



BRB No. 14-0340 BLA

MARVIN BRUNER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	
)	DATE ISSUED: 07/10/2015
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-5458) of Administrative Law Judge Alice M. Craft 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 miner's claim filed on May 6, 2010.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),¹ the administrative law judge credited claimant with thirty-one years of qualifying coal mine employment,² and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further 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 claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge, in finding that claimant established thirty-one years of qualifying coal mine employment, erred in relying upon 20 C.F.R. §718.305(b)(2), which it alleges is invalid. Employer also argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in rejecting opinions that she found inconsistent with scientific studies approved by the Department of Labor (DOL) in the preamble to the 2001 amended regulations. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that 20 C.F.R. §718.305(b)(2) is invalid. The Director further contends that the administrative law judge permissibly relied upon the preamble in discounting the opinions of employer's physicians on rebuttal. In a reply brief, employer reiterates its previous contentions.

¹ As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the 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). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

² The record reflects that claimant's coal mine employment was in Indiana. Hearing Transcript at 16. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 claimant invoked the Section 411(c)(4) presumption. Employer initially challenges the administrative law judge's finding that claimant established thirty-one years of qualifying coal mine employment. Section 411(c)(4), as implemented by 20 C.F.R. §718.305, requires at least fifteen years of employment either in "underground coal mines," or in "coal mines other than underground coal mines" in substantially similar conditions. Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found that claimant worked at the Squaw Creek Mine, as a surface miner, for his entire career. Decision and Order at 4. The administrative law judge further noted that claimant "testified that he was exposed to coal and rock dust every day at the Squaw Creek Mine," and that dust conditions were worse in his surface mining work than when he was working in an underground mine. *Id.* The administrative law judge, therefore, found that claimant established that he worked in conditions substantially similar to those in an underground coal mine, and credited claimant with thirty-one years of qualifying coal mine employment. *Id.* Substantial evidence, in the form of claimant's credited testimony as to his work conditions, supports the administrative law judge's determination.

Employer challenges the administrative law judge's determination on the basis that she relied on 20 C.F.R. §718.305(b)(2), and attacks the regulation as "arbitrary, capricious and an abuse of discretion because it lacks any support in the rulemaking record or elsewhere." Employer's Brief at 14. Because the administrative law judge's determination is supported by substantial evidence in the form of claimant's testimony as to dust conditions at his surface mine as compared to those in underground mining, the administrative law judge's determination is affirmable without regard to the regulation cited by employer.

We observe that in promulgating 20 C.F.R. §718.305(b)(2), the Department explained that the regulation was intended to codify the Director's long-standing interpretation of "substantially similar," as reflected in the standard set forth by the

United States Court of Appeals for the Seventh Circuit in *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988).³ 78 Fed. Reg. 59,102, 59,104 (Sept. 25, 2013). The United States Courts of Appeals for the Sixth and Tenth Circuits have recognized that 20 C.F.R. §718.305(b)(2) did not change the law, but merely codified the Department’s long-standing position. *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014). Consequently, we affirm the administrative law judge’s finding that claimant established thirty-one years of qualifying coal mine employment.

Employer next 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). Employer specifically argues that the administrative law judge erred in finding that the pulmonary function study, blood gas study, and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv).

The record contains three pulmonary function studies conducted on June 21, 2010, September 16, 2010, and March 9, 2012. The June 21, 2010 pulmonary function study produced qualifying values⁴ before the administration of a bronchodilator, but non-qualifying values after the administration of a bronchodilator. Director’s Exhibit 12. The September 16, 2010 and March 9, 2012 pulmonary function studies produced qualifying values, both before and after the administration of a bronchodilator. Director’s Exhibit 26; Employer’s Exhibit 13.

In addressing the pulmonary function study evidence, the administrative law judge discounted the two qualifying pulmonary function studies conducted on September 16, 2010 and March 9, 2012, because the administering physician, Dr. Repsher, indicated

³ In *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988), interpreting the originally-enacted Section 411(c)(4), the Seventh Circuit rejected the argument that surface miners needed to present evidence addressing the conditions in underground mines in order to prove substantial similarity. Instead, the court held that an aboveground miner “is required only to produce sufficient evidence of the surface mining conditions under which he worked.” *Id.*

⁴ 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.

that they were invalid.⁵ Decision and Order at 24. In regard to the remaining pulmonary function study conducted on June 21, 2010,⁶ the administrative law judge accurately found that the pre-bronchodilator portion of the study produced qualifying values. *Id.* Although the administrative law judge acknowledged that the post-bronchodilator portion of the June 21, 2010 study was “non-qualifying,” she noted that this portion of the study was “very close to qualifying.” *Id.* In support of her finding, the administrative law judge noted that the post-bronchodilator FEV1 value was qualifying, and that the post-bronchodilator FEV1/FVC ratio was close to qualifying at 58%.⁷ *Id.* Given the qualifying pre-bronchodilator values, and “very close to qualifying” post-bronchodilator values of the June 21, 2010 pulmonary function study, the administrative law judge found that the pulmonary function study evidence considered alone would establish total disability. *Id.*

In its post-hearing brief, employer acknowledged that the pulmonary function studies “appear to meet the disability threshold standard.” Employer’s Post-Hearing Brief at 30. Rather than challenging the pulmonary function study evidence, employer instead pointed to the “contrary probative” blood gas study evidence. *Id.* In this context, the administrative law judge acted within her discretion in finding that the “non-qualifying” post-bronchodilator results of the June 21, 2010 did not undermine the qualifying pre-bronchodilator results, as the post-bronchodilator values were “very close” to qualifying. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (*en banc*). Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the pulmonary function study evidence considered alone would establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

⁵ In a chart summarizing the pulmonary function study evidence, the administrative law judge noted that the September 16, 2010 and March 9, 2012 pulmonary function studies were invalid. Decision and Order at 11. In her subsequent consideration of the pulmonary function study evidence, the administrative law judge again noted that each of these studies had been invalidated. *Id.* at 24.

⁶ The administrative law judge noted that Dr. Gerblich validated the June 21, 2010 pulmonary function study. Decision and Order at 24.

⁷ For a pulmonary function test to constitute evidence of total disability pursuant to Section 718.204(b)(2)(i), it must produce *both* a qualifying FEV1 value *and* either an FVC or MVV equal to or less than those values appearing in the tables set forth in Appendix B, or it must produce an FEV1 to FVC ratio equal to or less than 55%. *See* 20 C.F.R. §718.204(b)(2)(i)(A)-(C).

Employer next argues that the administrative law judge erred in finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The record contains four resting blood gas studies conducted on June 21, 2010, September 16, 2010, May 23, 2011, and March 9, 2012.⁸ While the June 21, 2010 and September 16, 2010 blood gas studies produced qualifying values,⁹ Director's Exhibits 12, 26, the May 23, 2011 and March 9, 2012 blood gas studies produced non-qualifying values. Employer's Exhibits 8, 13. The administrative law judge initially accorded less weight to the non-qualifying May 23, 2011 blood gas study because it was conducted while claimant was receiving supplemental oxygen. Decision and Order at 24. The administrative law judge noted that the only remaining non-qualifying study, the study conducted on March 9, 2012, demonstrated "increased carbon dioxide, and decreased oxygen." *Id.* Because two of the three valid blood gas studies were qualifying, and the third "showed resting hypoxia," the administrative law judge found that the blood gas study evidence established total disability. *Id.*

Employer argues that the administrative law judge failed to adequately explain why she accorded less weight to the March 9, 2012 blood gas study.¹⁰ Employer specifically argues that the administrative law judge improperly "interpreted the significance of the tests when she declared that the 2012 test demonstrated increased carbon dioxide." Employer's Brief at 19. We disagree. Although employer correctly states that the administrative law judge characterized the March 9, 2012 study as revealing "increased carbon dioxide," she was not interpreting the study herself. Instead, the administrative law judge was relying on the opinions of employer's physicians, Drs. Repsher and Tuteur, who testified that the study revealed high or elevated carbon dioxide levels. Employer's Exhibits 14 at 45-47, 16 at 34-35. Because two of the three valid blood gas studies are qualifying, and because the remaining study revealed increased

⁸ The administrative law judge accurately noted that the record does not contain any exercise arterial blood gas studies. Decision and Order at 24.

⁹ A qualifying blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

¹⁰ As previously noted, the administrative law judge discounted the non-qualifying blood gas study conducted on May 23, 2011, because it was taken while claimant was hospitalized for an acute respiratory condition, and was taken while claimant was being administered oxygen. Appendix C to 20 C.F.R. Part 718; Decision and Order at 11, 24. Because employer does not challenge the administrative law judge's basis for discrediting the May 23, 2011 blood gas study, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

carbon dioxide, substantial evidence supports the administrative law judge's finding that the blood gas study evidence if considered alone would establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 24. The administrative law judge's finding is, therefore, affirmed.

Moreover, even if the blood gas studies did not definitively establish disability, they cannot be said to unequivocally demonstrate claimant's ability to engage in his usual coal mine employment and thus clearly weigh in the opposite direction. Further, the administrative law judge's analysis of the blood gas studies is consistent with that of the medical experts as discussed *infra*.

In finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Houser, Rasmussen, Repsher, and Tuteur. Each of these physicians provided an assessment of claimant's pulmonary status based upon his own assessment of claimant's pulmonary function and arterial blood gas study results. Test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985). The determination of the significance of a test is a medical assessment for the doctor. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984).

Drs. Houser and Rasmussen opined that claimant suffers from a totally disabling pulmonary impairment.¹¹ Director's Exhibit 12; Claimant's Exhibit 6. Dr. Repsher opined that claimant suffers from a "very severe respiratory impairment," which he noted was "probably" totally disabling. Employer's Exhibit 16 at 15. Based upon the information available to him, Dr. Tuteur opined that it was "not impossible for [claimant] to complete the tasks of his last job." Employer's Exhibit 14 at 32. However, Dr. Tuteur cautioned that, in order to confirm such an assessment from a pulmonary standpoint, he would need the results from an exercise arterial blood gas study. *Id.* at 32, 64-65.

In finding that the medical opinion evidence established total disability, the administrative law judge stated:

I find that the opinions of Drs. Houser, Rasmussen, and Repsher that the [c]laimant is disabled outweigh the equivocal opinion of Dr. Tuteur. The

¹¹ Dr. Houser opined that claimant suffers from a "disabling respiratory impairment which would physically preclude him from performing his prior job as a coal miner." Director's Exhibit 12. Dr. Rasmussen opined that claimant suffers from "a totally disabling chronic lung disease." Claimant's Exhibit 6.

opinions of Drs. Houser, Rasmussen and Repsher are in better accord both with the evidence underlying their opinions, and the overall weight of the medical evidence of record. I find that the preponderance of the medical opinion evidence supports a finding of total disability.

Decision and Order at 25.

Employer argues that the administrative law judge “ignored Dr. Tuteur’s testimony that [claimant’s] disability was due to the combined effects of aging” Employer’s Brief at 20. Contrary to employer’s contention, Dr. Tuteur addressed whether claimant was totally disabled from a pulmonary standpoint, ultimately stating that he could not make such a determination without the results from an exercise blood gas study. Employer’s Exhibit 14 at 64-65. Given Dr. Tuteur’s acknowledgment that he needed additional testing to confirm whether claimant could perform his usual coal mine employment from a pulmonary standpoint, the administrative law judge permissibly found his opinion equivocal. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); Decision and Order at 25. The administrative law judge correctly stated that all of the remaining physicians, namely Drs. Houser, Rasmussen, and Repsher, opined either that claimant suffers from a totally disabling pulmonary impairment, or that claimant “probably” suffers from a totally disabling pulmonary impairment.¹² *Id.* Because it is based upon substantial evidence, we affirm the administrative law judge’s finding that the medical opinion evidence considered alone would establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Moreover, the administrative law judge properly weighed the pulmonary function study, blood gas study, and medical opinion evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987)(en banc); Decision and Order at 25. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge’s finding that claimant established over 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), we affirm the administrative law judge’s finding that claimant invoked the rebuttable presumption

¹² Employer contends that the administrative law judge erred in not considering that Dr. Repsher attributed claimant’s pulmonary impairment to his obesity. We disagree. A claimant need not prove that his pulmonary disability arose out of coal mine employment, to invoke the presumption at 20 C.F.R. §718.305. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-86-87 (1987).

of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,¹³ 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Repsher and Tuteur. Drs. Repsher and Tuteur diagnosed chronic obstructive pulmonary disease (COPD) due entirely to claimant's cigarette smoking. Director's Exhibit 26; Employer's Exhibits 14 at 64; 16 at 15, 43. Drs. Repsher and Tuteur opined that claimant's obstructive pulmonary impairment was not caused by his coal mine dust exposure. *Id.*

The administrative law judge discredited the opinions of Drs. Repsher and Tuteur because she found that each was inadequately explained and inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions. Decision and Order at 29-30. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 31.

¹³ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Initially, we reject employer's contention that the administrative law judge erred in referring to the preamble to the 2001 regulatory revisions in determining the credibility of the medical opinion evidence. Employer's Brief at 24-25. It was within the administrative law judge's discretion to rely on the preamble as a guide to assess the credibility of the medical evidence in this case. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, or as a presumption that all obstructive lung disease is pneumoconiosis, but merely consulted it as a statement of credible medical research findings accepted by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012).

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Repsher and Tuteur were insufficient to disprove the existence of legal pneumoconiosis. Employer's Brief at 25-26. We disagree. Noting that the preamble to the revised regulations acknowledges the prevailing views of the medical community that the risks of smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of Drs. Repsher and Tuteur because she found that neither physician adequately explained why claimant's coal mine dust exposure did not contribute, along with his cigarette smoking, to his obstructive pulmonary impairment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order at 30-31.

Because the administrative law judge permissibly discredited the opinions of Drs. Repsher and Tuteur,¹⁴ we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

¹⁴ Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Repsher and Tuteur, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

The administrative law judge next addressed whether employer could establish rebuttal by showing that no part of claimant’s respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted the opinions of Drs. Repsher and Tuteur, that claimant’s disabling pulmonary impairment was not caused by pneumoconiosis, because Drs. Repsher and Tuteur did not diagnose legal pneumoconiosis, contrary to the administrative law judge’s finding that employer failed to disprove legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); Decision and Order at 31. Therefore, we affirm the administrative law judge’s determination that employer did not rebut the Section 411(c)(4) presumption by proving that no part of claimant’s total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, BLR (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge’s award of benefits.¹⁵

¹⁵ Employer argues that the administrative law judge’s decision in this case, as well as her decisions in other cases, “raise questions as to her impartiality or ability to provide ‘just’ proceedings.” Employer’s Brief at 23. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence, which is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 107 (1992). In this case, employer has not met that burden. Employer merely asserts that, in the 107 decisions issued by the administrative law judge since 2006, she has declared that “[m]edical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, are . . . contrary to the premises underlying the regulations.” Employer’s Brief at 23. Even if employer’s characterization of the administrative law judge’s decisions is accurate, employer has failed to demonstrate how this reflects bias on the part of the administrative law judge. Moreover, employer has not provided any concrete evidence to support its allegations that the administrative law judge held a preconceived view of the evidence, or that she applied a “formula” that finds employers “strictly liable in any case where a former miner and cigarette smoker is totally disabled by obstructive lung disease.” *Id.*

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge