claimant is entitled to the presumption that the miner's total disability was due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether employer has rebutted the presumption.

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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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