

BRB Nos. 13-0273 BLA  
and 13-0273 BLA-A

ROSEANNA HUFFMAN<sup>1</sup> )  
(o/b/o the Estate of RICHARD W. )  
HUFFMAN) )  
 )  
Claimant-Respondent )  
Cross-Petitioner )  
 )  
v. )  
 )  
PEN COAL CORPORATION )  
 )  
and )  
 ) DATE ISSUED: 03/06/2014  
WEST VIRGINIA CWP FUND )  
 )  
Employer/Carrier- )  
Petitioners )  
Cross-Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Amy Jo Holley and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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<sup>1</sup> Claimant, the miner's widow, is pursuing the miner's claim on behalf of his estate. Claimant's Exhibit 5. By Order dated July 12, 2012, the administrative law judge substituted the miner's widow as the claimant. Decision and Order at 2.

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

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2011-BLA-5274) of Administrative Law Judge Peter B. Silvain, Jr., rendered 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 February 23, 2010. Director's Exhibit 2.

Applying amended Section 411(c)(4),<sup>2</sup> 30 U.S.C. §921(c)(4), the administrative law judge found that claimant established that the miner had twenty-four and one-half years of coal mine employment,<sup>3</sup> primarily in surface mining.<sup>4</sup> The administrative law

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<sup>2</sup> 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 of total disability 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) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

<sup>3</sup> The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

judge further found that all of the miner's surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant established that the miner had more than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. The administrative law judge further found that the medical evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further asserts that the administrative law judge erred in finding that claimant established that the miner had at least fifteen years of qualifying coal mine employment. Employer also contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. In her response brief and brief in support of her cross-appeal, claimant urges affirmance of the award of benefits. Claimant further contends that, if the Board remands this case, it must instruct the administrative law judge to reconsider whether additional periods of the miner's employment, which the administrative law judge described as surface coal mine work, actually constituted underground coal mine employment.<sup>5</sup> In a consolidated response to claimant's cross-appeal and reply brief, employer contends that claimant's arguments on cross-appeal are moot, and reiterates its contentions on appeal.<sup>6</sup> The Director, Office of Workers' Compensation Programs, has filed a limited combined response to employer's appeal and claimant's cross-appeal, arguing that the administrative law judge properly applied Section 411(c)(4) to this case,

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<sup>4</sup> The administrative law judge found that the miner worked for approximately six to eight months underground for a different employer, Elkhorn Coal. Decision and Order at 16; Hearing Tr. at 18-19.

<sup>5</sup> Claimant specifically asserts that "much of what the administrative law judge considered to be surface work was actually spent either underground servicing equipment[,] or at the site of deep mines" and, therefore, should have been considered underground coal mine employment. Claimant's Brief at 17.

<sup>6</sup> Because employer does not challenge the administrative law judge's finding that the medical evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

permissibly found that the miner had the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, and applied the correct rebuttal standard.

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).

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

Employer argues that the administrative law judge erred in finding that claimant established that the miner had at least fifteen years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. Employer specifically argues that claimant failed to prove that the miner was exposed to dust conditions substantially similar to those existing underground during his approximately twenty-four years as a surface miner. Employer's Brief at 6-12. Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor (DOL) promulgated regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,102 (Sept 25, 2013). Those regulations provide 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."<sup>7</sup> 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R.

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<sup>7</sup> The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

[T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. at 59,105.

§718.305(b)(2)); *see also Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988).

As summarized by the administrative law judge, the miner testified that all of the strip mines he worked in were dusty, that “there was a lot of dust,” and that the dust conditions at the strip mines were “about the same” or “pretty close” to dust conditions in the underground mine where he worked. Further, according to the miner, while he was performing his surface duties the dust would blow into his face, causing him to spit up coal dust. Decision and Order at 17-18; Hearing Tr. at 23, 24, 39. Based on the miner’s uncontradicted testimony, the administrative law judge permissibly found that all of the miner’s surface mine employment, approximately twenty-four years, took place in conditions “substantially similar” to those in underground employment. 20 C.F.R. §718.305(b)(2); *see also Leachman*, 855 F.2d at 512-13; Decision and Order at 17, 19. We, therefore, affirm the administrative law judge’s finding that claimant established more than fifteen years of qualifying coal mine employment, and satisfied the requirement of Section 411(c)(4).<sup>8</sup>

In light of our affirmance of the administrative law judge’s findings that claimant established fifteen years of qualifying coal mine employment, and that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we also affirm the administrative law judge’s finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden of proof shifted to employer to rebut the presumption by disproving the existence of both clinical<sup>9</sup>

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<sup>8</sup> Employer asserts that it is unclear from the record whether the miner’s employment from 1983 to 1986 constituted coal mine employment, as found by the administrative law judge. Employer’s Brief at 8, 11. We need not resolve this issue, however, because subtracting those three years from the administrative law judge’s finding of twenty-four and one-half years of qualifying coal mine employment would not alter the administrative law judge’s ultimate determination that the miner had at least fifteen years of qualifying coal mine employment. Thus, error, if any, in the administrative law judge’s determination to credit the miner with coal mine employment for the years 1983 to 1986 was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

<sup>9</sup> “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

and legal<sup>10</sup> pneumoconiosis, or by proving that the miner's disabling respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, but did not disprove the existence of legal pneumoconiosis.<sup>11</sup> The administrative law judge further found that employer failed to prove that the miner's disabling respiratory impairment "did not arise out of, or in connection with," his coal mine employment. Thus, the administrative law judge concluded that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Broudy and Jarboe.<sup>12</sup> Dr. Broudy opined that the miner's disabling chronic obstructive airways disease was due to cigarette smoking, and was unrelated to coal mine dust exposure. Director's Exhibit 16. Dr. Jarboe opined that the miner suffered from disabling airflow obstruction that was consistent with smoking-related emphysema and intrinsic asthma, but was unrelated to coal mine dust inhalation. Employer's Exhibits 1, 2.

The administrative law judge discounted the opinions of Drs. Broudy and Jarboe because he found that each was inadequately explained, and inconsistent with the scientific views endorsed by DOL in the preamble to the 2000 regulatory revisions.

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reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

<sup>10</sup> 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).

<sup>11</sup> In order 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. See *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

<sup>12</sup> The administrative law judge also considered the opinion of Dr. Westerfield, that coal mine dust exposure was a significant contributing factor to the miner's disabling respiratory impairment. Decision and Order at 9-10, 23-24; Director's Exhibits 10, 13; Employer's Exhibit 3.

Decision and Order at 24-26. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 26.

As an initial matter, we reject employer's contention that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 13-17. This argument was rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, as discussed *supra* note 2, DOL recently promulgated regulations implementing amended Section 411(c)(4). Those regulations make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

Employer further asserts that the administrative law judge applied an incorrect rebuttal standard. Employer's Brief at 15-17. Contrary to employer's argument, the administrative law judge correctly stated that employer bore the burden to establish that the miner did not have pneumoconiosis, or that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 19; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); 78 Fed. Reg. at 59,106; *see Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Moreover, the United States Court of Appeals for the Fourth Circuit has stated, explicitly, that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to the miner's pulmonary impairment by coal mine dust exposure.<sup>13</sup> *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we reject employer's contention that the administrative law judge erred when he required employer's physicians to provide persuasive opinions establishing that the miner's twenty-four and one-half years of coal

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<sup>13</sup> Similarly, the implementing regulation that was promulgated after the administrative law judge's decision requires the party opposing entitlement in a miner's claim to establish "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); 78 Fed. Reg. at 59,115; *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard).

mine dust exposure did not contribute to his obstructive impairment. *See Id.*; 20 C.F.R. §718.201(a)(2).<sup>14</sup>

Employer also contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Broudy and Jarboe did not disprove the existence of legal pneumoconiosis. Employer's Brief at 27-38. We disagree. As set forth below, the administrative law judge permissibly found that the reasons given by Drs. Broudy and Jarboe for excluding coal mine dust exposure as a cause of the miner's disabling obstructive pulmonary impairment were not persuasive. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In assessing the credibility of the physicians' opinions, the administrative law judge accurately noted that Drs. Broudy and Jarboe relied, in part, on the partial reversibility of the miner's impairment after bronchodilator administration to exclude coal mine dust exposure as a cause of the miner's obstructive impairment. Decision and Order at 24-26. The administrative law judge further noted, however, that all of the miner's pulmonary function studies demonstrated the presence of a totally disabling impairment, even after the administration of bronchodilators. Decision and Order at 24; Director's Exhibits 10, 16; Employer's Exhibit 1. The administrative law judge concluded, as was within his discretion, that neither Dr. Broudy nor Dr. Jarboe adequately explained why the irreversible portion of the miner's pulmonary impairment was unrelated to coal mine dust exposure, or why the miner's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. 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).

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<sup>14</sup> We further reject employer's argument that the administrative law judge erred in failing to provide the parties with notice of the rebuttal standard to be applied, thus depriving employer of the opportunity to develop evidence relevant to the new standard. Employer's Brief at 17-19. The hearing in this case was held on November 29, 2011, well after passage of the 2010 amendments to the Act. Moreover, at the hearing, employer indicated that it intended to challenge the application of those amendments to this claim. Hearing Tr. at 7-8. Therefore, employer had ample opportunity to request additional time to develop evidence in light of the amendments.



The administrative law judge further noted that Drs. Broudy and Jarboe both emphasized the appearance of the miner's lungs on x-ray to support their conclusion that only the miner's cigarette smoking, and not his coal mine dust exposure, contributed to his disabling obstructive impairment.<sup>15</sup> Decision and Order at 24-26; Director's Exhibit 18; Employer's Exhibits 1, 2. The administrative law judge permissibly concluded that, to the extent that Drs. Broudy and Jarboe relied on the absence of x-ray evidence of pneumoconiosis, their reasoning was contrary to DOL's recognition, as set forth in the 2000 preamble to the revised regulations, that coal mine dust can cause clinically significant obstructive lung disease, even in the absence of evidence of clinical pneumoconiosis. *Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 313, 25 BLR 2-115, 2-130 (4th Cir. 2012); *see A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Banks*, 690 F.3d at 487, 489, 25 BLR at 2-150, 2-152-53; Decision and Order on Remand at 31-32, 34, *citing* 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000). Contrary to employer's assertions, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is pneumoconiosis; rather, he permissibly consulted the preamble as a statement of the medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Looney*, 678 F.3d at 314-15, 25 BLR at 2-130; *Adams*, 694 F.3d at 801-02, 25 BLR at 2-211; *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). For the foregoing reasons, we affirm the administrative law judge's findings that the opinions of Drs. Broudy and Jarboe were not well-reasoned and were therefore entitled to little weight. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 25-26.

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Broudy and Jarboe, the only opinions supportive of a finding that the miner did not suffer from legal pneumoconiosis, we affirm the administrative law judge's

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<sup>15</sup> Dr. Broudy stated that he believed the miner's respiratory impairment was due to cigarette smoking, in part, "because of . . . the x-ray appearances." Director's Exhibit 16 at 5. Dr. Broudy stated that "[t]he x-rays show[ed] large, hyperinflated lungs, which is in contrast to what one would expect to see with severe impairment due to the inhalation of coal mine dust," which tends to cause small, contracted lungs. Director's Exhibit 16 at 5. Dr. Jarboe acknowledged that the miner still had severe airflow obstruction even after the administration of bronchodilators, and opined that one reason for this was the miner's severe emphysema. Employer's Exhibit 2 at 23, 26. However, Dr. Jarboe explained that he ruled out coal mine dust exposure as a cause of the miner's emphysema because he did not see any evidence of pneumoconiosis on the miner's chest x-ray. Employer's Exhibit 2 at 35.

finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.<sup>16</sup>

Employer next argues that the administrative law judge failed to adequately address whether employer could establish rebuttal by proving that the miner's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment, pursuant to 30 U.S.C. §921(c)(4). Employer's Brief at 38-39. Contrary to employer's contention, the administrative law judge permissibly found that the same reasons he provided for discrediting the opinions of Drs. Broudy and Jarboe, that the miner did not suffer from legal pneumoconiosis, also undercut their opinions that the miner's impairment was unrelated to his coal mine employment. *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); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 26. Although the administrative law judge did not provide a detailed explanation for his determination, it was not necessary in this case. Because the administrative law judge did not find the opinions of Drs. Broudy and Jarboe credible on the issue of legal pneumoconiosis, he could not credit their opinions on the causation of total disability absent "specific and persuasive reasons for concluding that the doctor[s'] judgment on the question of disability causation d[id] not rest upon [their] disagreement with the [administrative law judge's] finding . . . ." *Toler*, 43 F.3d at 116, 19 BLR at 2-83. We therefore affirm the administrative law judge's determination that employer failed to establish that the miner's disabling impairment was unrelated to his coal mine employment. 30 U.S.C. §921(c)(4).

We affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Therefore, we affirm the award of benefits. Consequently, we need not address claimant's contentions of error raised in her cross-appeal challenging the administrative law judge's findings regarding the nature of the miner's coal mine employment. *See supra* note 5.

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<sup>16</sup> Thus, we need not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Westerfield's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 20-27.



Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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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REGINA C. McGRANERY  
Administrative Appeals Judge