BRB No. 12-0336 BLA

LOVELLA E. SWINEY (Widow of DONALD SWINEY) Claimant-Respondent v. DONALD SWINEY MINING and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/26/2013 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Emily Goldberg-Kraft (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 Awarding Benefits (2009-BLA-05676) of Administrative Law Judge Lystra A. Harris with respect to a survivor's claim filed on November 8, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge initially determined that claimant was not collaterally estopped from bringing her claim based on the denial of benefits in the miner's claim. In addition, the administrative law judge accepted the parties' stipulation to thirty-three years of coal mine employment and found that claimant established that at least fifteen years were spent underground. The administrative law judge further found that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in failing to apply the doctrine of collateral estoppel to bar claimant from relitigating whether the miner had pneumoconiosis or whether he was totally disabled due to a respiratory impairment.[3] In the alternative, employer asserts that the administrative law judge erred

[1] Claimant is the widow of the miner, Donald Swiney, who died on April 3, 2007. Director's Exhibit 9. The miner filed a subsequent claim for benefits on August 8, 2006, which was finally denied by Administrative Law Judge Alan L. Bergstrom on March 18, 2009. Director's Exhibit 1.

[2] On March 23, 2010, Congress adopted amendments to the Act, that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, the amendments reinstated Section 411(c)(4), which provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and had fifteen or more years of underground, or substantially similar, coal mine employment. 30 U.S.C. §921(c)(4).

[3] Employer initially requested that the Board hold this case in abeyance pending resolution of the constitutional challenges to the PPACA. However, in its reply brief, employer indicated that its request is moot, based on the United States Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (June 28, 2012).

in finding that claimant established that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Further, employer argues that the administrative law judge did not properly weigh the evidence in determining that employer failed to rebut the amended Section 411(c)(4) presumption.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief in which he contends that the Board should reject employer's argument concerning collateral estoppel. In addition, the Director alleges that the administrative law judge did not address whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's death was not related to his coal mine employment but states that because employer did not challenge this omission, it waived the issue. In its reply brief, employer reiterates the arguments in its initial petition and clarifies that, contrary to the Director's assertion, it challenged the administrative law judge's failure to consider whether employer rebutted the presumption that the miner's death was due to pneumoconiosis.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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).

I. Collateral Estoppel

To successfully invoke the doctrine of collateral estoppel, a party must establish the following:

> (1) The precise issue raised in the present case was raised and actually litigated in the prior proceeding;

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[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established that the miner had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 1, 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

(2) Determination of the issue was necessary to the outcome of the prior proceeding;
(3) The prior proceeding resulted in a final judgment on the merits; and
(4) The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328, 330 (6th Cir. 1987); *see also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 311 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co*., 21 BLR 1-134 (1999)(en banc). However, even if these elements are met, collateral estoppel does not bar the relitigation of factual issues "where the party against whom the doctrine is invoked had a heavier burden of persuasion on that issue in the first action than he does in the second, or where his adversary has a heavier burden in the second action than he did in the first." *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 218, 23 BLR 2-393, 2-401 (4th Cir. 2006), *quoting Newport News Shipbldg, & Dry Dock Co. v. Director, OWCP*, 583 F.2d 1273, 1279 (4th Cir. 1978).

In the present case, the administrative law judge determined that collateral estoppel does not apply to the findings in the miner's claim regarding the existence of pneumoconiosis and total disability, as the burden of proof has changed on the former issue, and the latter issue was not actually litigated in the miner's claim. Decision and Order at 3-4. Employer argues that the alteration in the burden of proof does not allow the administrative law judge to ignore the findings made in the miner's claim regarding the existence of pneumoconiosis and that total disability was fully litigated in the miner's claim.

Because claimant was not a party to the miner's claim and, therefore, did not have a full and fair opportunity to litigate the issues in that claim, the administrative law judge was not required to address the other prerequisites to the application of collateral estoppel, nor was she required to consider whether any exception to the application of the doctrine was warranted. *See Detroit Police Officers Ass'n*, 821 F.3d at 330. Accordingly, we affirm the administrative law judge's determination that claimant was not precluded from litigating the issue of the existence of pneumoconiosis and total disability in her survivor's claim without reaching the validity of the grounds cited by the administrative law judge.

II. Invocation of the Amended Section 411(c)(4) Presumption – Total Disability

Employer contends that, in finding that claimant established total disability, the administrative law judge did not fully consider Dr. Forehand's opinion at 20 C.F.R. §718.204(b)(2)(iv), as there were several factors that detracted from the credibility of his

diagnosis of total disability, including an inflated work history, a discredited x-ray finding of complicated pneumoconiosis, and reliance on a normal pulmonary function study.[6] Further, employer argues that there is no evidence that Dr. Forehand considered the exertional requirements of the miner's usual coal mine employment or that he, or any of the physicians, provided the administrative law judge with enough information for the administrative law judge to make a finding on this issue. Employer also asserts that the administrative law judge did not "consider whether either Dr. Forehand['s] or [Dr.] Rosenberg's opinions [sic] constituted a finding of total disability where, as here, the condition causing the disability was lung cancer or possibly osteoarthritis of the knee." Employer's Brief at 19. In addition, employer argues that the administrative law judge did not adequately explain, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), why she found the medical opinions were more persuasive than the objective tests in concluding that the evidence of record, as a whole, was sufficient to establish total disability.

We reject employer's contention that evidence regarding the cause of the miner's totally disabling respiratory impairment is relevant to 20 C.F.R. §718.204(b)(2), as that issue is considered at 20 C.F.R. §718.204(c), or when determining whether the amended Section 411(c)(4) presumption has been rebutted. *See Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 303 (6th Cir. 2001). However, employer is correct in maintaining that the administrative law judge did not adequately consider whether the diagnoses of a totally disabling respiratory impairment rendered by Drs. Forehand and Rosenberg were based on an accurate understanding of the exertional requirements of the miner's usual coal mine employment.[7] Pursuant to 20 C.F.R. §718.204(b)(1), the

[6] Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that claimant did not establish total disability, as the sole pulmonary function test, performed by Dr. Forehand on October 19, 2006, was non-qualifying. Decision and Order at 6; Director's Exhibit 13. The administrative law judge found that the sole blood gas test, also obtained by Dr. Forehand on October 19, 2006, was in equipoise, as the resting values were nonqualifying, while the post-exercise values were qualifying pursuant to 20 C.F.R. §718.204(b)(2)(ii) . Decision and Order at 7; Director's Exhibit 13. As there was no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge also found that total disability was not established at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 7.

[7] Dr. Forehand further indicated that as a result of lung cancer, the miner developed "[a] significant respiratory impairment" and had "insufficient residual oxygen carrying capacity . . . to return to [his] last coal mining job." Director's Exhibi5t 13. Dr. Rosenberg stated, "[p]rior to his developing lung cancer, [claimant] had no significant obstruction or restriction, and his oxygenation was preserved. Clearly, from a pulmonary

administrative law judge must determine the exertional requirements of claimant's usual coal mine work and consider them in conjunction with the medical reports assessing disability.[8] *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). In the present case, the administrative law judge did not render a finding as to the nature of the miner's last coal mine job, nor did she consider whether Drs. Forehand and Rosenberg were aware of the degree of exertion that this job required of the miner.[9] Further, we agree with employer that the administrative law judge did not explain, as required by the APA, why the diagnoses of a disabling respiratory impairment made by Drs. Forehand and Rosenberg outweighed the contrary probative evidence at 20 C.F.R. §718.204(b)(2). *See Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

Accordingly, we vacate the administrative law judge's finding that the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2), and invocation of the amended Section 411(c)(4) presumption. *See Martin*, 400 F.3d at 306, 23 BLR at 2-285; *Cornett*, 227 F.3d at 576, 22 BLR at 2-121. On remand, the administrative law judge must identify claimant's usual coal mine work and determine the exertional requirements of that work.[10] She must then assess whether, in light of

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perspective, he was not disabled from performing his previous coal mine job or similarly arduous types of labor. However, in association with [claimant's] lung cancer, he developed restriction with oxygenation abnormalities," which resulted in a totally disabling respiratory impairment. Employer's Exhibit 4.

[8] A miner's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

[9] Drs. Forehand and Rosenberg both indicated that the miner last worked as a boss loader and general inside laborer but neither physician listed or discussed the duties these positions entailed. *See* Director's Exhibit 13; Employer's Exhibits 4, 5.

[10] In the miner's claim, the miner indicated on Form CM-913 that he "did most of the jobs in [the] mine" including "scoops, motor, belt line, bolt machine." In addition, he stated that he "supervised 7 or 8 men" and "worked along beside of them." Director's Exhibit 1. In a deposition taken on May 22, 2002, the miner testified that he "was doing about anything. I run a loader, roof bolter machine and anything else." *Id*. At the hearing in the survivor's claim on June 14, 2011, claimant testified that the miner's work clothes were very dusty. Hearing Transcript at 19-20.

these exertional requirements, the medical opinions of Drs. Forehand and Rosenberg contain reasoned and documented diagnoses of total disability. If the administrative law judge again determines that the opinions of Drs. Forehand and Rosenberg are sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), she must consider whether their opinions outweigh the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i), (ii).[11] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(en banc).

Contrary to employer's allegation, however, when reconsidering the evidence on remand, the administrative law judge cannot discredit a physician's diagnosis of total disability solely because he relied on a nonqualifying objective study; nor can she summarily conclude that the nonqualifying or inconclusive objective studies outweigh the diagnoses of total disability. Test results that exceed the applicable table values may document a diagnosis of a totally disabling respiratory or pulmonary impairment if the physician provides a reasoned explanation of his diagnosis. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *see also Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984)(The determination of the significance of a test is a medical assessment for the doctor, rather than the administrative law judge).

In addition, we reject employer's assertion that the administrative law judge must discredit Dr. Forehand's diagnosis of a totally disabling respiratory impairment because he erroneously determined that the miner's October 19, 2006 x-ray was positive for complicated pneumoconiosis. Contrary to employer's suggestion, the record reflects that Dr. Forehand did not rely on his x-ray reading in rendering his opinion regarding the miner's ability to work. Rather, he diagnosed exercise-induced hypoxemia, based on the miner's blood gas study results, and stated, "a significant respiratory impairment is present; insufficient residual oxygen carrying capacity remains to return to last coal mining job." Director's Exhibit 13. Similarly, we hold that there is no merit in employer's contention that the administrative law judge is required to discredit Dr. Forehand's opinion, as he relied on a forty-one year history of coal mine employment, rather than the thirty-three year history to which the parties stipulated. Employer has not identified any link between Dr. Forehand's diagnosis of total disability and his understanding of the length of claimant's coal mine employment, nor does the record reveal such a link.

[11] The administrative law judge gave less weight to the opinions of Drs. Perper and Oesterling, as they did not comment on whether the miner had a totally disabling respiratory impairment. Decision and Order at 9; Director's Exhibit 36; Employer's Exhibits 2-3, 11. We affirm these findings, as they are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

If the administrative law judge finds that claimant has established total disability under 20 C.F.R. §718.204(b)(2) on remand, claimant will have again invoked the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. If the administrative law judge determines that claimant has not met her burden to establish that the miner was totally disabled at the time of his death, she must determine whether claimant has established the elements of entitlement, without the benefit of the presumption.[12]

III. Rebuttal of the Presumption

Because the administrative law judge may find that claimant has invoked the amended Section 411(c)(4) presumption on remand, to promote judicial efficiency, we will now address employer's allegation that the administrative law judge erred in finding that employer did not rebut the presumption.

A. Disproving the Existence of Pneumoconiosis

Employer argues that the administrative law judge erred in discrediting Dr. Hayes's negative interpretation of the x-ray dated October 19, 2006, despite his status as a dually-qualified Board-certified radiologist and B reader, without discussing the quality of the x-ray or explaining why Dr. Hayes's comments on the film quality did not diminish the credibility of the other interpretations.[13] Employer also asserts that the administrative law judge did not explain why she gave less weight to the ten negative x-ray interpretations in the miner's treatment records, as they could constitute evidence of the absence of clinical pneumoconiosis.[14] In addition, employer contends that the

[12] In order to establish entitlement to survivor's benefits, without the amended Section 411(c)(4) presumption, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c).

[13] Dr. Hayes stated that the x-ray was "[t]echnically flawed . . . due to quantum mottle." Employer's Exhibit 1.

[14] Under 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose 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

administrative law judge did not adequately explain why the negative CT scans and negative biopsy evidence were insufficient to disprove the existence of clinical pneumoconiosis. Further, employer maintains that the administrative law judge erred in discrediting Dr. Rosenberg's opinion, as "[i]t is difficult to comprehend what more Dr. Rosenberg could say" to support his conclusion that there was no evidence of clinical pneumoconiosis. Employer's Brief at 23.

Contrary to employer's contention, the administrative law judge did not discredit Dr. Hayes's interpretation of the October 19, 2006 x-ray, the only x-ray classified under the ILO system. Rather, she rationally determined that this x-ray was in equipoise, as Dr. Alexander, who is also dually-qualified, read it as positive. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 12. We affirm, therefore, the administrative law judge's finding that the October 19, 2006 x-ray was insufficient to disprove the existence of clinical pneumoconiosis.

However, employer is correct in arguing that the administrative law judge did not explain her weighing of the x-ray readings that appear in the miner's treatment records, all of which are silent as to the existence of pneumoconiosis. The significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in her role as fact-finder. *See Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996), *modified on recon.*, 21 BLR 1-52 (1997); *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Because the administrative law judge did not make a finding on this issue, we must vacate the administrative law judge's determination that the x-ray evidence, as a whole, does not establish the absence of clinical pneumoconiosis.

Similarly, we agree with employer that the administrative law judge's weighing of the evidence of record, as a whole, on the issue of the existence of clinical pneumoconiosis does not comply with the APA, which requires that the administrative law judge resolve all questions of fact and law and set forth her findings in detail, including the underlying rationale. *See Wojtowicz*, 12 BLR at 1-165. After determining that the ILO-classified x-ray evidence was in equipoise, the administrative law judge determined that the biopsy evidence "rule[d] out the possibility of clinical pneumoconiosis within the lung specimens submitted" and that the CT scan and digital x-ray evidence "rule[d] out the possibility of clinical pneumoconiosis." Decision and Order at 14, 17. With respect to the medical opinion evidence, the administrative law judge found that "none of the physicians' opinions are given probative weight on the issue of

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reaction of the lung to that deposition caused by dust exposure in coal mine employment.

clinical pneumoconiosis." *Id*. at 19. Regarding the evidence as a whole, the administrative law judge stated:

> The CT scans and digital x-rays did rule out clinical pneumoconiosis; however, the x-ray evidence does not establish that the miner did not suffer from clinical pneumoconiosis. The biopsy evidence found no evidence of clinical pneumoconiosis; however, as stated in [20 C.F.R.]§718.106(c), "a negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." Accordingly, weighing all of the evidence together, I find that the [e]mployer has not established by a preponderance of evidence . . . the absence of clinical pneumoconiosis.

Id.

Although the administrative law judge clearly set forth her conclusion that employer failed to meet its burden on rebuttal, she did not explain why the evidence that she deemed sufficient to rule out the possibility of clinical pneumoconiosis did not preponderate. If the administrative law judge again finds that claimant has invoked the amended Section 411(c)(4) presumption, she must reconsider whether employer has rebutted the presumption by establishing the absence of clinical pneumoconiosis, resolve all questions of fact and law on this issue, and provide a detailed explanation of her findings, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge determines on remand that employer has rebutted the presumed fact that the miner had clinical pneumoconiosis, she must then evaluate whether employer has rebutted the presumed fact that the miner had legal pneumoconiosis.[15]

B. Disproving the Causal Connection Between Pneumoconiosis and Death

Employer contends that the administrative law judge did not apply the proper standard in determining that employer did not rebut the amended Section 411(c)(4) presumption by establishing that the miner's death was not due to pneumoconiosis.[16] We

[15] The administrative law judge found that she did not have to reach the issue of the existence of legal pneumoconiosis, as she determined that employer did not rebut the presumption that the miner had clinical pneumoconiosis. Decision and Order at 20.

[16] The Director, Office of Workers' Compensation Programs (the Director), argues that employer has not challenged the administrative law judge's failure to address whether employer rebutted the amended Section 411(c)(4) presumption by proving that the miner's death was unrelated to his coal mine employment and, therefore, waived this issue. Director's Brief at 4 n.5. The Director's contention is without merit, as employer contended in its Brief In Support of Petition for Review that "the [administrative law

agree. The administrative law judge based her finding that employer did not rebut the presumption on her determination that employer did not establish the absence of pneumoconiosis. Decision and Order at 20. However, the party opposing entitlement in a survivor's claim can establish rebuttal of the amended Section 411(c)(4) presumption by establishing either that the miner did not have pneumoconiosis *or* that his death did not arise from his coal mine employment.[17] *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,475 (Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305)(In a survivor's claim, the party opposing entitlement may rebut the presumption by establishing that the miner did not have pneumoconiosis or that the miner's death did not arise in whole, or in part, out of dust exposure in the miner's coal mine employment). Thus, a determination that employer failed to establish rebuttal by the first method does not preclude employer from establishing rebuttal by the second method. Therefore, if the administrative law judge reaches the issue of rebuttal on remand and finds that employer has not established the absence of pneumoconiosis, she must determine whether employer has rebutted the amended Section 411(c)(4) presumption by proving that the miner's death did not arise in whole, or in part, out of dust exposure in the miner's coal mine employment.

judge] erred in failing to consider whether the evidence established that [the miner] did not die due to pneumoconiosis." Employer's Brief at 23.

[17] Because the issue of total disability due to pneumoconiosis is not relevant in this survivor's claim, we need not address employer's allegations of error concerning the administrative law judge's weighing of Dr. Rosenberg's opinion on this issue. *See Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further proceedings 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