U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0278 BLA

PAUL B. BURSKY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BARNES & TUCKER COMPANY	)	
	)	DATE ISSUED: 9/27/2022
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Modification of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Ralph J. Trofino, Johnstown, Pennsylvania, for Employer.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Denying Benefits and Modification (2020-BLA-05443) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a claim filed on July 27, 2017.

In his August 5, 2019 Decision and Order Denying Benefits, ALJ Drew A. Swank found Claimant did not establish a totally disabling respiratory or pulmonary impairment and thus could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2); Director's Exhibit 49. Because the Claimant also failed to establish an essential element of entitlement under 20 C.F.R. Part 718, ALJ Swank denied benefits. Director's Exhibit 49.

Claimant timely requested modification. Director's Exhibit 51. In her Decision and Order Denying Benefits and Modification that is the subject of this appeal, ALJ Appetta (the ALJ) credited Claimant with seventeen years of underground coal mine employment but found the evidence insufficient to establish total disability. 20 C.F.R. §718.204(b)(2). Thus she found Claimant failed to establish a change in conditions or a mistake in a determination of fact, and denied the request for modification. 20 C.F.R. §725.309.

On appeal, Claimant asserts the ALJ erred in determining he failed to establish total disability. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief, unless requested to do so.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Because this case involves a request for modification, the ALJ was required to consider whether Claimant established a mistake in a determination of fact in the prior

---

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Mar. 29, 2019 Hearing Tr. at 30.

denial, or whether any additional evidence submitted on modification demonstrates a change in conditions since the prior denial. 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993).

A miner is totally disabled if he has a pulmonary or respiratory impairment that, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Claimant challenges the ALJ's finding that the pulmonary function study and medical opinion evidence does not establish total disability. [4]

Pulmonary Function Studies

Claimant first argues the ALJ erred in weighing the pulmonary function testing. 20 C.F.R. §718.204(b)(2)(i); Claimant's Brief at 7. We agree.

Two criteria must be met to establish total disability based on a pulmonary function study. First, it must yield a qualifying FEV1 value as set forth in the regulations.[5] Second, it must yield either a qualifying FVC or MVV value, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. §718.204(b)(2)(i).

The ALJ initially weighed two pulmonary function studies dated August 7, 2020, and September 16, 2020, that Claimant submitted in support of his request for modification. Decision and Order on Modification at 8-10. She noted these two studies reported differing

---

[4] As they are not challenged, we affirm the ALJ's findings that the arterial blood gas studies do not establish total disability and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. *Skrack*, 6 BLR at 1-711; Decision and Order at 11.

[5] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i). These values are adjusted for the miner's age, sex, and height.

heights for Claimant. *Id.* Averaging the recorded heights,[6] the ALJ found Claimant's height is 67.5 inches as it pertains to these two studies. *Id.* Because there is no value for a height of 67.5 inches in the table at 20 C.F.R. Part 718, Appendix B, she rounded up to the next listed table height of 67.7 inches to determine whether these studies are qualifying. *Id.* at 9 n. 16. She found the August 7, 2020 study produced qualifying values pre-bronchodilator and post-bronchodilator, but the September 16, 2020 study produced non-qualifying pre-bronchodilator and post-bronchodilator results. *Id.* Because Claimant performed these studies one month apart and they produced conflicting test results, the ALJ found the results of the pulmonary function testing "submitted on modification to be in equipoise and unsupportive of a finding of total disability." *Id.*

The ALJ next weighed the pulmonary function studies the parties had previously submitted to ALJ Swank. Decision and Order on Modification at 8-10. She considered three studies dated September 8, 2017, March 23, 2018, and August 14, 2018. *Id.* Again, she noted these studies reported different heights for Claimant.[7] *Id.* She used a height 68 inches for these studies because this figure was "the most often reported height" of the three tests. Decision and Order on Modification at 8-10. As there was no value for a height of 68 inches in the table at 20 C.F.R. Part 718, Appendix B, she rounded up to the next listed table height of 68.1 inches to determine whether these tests are qualifying. *Id.* Based on a table value of 68.1 inches, the ALJ found none of the studies produced qualifying values for total disability before or after the administration of bronchodilators.[8] *Id.*

---

[6] Dr. Zlupko recorded a height of 68 inches on the August 7, 2020 study and Dr. Pickerill recorded a height of 67 inches on the September 16, 2020 study. Claimant's Exhibit 1; Employer's Exhibit 1.

[7] Dr. Zlupko reported a height of 68 inches on the September 8, 2017 study, Dr. Pickerill reported a height of 68 inches on the March 23, 2018 study, and Dr. Zlupko reported a height of 67 inches on the August 14, 2018 study. Director's Exhibits 14, 43 (internally Claimant's Exhibit 1), 44 (internally Employer's Exhibit 1).

[8] The ALJ erred to the extent she assumed a height of 67.5 inches for the August 7, 2020 and September 16, 2020 pulmonary function studies, but then a height of 68 inches for the September 8, 2017, March 23, 2018 and August 14, 2018 studies, as she must apply equal scrutiny to the evidence. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). The proper height the ALJ should have used for all the studies is 68 inches and thus a table value of 68.1 inches. This represents an average of the varying heights in the five studies that she considered, as well as the most frequently reported height, the latter of which is the criteria the ALJ applied when determining a height for the three earlier studies. But we

Because she found the results of the pulmonary function studies submitted on modification are in equipoise and none of the studies submitted to ALJ Swank are qualifying, the ALJ found Claimant did not establish total disability based on this evidence. Decision and Order on Modification at 8-10.

We agree with Claimant's argument that the ALJ erred in finding the September 8, 2017 and August 14, 2018 pulmonary function studies are non-qualifying. Claimant's Brief at 7. Claimant was over 71 years old when he performed all the studies. Pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values the miner produces would be qualifying for a 71 year old, in the absence of contrary evidence. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). A study performed on a 71-year-old male miner with a height of 68.1 inches qualifies if it produces an FEV1 value at or below 1.73 and either an FVC value at or below 2.24, an MVV value at or below 69, or an FEV1/FVC ratio of 55 percent or less. 20 C.F.R. Part 718, Appendix B. The September 8, 2017 study produced an FEV1 of 1.69 and an MVV of 63 pre-bronchodilator. Director's Exhibit 14. The August 14, 2018 study produced an FEV1 of 1.6 and an MVV of 66 pre-bronchodilator, and an FEV1 of 1.72 and an MVV of 64 post-bronchodilator. Claimant's Exhibit 1. Thus, the September 8, 2017 study is qualifying pre-bronchodilator and the August 14, 2018 study is qualifying both before and after the administration of a bronchodilator. Director's Exhibit 14; Claimant's Exhibit 1.

Consequently, the ALJ's finding with respect to the pulmonary function study evidence is not supported by substantial evidence, and we vacate it. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163-64 (3d Cir. 1986); 20 C.F.R. §718.204(b)(2)(i). We therefore remand the case for the ALJ to resolve the conflict in the pulmonary function study evidence and accurately characterize whether each study produced qualifying results.

Medical Opinions

Before weighing the medical opinions, the ALJ addressed the exertional requirements of Claimant's usual coal mine employment. She summarized the evidence as follows:

---

consider the ALJ's error in failing to use a table value of 68.1 inches for all five studies of record to be harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). As she noted, even if she had used a table value of 68.1 inches when evaluating the August 7, 2020 and September 16, 2020 pulmonary function studies, the August 7, 2020 study would still have produced qualifying values and the September 16, 2020 study would have produced non-qualifying values. Decision and Order on Modification at 10 n. 17.

> In his position as coal preparation plant foreman, Claimant walked about [one-half to one] mile on average per day, but it was up and down steps, mostly at the two screening plants which were up high and had about [six] flights of stairs each. [He would] walk at least one of them every day and when he did [he would] walk up to the silos, with more steps, and on the catwalk to check them. Based on Claimant's Form CM-913, Claimant reported he sat for [one to two] hours, stood [eight to nine] hours, [and] lifted and carried [ten to forty] pounds several times per day. He also indicated he supervised [ten to fifteen] men depending on the shift. At hearing, he testified that he carried a [fifty] pound bag of magnetite to the feeder sometimes two or three times per day, about [fifty] feet.

Decision and Order on Modification at 4, *citing* Director's Exhibits 4, 38, 46. Based on this evidence, the ALJ found Claimant's usual coal mine work required "medium to heavy exertion." *Id.* We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ then weighed the medical opinions of Drs. Zlupko and Fino that Claimant is totally disabled by a respiratory or pulmonary impairment, and Dr. Pickerill's opinion that he is not. Director's Exhibits 14, 43-44, 59; Employer's Exhibit 1.

The ALJ found Dr. Zlupko's conclusion not credible because he did not "indicate or characterize the exertional requirements of Claimant's last job in the mines." Decision and Order on Modification at 13-14. She also found he relied on the qualifying pulmonary function testing to diagnose total disability, contrary to her finding that the weight of the pulmonary function studies is non-qualifying. *Id.* Similarly, she found Dr. Fino did not identify "Claimant's job duties or [the] exertional level necessary for his last job" when opining Claimant is totally disabled from his usual coal mine employment. *Id.* at 14. Thus she rejected their opinions. *Id.* at 13-14. Conversely, the ALJ found Dr. Pickerill's opinion reasoned and documented. *Id.* at 16.

Because the ALJ's error in weighing the pulmonary function studies affected her consideration of the medical opinion evidence, we vacate her finding that the medical opinions do not establish total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 13-15.

Further, Claimant correctly argues the ALJ erred in discrediting Dr. Fino's opinion. Claimant's Brief at 8. A medical opinion may support a finding of total disability if it provides sufficient information from which the ALJ can reasonably infer a miner is unable to do his usual coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (physical limitations described in doctor's report sufficient to establish total

disability); *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894 (7th Cir. 1990) ("[A]n ALJ must consider all relevant evidence on the issue of disability including medical opinions which are phrased in terms of total disability or provide a medical assessment of physical abilities or exertional limitations which lead to that conclusion."); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52 (1986) (en banc) (ALJ may find total disability by comparing physician's impairment rating and any physical limitations due to that impairment with the exertional requirements of the miner's usual coal mine work).

Dr. Fino indicated he reviewed Claimant's Form CM-913 before addressing whether he is totally disabled. Specifically, in his initial report, Dr. Fino stated he reviewed "[b]ackground information consisting of Description of Coal Mine Work and Other Employment, U.S. Department of Labor, dated [July 15, 2017]."[9] Director's Exhibit 43 (Internally Claimant's Exhibit 5). As discussed above, the Form CM-913 listed Claimant's job duties in his usual coal mine employment, and the ALJ based her exertional requirements finding on this document. Director's Exhibit 4. Dr. Fino further identified Claimant's usual coal mine employment working as a preparation plant mechanic and foreman in his report, consistent with the ALJ's finding. Director's Exhibit 43 (Internally Claimant's Exhibit 5). He diagnosed Claimant with a moderate restrictive lung defect based on pulmonary function testing and opined Claimant is totally disabled from "returning to his last mining job" as a result of that impairment. *Id.* In a supplemental report, he stated he "reviewed the duties of [a] preparation plant foreman" and he "understand[s] that this was [Claimant's] last coal mine employment." Director's Exhibit 59. He reiterated that Claimant is totally disabled "from that job." *Id.*

The ALJ erroneously discredited Dr. Fino's opinion because he failed to list the specific job duties or the exertional requirements of Claimant's usual coal mine employment in his report. Decision and Order on Modification at 14. Because Dr. Fino indicated he reviewed the job duties of a plant foreman as listed in Claimant's Form CM-913, and was aware of those duties when opining Claimant's restrictive impairment would render Claimant totally disabled, Dr. Fino's opinion provides sufficient information from which the ALJ can reasonably infer Claimant is unable to do his usual coal mine employment. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52. Thus we remand the case for the ALJ to address if Dr. Fino's opinion is reasoned and documented. If she finds it is reasoned and documented, then his opinion supports Claimant's burden of establishing total disability. *Kertesz*, 788 F.2d at 163; *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002).

---

[9] Claimant completed and signed his Form CM-913 "Description of Coal Mine Work and Other Employment" on July 15, 2017. Director's Exhibit 4.

We also instruct the ALJ to revisit Dr. Zlupko's opinion to ascertain whether it also provides sufficient information from which she can reasonably infer Claimant is unable to do his usual coal mine employment. *See Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52. Dr. Zlupko diagnosed Claimant with mild obstructive and moderate restrictive lung impairments based on pulmonary function testing and a reduced pO2 value with activities based on arterial blood gas testing. Director's Exhibit 14 at 6, 16. He concluded Claimant could not perform his "previous jobs in the cleaning plant." *Id.* at 6. In a supplemental report, he acknowledged Claimant did not put forth "consistent" effort in the pulmonary function testing, but he stated the testing "did meet the [American Thoracic Society] Standards." *Id.* at 1. He also reiterated that Claimant "did have a reduction in his arterial oxygen level with activity" which "presents a problem for him in performing *any work duties*." *Id.* (emphasis added). Thus the doctor again concluded Claimant is totally disabled "from his previous job in the cleaning plant." *Id.*

Finally, the ALJ should address Claimant's argument that Dr. Pickerill's opinion supports a finding of total disability. Claimant's Brief at 8. Dr. Pickerill reviewed Claimant's Form CM-913 and indicated his usual coal mine employment was working as a "mechanic and foreman at the coal preparation plant."[10] Director's Exhibit 44 at 18. He opined Claimant's pulmonary function testing is consistent with a "moderate restrictive and [a] mild obstructive lung disease" and concluded he could perform the work of a mechanic or foreman "from a respiratory standpoint." *Id.* at 21, 24, 27-28. Because Claimant's lung function is "not severe enough to impair his ability" to do the tasks of the mechanic/foreman job, Dr. Pickerill opined Claimant is not totally disabled. *Id.* at 28. He elaborated that Claimant's pulmonary function and arterial blood gas testing is non-qualifying, and the "main problem" with Claimant is his "advanced age" and heart disease. *Id.*

During cross-examination from Claimant's counsel, Dr. Pickerill stated he would characterize Claimant's usual coal mine employment as consisting of "intermittent, moderate, heavy labor." Director's Exhibit 33 at 31-32. When asked if Claimant could perform the "heavier aspects of his last job," Dr. Pickerill stated Claimant "could do

---

[10] The ALJ erroneously determined Dr. Pickerill "did not indicate [knowledge of] the exertional requirements associated with Claimant's [usual] coal mine job as a foreman." Decision and Order on Modification at 16. The record reflects he reviewed Claimant's Form CM-913 at his deposition. Director's Exhibit 44 at 18. However, because the ALJ declined to discredit his opinion on this basis, this error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Modification at 16.

intermittent heavy lifting." *Id.* Dr. Pickerill was again asked if Claimant "would have trouble doing the heavier aspects of his job," and he responded that he would be more concerned with "sustained heavy exertion" rather than "intermittent" exertion. *Id.* at 34.

As discussed above, in addressing the exertional requirements of Claimant's usual coal mine employment, the ALJ found Claimant "carried [ten to forty] pounds several times per day" and "carried a [fifty] pound bag of magnetite to the feeder sometimes two or three times per day, about [fifty] feet." Decision and Order on Modification at 4. On remand, the ALJ should address whether Claimant performed these tasks on a "sustained" or "intermittent" basis, and thus whether Dr. Pickerill's statement that he would be "concerned" that Claimant could do heavy lifting with "sustained heavy exertion" supports a finding of total disability. Director's Exhibit 44 at 18; *see Scott*, 60 F.3d at 1141; *Poole*, 897 F.2d at 894; *Budash*, 9 BLR at 1-51-52.

Based on the ALJ's errors, we vacate her finding that Claimant failed to establish total disability. We therefore vacate her conclusion that Claimant is not entitled to benefits.

Remand Instructions

On remand, the ALJ must first reconsider whether the pulmonary function studies establish total disability. 20 C.F.R. §718.204(b)(2)(i). She must then evaluate the medical opinions of Drs. Zlupko, Fino, and Pickerill and address whether the preponderance of the medical opinions establish total disability considering our instructions. 20 C.F.R. §718.204(b)(2)(iv). Specifically, she should bear in mind that a physician may diagnose a totally disabling respiratory or pulmonary impairment even where the objective studies are non-qualifying. *See Killman v. Director*, OWCP, 415 F.3d 716, 721-22 (7th Cir. 2005); 20 C.F.R. §718.204(b)(2)(iv).

When weighing the medical opinions, the ALJ must address the comparative credentials of the physicians, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of and bases for their conclusions. *See Kertesz*, 788 F.2d at 163; *Balsavage*, 295 F.3d at 396; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). She must adequately explain her credibility findings in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] If Claimant establishes total disability based on the pulmonary function studies or medical

[11] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

opinions, in isolation, the ALJ should then weigh all of the relevant evidence together to determine whether Claimant has established total disability. *See* 20 C.F.R. §718.204(b)(2); *Shedlock*, 9 BLR at 1-198.

If Claimant establishes total disability, and thereby invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305. The burden would then shift to Employer to establish he has neither legal nor clinical pneumoconiosis,[12] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). As the ALJ noted, however, Employer "has indicated [its] agreement to the finding of legal pneumoconiosis by [ALJ] Swank, thus conceding Claimant established legal pneumoconiosis." Decision and Order on Modification at 20, *citing* Employer Closing Brief at 3. Therefore Employer is foreclosed from rebutting the presumption by establishing Claimant does not have pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). In this scenario, the ALJ should address whether Employer has established Claimant does not have clinical pneumoconiosis,[13] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii).

If Claimant is unable to establish total disability, benefits are precluded. 20 C.F.R. Part 718; *see Trent v. Director, OWCP*, 11 BLR 1-26, 27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

---

[12] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary 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).

[13] Whether Employer has rebutted the presumption of clinical pneumoconiosis may be relevant to rebuttal of disability causation at 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order Denying Benefits and Modification is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge