

BRB No. 12-0553 BLA

RONALD L. LYNCH)
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 06/27/2013
)
 OLD BEN COAL COMPANY)
)
 and)
)
 THE TRAVELERS COMPANIES,)
 INCORPORATED)
)
 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 Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

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

McGRANERY, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order on Remand Awarding Benefits (07-BLA-5426) of Administrative Law Judge Robert B. Rae rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a miner's claim filed on February 14, 2006, Director's Exhibit 2, and is before the Board for the second time.

Initially, Administrative Law Judge Jeffrey Tureck credited claimant with sixteen years of coal mine employment,¹ and found that the medical evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Tureck denied benefits. Judge Tureck further found, assuming arguendo that claimant was entitled to benefits, that employer was not the responsible operator and that liability for the payment of any benefits must be transferred to the Black Lung Disability Trust Fund (the Trust Fund).

Upon review of claimant's appeal, and of the cross-appeal filed by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated Judge Tureck's denial of benefits. *Lynch v. Old Ben Coal Co.*, BRB Nos. 10-0209 BLA/A (Dec. 8, 2010)(unpub.). Because Judge Tureck erred in considering x-ray evidence submitted by employer in excess of the evidentiary limitations of 20 C.F.R. §725.414, and because substantial evidence did not support Judge Tureck's analysis of the medical opinion evidence, the Board vacated his findings that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (4), and remanded the case to him for further consideration. *Lynch*, slip op. at 5-6, 8-9. Additionally, the Board remanded the case for consideration of whether claimant was entitled to the presumption at amended Section 411(c)(4) of the Act,² 30 U.S.C. §921(c)(4), and instructed Judge Tureck to allow the parties to submit evidence to address the change in law. *Lynch*, slip op. at 3-4. Finally, the Board held that employer was properly identified as the

¹ The administrative law judge had accepted employer's stipulation to sixteen years of coal mine employment. The Board affirmed that finding as unchallenged on appeal. *Lynch v. Old Ben Coal Co.*, BRB Nos. 10-0209 BLA/A (Dec. 8, 2010)(unpub.), slip op. at 3 n.4. The record indicates that claimant's coal mine employment was in Illinois. Director's Exhibit 3. 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).

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

responsible operator, and therefore vacated Judge Tureck's determination that the Trust Fund would be liable for any benefits ultimately awarded. *Lynch*, slip op. at 12-16.

On remand, due to Judge Tureck's unavailability, the case was reassigned without objection to Administrative Law Judge Robert B. Rae (the administrative law judge). The record contains no indication, following the reassignment, that the administrative law judge reopened the record to allow for the submission of evidence to address the change in law, or that the parties requested permission to submit such evidence. On July 3, 2012, the administrative law judge issued a Decision and Order on Remand Awarding Benefits. The administrative law judge found that claimant invoked the Section 411(c)(4) presumption, and that employer failed to rebut it. The administrative law judge therefore awarded benefits pursuant to Section 411(c)(4). In addition, the administrative law judge found that claimant affirmatively established entitlement to benefits under 20 C.F.R. Part 718, by establishing that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b),(c). Accordingly, the administrative law judge awarded benefits pursuant to 20 C.F.R. Part 718.

On appeal, employer contends that the administrative law judge erred in failing to reopen the record to allow employer to submit evidence addressing the change in law caused by the reinstatement of Section 411(c)(4). Additionally, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding that employer did not rebut the Section 411(c)(4) presumption, and in finding that claimant established that he is totally disabled due to pneumoconiosis.³ Claimant responds in support of the administrative law judge's award of benefits, to which employer replied. The Director declined to file a substantive response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Failure to Reopen the Record Does Not Require Remand

Employer argues that the administrative law judge's decision must be vacated because the administrative law judge on remand did not comply with the Board's Order, which specifically provided that, "The administrative law judge, on remand, must allow

³ Employer does not challenge the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and invoked the Section 411(c)(4) presumption. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

for the submission of evidence by the parties to address the change in law, consistent with the evidentiary limitations.” *Lynch*, BRB Nos. 10-0209 BLA/A, slip op. at 4. Employer asserts that the administrative law judge’s failure is “legal error requiring remand,” and that it amounts to a “due process violation.” Employer’s Brief at 8. Employer does not state how the administrative law judge’s error affected the conduct of the litigation, if at all.

In *Shinseki v. Sanders*, 556 U.S. 396 (2009), the United States Supreme Court rejected a similar argument. Sanders was a Veterans Administration claimant who contended that the denial of his claim must be vacated because the Veterans Administration had failed to comply with the statutory requirement that he be provided notice of the portion of the requisite evidence which the Secretary would provide, and notice of the portion of the requisite evidence which he must provide. Unpersuaded, the Veterans Court affirmed the denial of his claim because Sanders did not identify what different evidence he would have produced, or he would have asked the Secretary to obtain for him, had he received proper notice. When Sanders appealed that decision to the United States Court of Appeals for the Federal Circuit, that court reversed. The court held that when the Veterans Administration provides a notice letter which is deficient in any respect, the error is presumed prejudicial, requiring reversal, unless the Veterans Administration can prove otherwise. The Veterans Administration appealed to the Supreme Court which reversed the Federal Circuit’s decision, holding the notice error had been harmless. The Court began its analysis with the observation that the harmless error rule had been incorporated into the Administrative Procedure Act at 5 U.S.C. §706 (“[A] court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error”). *Shinseki*, 556 U.S. at 406, citing *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The Court went on to repeat its admonition to courts not to:

determin[e] whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record. See *Kotteakos v. United States*, 328 U.S. 750, 760, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The federal “harmless-error” statute, now codified at 28 U.S.C. §2111, tells courts to review cases for errors of law “without regard to errors” that do not affect the parties’ “substantial rights.” That language seeks to prevent appellate courts from becoming “ ‘impregnable citadels of technicality,’ ” *Kotteakos*, 328 U.S. at 759, 66 S.Ct. 1239. And we have read it as expressing a congressional preference for determining “harmless error” without the use of presumptions insofar as those presumptions may lead courts to find an error harmful, when, in fact, in the particular case before the court, it is not. See *Id.*, at 760, 66 S.Ct. 1239; *O’Neal v. McAninch*, 513 U.S. 432, 436-437, 115 S.Ct. 992, 130 L.Ed. 947 (1995)

Shinseki, 556 U.S. at 407-08. The court then examined the record, stating:

[claimant] has not told the Veterans Court, the Federal Circuit, or this Court, what specific additional evidence proper notice would have led him to obtain or seek. He has not explained to the Veterans Court, to the Federal Circuit, or to us, how the notice error to which he points could have made any difference.

Id. at 413. The Court concluded that under these circumstances, the “harmlessness issue [is not] a borderline question.” *Id.* Similarly, in this case, employer has not told the Board what specific evidence it would have offered had the record been reopened, nor has it shown how reopening the record would have made any difference. The inescapable conclusion under the teaching of *Shinseki* is that the error was harmless.

Our dissenting colleague disagrees. She would hold that the administrative law judge’s failure on remand to follow the Board’s direction to reopen the record requires that his decision be vacated, even though employer has not shown prejudice. Implicit in her opinion is a presumption that the administrative law judge’s error affected substantial rights. Yet application of such a presumption is contrary to the teaching of the Supreme Court in *Shinseki*. It was the Federal Circuit’s application of a similar presumption which the Supreme Court condemned in *Shinseki* because it conflicted with Congressional intent that judicial decisions be upheld unless they contain error which is, in fact, harmful. *Id.* at 413. Application of such presumptions is wrong because they “would prevent that court from resting its conclusion on the facts and circumstances of the particular case.” *Id.* at 408. Thus, we must consider the allegation of error in the context of the case, and necessarily conclude the administrative law judge’s error was harmless.

Moreover, we disagree with our dissenting colleague that the decision of the United States Court of Appeals for the Seventh Circuit in *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011), compels a different conclusion. It is true that when the *Keene* court remanded the case, it ordered that the record be reopened to consider the applicability of the Section 411(c)(4) presumption. *Keene*, 645 F.3d at 851, 24 BLR at 2-401. But reopening the record was not necessary in this case because the applicability of the presumption is uncontested. None of the three elements required to invoke the Section 411(c)(4) presumption is in dispute: (1) that the claim was filed after January 1, 2005, and was pending on March 23, 2010; (2) that claimant has established at least fifteen years of qualifying coal mine employment; and (3) that claimant has a totally disabling respiratory or pulmonary impairment. Employer does not challenge the administrative law judge’s finding that claimant invoked the Section 411(c)(4) presumption. Thus, it is not the applicability of the presumption, but its application to which employer objects. It is noteworthy that the *Keene* court did not order that the record be reopened to apply the presumption. Even though the reenacted

presumption is a change in law, reopening the record was unnecessary because the issues to be resolved under the presumption, *i.e.*, the existence of pneumoconiosis and the causation of claimant's totally disabling respiratory impairment, are also issues under 20 C.F.R. Part 718, and the same evidentiary limitations apply to both provisions. The only reasonable conclusion to draw from employer's failure to identify additional evidence it would have submitted had the record been reopened, is that it had already submitted what it considered the best, relevant evidence available to it which was admissible under the evidentiary limitations.⁴ Since employer has not demonstrated that it was prejudiced by the administrative law judge's failure to order the record reopened, we hold the administrative law judge's omission to be harmless error. The Supreme Court's statement in *Shinseki* is equally applicable to the case at bar: "the harmlessness issue [is not] a borderline question." *Shinseki*, 556 U.S. at 413. Hence, we shall address employer's contentions that the administrative law judge erred in failing to find it had rebutted the Section 411(c)(4) presumption.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at 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). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 17-21.

To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must disprove the existence of both clinical and legal pneumoconiosis.⁵ See 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899,

⁴ The administrative law judge had already provided employer with an opportunity to submit two supplemental reports by each of its doctors, addressing both the existence of pneumoconiosis and the relationship of claimant's disabling impairment to coal mine employment. Administrative Law Judge's Order dated January 21, 2009; Hearing Transcript at 29-36; Employer's Evidence Summary Form Dated October 8, 2008.

⁵ 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 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

900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that the x-ray evidence was in equipoise as to the existence of clinical pneumoconiosis.⁶ Decision and Order at 7-8.

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Cohen, Houser, Tuteur, and Rosenberg. Drs. Cohen and Houser opined that claimant has legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to both coal mine dust exposure and smoking. Director's Exhibit 9 at 6; Claimant's Exhibit 1 at 6-7. Drs. Tuteur and Rosenberg attributed claimant's COPD solely to smoking. Employer's Exhibits 3 (Dr. Tuteur's March 16, 2007 report at 2); 4 at 5.

The administrative law judge found that the opinions of Drs. Cohen and Houser were consistent with a premise underlying the regulatory definition of pneumoconiosis, expressed by the Department of Labor in the preamble to the amended regulations, that coal mine dust exposure and smoking are additive in causing obstructive lung disease. Decision and Order on Remand at 19, 21. Additionally, the administrative law judge found that both Drs. Cohen and Houser relied on claimant's smoking and coal mine employment histories in forming their opinions. *Id.* at 20, 21. Moreover, the administrative law judge found that Dr. Cohen's opinion was well-reasoned, since Dr. Cohen explained that the pattern of impairment seen in claimant's objective studies did not rule out coal mine dust exposure as a cause of claimant's COPD. *Id.* at 20-22.

On the other hand, the administrative law judge found that Dr. Tuteur's opinion was inconsistent with the medical literature accepted by the Department of Labor in the preamble to the regulations, in that Dr. Tuteur opined that claimant's COPD is due solely to smoking because coal mine dust exposure rarely causes COPD. Moreover, the administrative law judge discounted Dr. Tuteur's opinion eliminating coal mine dust exposure as a cause of claimant's COPD, based on the reversibility seen on claimant's pulmonary function study, because he found that Dr. Tuteur did not adequately explain the cause of claimant's residual impairment. The administrative law judge discounted Dr. Rosenberg's opinion as contrary to the premises underlying the regulations, because Dr. Rosenberg required the presence of a coal macule before he could relate claimant's emphysema to coal mine dust exposure. The administrative law judge also discounted Dr. Rosenberg's opinion because Dr. Rosenberg unpersuasively relied on the reduction in

pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

⁶ We affirm the above finding as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

claimant's FEV1/FVC ratio to eliminate coal mine dust exposure as a cause of claimant's pulmonary impairment. Therefore, the administrative law judge found that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis, based upon the opinions of Drs. Tuteur and Rosenberg.

Employer first contends that the administrative law judge erred in referring to the preamble to the amended regulations in evaluating the credibility of the medical opinion evidence. Employer's Brief at 9-17. We disagree. The administrative law judge, as the trier-of-fact, has the discretion to determine whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *see also Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). We therefore reject employer's allegation of error.

Employer next contends that the administrative law judge erred in discounting the opinions of Drs. Tuteur and Rosenberg, and in crediting the opinions of Drs. Cohen and Houser. Employer's Brief at 17-22. Employer's contentions lack merit.

Contrary to employer's contention, the administrative law judge rationally found that Dr. Tuteur's opinion was inconsistent with a premise underlying the regulations, because Dr. Tuteur stated that coal mine dust exposure rarely causes COPD. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order on Remand at 19; Employer's Exhibit 3 (Dr. Tuteur's August 9, 2007 report at 4). As the administrative law judge noted, the Department of Labor found that the prevailing medical literature indicates that coal mine dust exposure is associated with clinically significant obstructive lung disease, and that coal miners who smoke have an additive risk of developing significant obstruction. Decision and Order on Remand at 19, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); Decision and Order on Remand at 21. Additionally, the administrative law judge acted within his discretion in discounting Dr. Tuteur's opinion, because he found that Dr. Tuteur did not adequately explain why the partial reversibility seen on claimant's post-bronchodilator pulmonary function testing eliminated coal mine dust exposure as a cause of claimant's remaining impairment.⁷ *See Crockett Collieries, Inc. v.*

⁷ Contrary to employer's contention, the administrative law judge's incorrect statement, that the post-bronchodilator portions of Dr. Tuteur's pulmonary function study yielded qualifying values, does not affect the administrative law judge's evaluation of the credibility of Dr. Tuteur's opinion. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009);

Barrett, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order on Remand at 19, 21. We thus affirm the administrative law judge's decision to discount Dr. Tuteur's opinion, as it is rational and supported by substantial evidence.

We also reject employer's contention that the administrative law judge erred in discounting Dr. Rosenberg's opinion. The administrative law judge noted that Dr. Rosenberg excluded coal mine dust exposure as a cause of claimant's emphysema because there were no coal macules in claimant's lungs. The administrative law judge acted within his discretion in finding this aspect of Dr. Rosenberg's opinion to be inconsistent with the premise underlying the regulations, that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order on Remand at 19, *quoting* 65 Fed. Reg. at 79,943; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; Decision and Order on Remand at 19, 21; Employer's Exhibit 12 at 7-8, 10; Employer's Exhibit 17 at 4-5. Moreover, the administrative law judge rationally determined that Dr. Rosenberg's opinion was inconsistent with the premises underlying the regulations, because the physician relied on the reduction in claimant's FEV1/FVC ratio to eliminate coal mine dust exposure as a cause of claimant's obstructive impairment, even though the regulations specifically provide that a reduced FEV1/FVC ratio may support a finding that a claimant is totally disabled under the Act. *See* 20 C.F.R. §718.204(b)(2)(i)(C); *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32; Decision and Order on Remand at 19, 21; Employer's Exhibit 4 at 5; Employer's Exhibit 12 at 6, 10; Employer's Exhibit 17 at 3-4. Thus, we affirm the administrative law judge's credibility determination regarding Dr. Rosenberg's opinion, as it is rational and supported by substantial evidence.

Further, we reject employer's argument that the administrative law judge credited the opinions of Drs. Cohen and Houser without adequately considering whether the opinions were reasoned and documented. The administrative law judge reasonably relied on the opinions of Drs. Cohen and Houser, because he found that they adequately considered claimant's coal mine employment and smoking histories, and because their

Larioni v. Director, OWCP, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 19-20. Dr. Tuteur ruled out coal mine dust exposure as a cause of claimant's COPD, in part, because of the partial reversibility of the "severe" obstructive impairment seen on claimant's March 16, 2007 pulmonary function study, not because the study's post-bronchodilator values were non-qualifying under the tables at 20 C.F.R. Appendix B. Employer's Exhibit 3 (Dr. Tuteur's March 16, 2007 report at 2); Employer's Exhibit 11 at 8.

opinions were consistent with a premise underlying the revised regulations, that coal mine dust and smoking are additive in causing significant obstructive lung disease. Decision and Order on Remand at 19-20; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *see also Adams*, 694 F.3d at 801-02, 25 BLR at 2-210-11; *Looney*, 678 F.3d at 314-16, 25 BLR at 2-129-32. Additionally, the administrative law judge permissibly found that Dr. Cohen's opinion was "well-reasoned in describing that no physiological test differentiates between smoking and coal dust in causing an impairment and that partial reversibility does not rule out coal dust as a contributing factor to [c]laimant's disability." *See Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-492 (7th Cir. 2002); Decision and Order on Remand at 19-21. Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis.

We next address the administrative law judge's finding that employer failed 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); Decision and Order at 20-21. In so finding, the administrative law judge considered the opinions of Drs. Cohen, Houser, Tuteur, and Rosenberg, all of whom agreed that claimant suffers from a totally disabling respiratory or pulmonary impairment, but disagreed as to its cause. Drs. Cohen and Houser related claimant's total disability to COPD arising, in part, out of coal mine employment, Director's Exhibit 9 at 6; Claimant's Exhibit 1 at 10; Drs. Tuteur and Rosenberg related claimant's total disability solely to smoking. Employer's Exhibit 3 (Dr. Tuteur's August 9, 2007 report at 5); Employer's Exhibit 4 at 5. The administrative law judge discounted the opinions of Drs. Tuteur and Rosenberg, and credited those of Drs. Cohen and Houser, for the same reasons he provided for his analysis of the opinions on the issue of whether employer disproved the existence of legal pneumoconiosis, which we have affirmed. Decision and Order on Remand at 22. Therefore, we also affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, coal mine employment, as it is rational and supported by substantial evidence. Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits under Section 411(c)(4).

Entitlement under 20 C.F.R. Part 718

The administrative law judge also found that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718, by affirmatively establishing that he is totally disabled due to legal pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.204(b),(c). Decision and Order at 21-22. To establish entitlement to benefits under

20 C.F.R. Part 718, claimant must establish by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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).

The administrative law judge found that the medical opinions of Drs. Cohen and Houser established that claimant has legal pneumoconiosis, in the form of COPD/chronic bronchitis due to both smoking and coal mine dust exposure, and that he is totally disabled due to legal pneumoconiosis. The administrative law judge discredited the contrary opinions of Tuteur and Rosenberg. He gave the same reasons for crediting and discrediting the conflicting medical opinions on legal pneumoconiosis and disability causation that he gave for his analysis of the credibility of the opinions under Section 411(c)(4), which we have affirmed. Therefore, we also affirm, for the reasons discussed above, the administrative law judge's findings of legal pneumoconiosis and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Accordingly, we affirm the administrative law judge's award of benefits under 20 C.F.R. Part 718.

Attorney's Fee

Having affirmed the administrative law judge's award of benefits under both Section 411(c)(4) and 20 C.F.R. Part 718, we now address the fee petition filed by claimant's counsel. On August 13, 2012, claimant's counsel filed a fee petition with the Board requesting a total fee of \$4,200.00, representing 17.50 hours of legal services at an hourly rate of \$240.00, for work performed in the prior appeal, BRB Nos. 10-0209 BLA/A. Employer objects to the requested hourly rate, contending that claimant's counsel has not submitted evidence of her market rate.⁸ Claimant's counsel filed a reply to employer's objection.

In support of her requested hourly rate, claimant's counsel provided a list of black lung cases in which the Office of Administrative Law Judges, the Board, and the United States Court of Appeals for the Seventh Circuit have awarded her an hourly rate of \$240.00. Based on the documentation provided by claimant's counsel, the Board finds that the referenced black lung awards support claimant's counsel's requested hourly rate

⁸ Alternatively, employer requests that the fee petition be held in abeyance pending claimant's counsel's submission of her answers to employer's discovery request concerning her requested hourly rate, pending before the administrative law judge. Employer's Opposition to Fee Petition at 4. Employer's request is denied.

of \$240.00.⁹ *See Chubb*, 312 F.3d at 894-95, 22 BLR at 2-534-36; *Goodloe*, 299 F.3d at 672, 22 BLR at 2-492-93; *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Grp., Knott Cnty., LLC*, 24 BLR 1-172 (2010). Additionally, we find the requested fee to be reasonable in light of the necessary services performed. Therefore, we award a fee of \$4,200.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed, and claimant's counsel is awarded a fee of \$4,200.00 for services performed in the prior appeal, BRB Nos. 10-0209 BLA/A.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully disagree with my colleagues' decision to affirm the administrative law judge's award of benefits. In the Board's prior decision, we specifically directed the prior administrative law judge to consider entitlement under Section 411(c)(4), with an

⁹ As a general proposition, rates awarded in other cases do not set the prevailing market rate. *See B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 664, 24 BLR 2-106, 2-122-23 (6th Cir. 2008); *Employer's Opposition to Fee Petition* at 3. However, where, as in this case, there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 290, 24 BLR 2-269, 2-291 (4th Cir. 2010).

instruction that he “must allow for the submission of evidence by the parties to address the change in law” *Lynch*, BRB Nos. 10-0209 BLA/A, slip op. at 4. On remand, the case was reassigned to a different administrative law judge, and there is no indication that he reopened the record for the submission of evidence to address the change in law. The administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption, and the brief findings at the end of his decision, which the majority affirms under 20 C.F.R. Part 718, were related to his Section 411(c)(4) rebuttal analysis.

Under these circumstances, the majority’s argument to the contrary, employer correctly argues that remand is required because the administrative law judge did not comply with the Board’s instruction to reopen the record for the parties to submit evidence addressing the reinstatement of the Section 411(c)(4) presumption. I would therefore vacate the administrative law judge’s award of benefits, and remand this case for the administrative law judge to reopen the record “to allow the parties to present evidence regarding the applicability of the 15-year presumption,” as the United States Court of Appeals for the Seventh Circuit did in *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 851, 24 BLR 2-385, 2-401 (7th Cir. 2011). Because I would vacate the administrative law judge’s award of benefits, I would decline to address, at this time, the fee petition filed by claimant’s counsel, as I would hold that there has not been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

NANCY S. DOLDER, Chief
Administrative Appeals Judge