BRB No. 13-0321 BLA

ROBERT C. THOMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/23/2014
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
WELLS FARGO DISABILITY MANAGEMENT/SELF-INSURED THROUGH CONSOL ENERGY	)	
	)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman Law Firm, P. C.), Denver, Colorado, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Michelle S. Gerdano (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 on Remand (09-BLA-5197) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a miner's claim filed on February 14, 2008, and is before the Board for the second time.

In his initial decision, applying amended Section 411(c)(4),[1] 30 U.S.C. §921(c)(4), the administrative law judge found that claimant established more than fifteen years of qualifying coal mine employment.[2] The administrative law judge further found that the medical evidence established that claimant is 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 further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

[1] 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)(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).

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

Upon review of employer's appeal, the Board vacated the administrative law judge's decision, and remanded the case so that the parties could submit evidence in response to the change in the law due to the reinstatement of Section 411(c)(4) after the hearing.[3] *Thompson v. Consolidation Coal Co.*, BRB No. 11-0331 BLA, slip op. at 4-6 (Jan. 20, 2012)(unpub.). In remanding the case for the administrative law judge to reopen the record, the Board rejected employer's arguments that the retroactive application of amended Section 411(c)(4) to this claim violates employer's due process rights and constitutes an unlawful taking of its property, in violation of the Fifth Amendment to the United States Constitution. *Thompson*, slip op. at 6.

On remand, following the parties' submission of additional evidence, the administrative law judge accepted employer's stipulation that claimant had over fifteen years of underground coal mine employment. Decision and Order on Remand at 16. The administrative law judge found that the medical evidence established that claimant is 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 Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that he is totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge applied an improper rebuttal standard, and erred in his analysis of the evidence in finding that employer failed to rebut the Section 411(c)(4) presumption.[4] Claimant responds in support of the award of benefits. The Director,

[3] The Board also instructed the administrative law judge to reconsider his decision to exclude a medical report from Dr. Cohen that was submitted by employer. *Thompson v. Consolidation Coal Co.*, BRB No. 11-0331 BLA, slip op. at 3-4 (Jan. 20, 2012)(unpub.). On remand, the administrative law judge admitted Dr. Cohen's medical report as part of employer's evidence, and the admissibility of Dr. Cohen's report is not at issue in the current appeal.

[4] Additionally, employer argues that the retroactive application of Section 411(c)(4) violates its due process rights and constitutes an unlawful taking under the Fifth Amendment to the United States Constitution. Employer's Brief at 31-31. We decline to address these arguments, as we rejected them in the prior appeal, and employer has not demonstrated any exception to the law of the case doctrine. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting).

Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge applied an improper rebuttal standard. Employer has filed a reply brief, reiterating its contentions on appeal.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Employer specifically challenges the administrative law judge's findings that the arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).[6] Employer argues further that the administrative law judge did not weigh the contrary probative evidence at 20 C.F.R. §718.204(b)(2).

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three arterial blood gas studies conducted on May 7, 2008, November 13, 2008, and September 17, 2009. The May 7, 2008 blood gas study, performed by Dr. Gagon, produced non-qualifying values at rest, and qualifying[7] values with exercise. Director's Exhibit 10. The November 13, 2008 and September 17, 2009 blood gas studies, performed by Drs. Repsher and James, respectively, produced qualifying values at rest

[5] The administrative law judge's finding that claimant had more than fifteen years of underground coal mine employment is unchallenged on appeal. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The administrative law judge found that the three pulmonary function studies of record did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 17. Further, as there is no evidence of record that claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*.

[7] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C, for establishing total disability. 20 C.F.R. §718.204(b)(2)(i), (ii). A "non-qualifying" study exceeds those values.

and did not include an exercise portion. Employer's Exhibit 8 at 18; Claimant's Exhibit 4.

The administrative law judge found that "three qualifying arterial blood gas studies . . . show total disability and no tests . . . contradict the findings. Therefore, the [c]laimant has established total disability under § 718.204(b)(2)(ii)." Decision and Order on Remand at 17. Employer contends that substantial evidence does not support the administrative law judge's finding because he did not address the non-qualifying blood gas study values. Employer's Brief at 8-9. This contention has merit. The administrative law judge did not weigh the non-qualifying resting values of the May 7, 2008 blood gas study. Therefore, the Board is unable to determine whether substantial evidence supports his determination that the blood gas study evidence established that claimant is totally disabled. *See* 30 U.S.C. §923(b). Consequently, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii), and remand this case for him to consider all of the relevant evidence, and determine whether the blood gas study evidence establishes total disability. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479, 13 BLR 2-196, 2-208 (10th Cir. 1989).

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. James, Repsher, and Zaldivar.[8] Dr. James opined that claimant is totally disabled by a respiratory or pulmonary impairment, based on the results of his pulmonary function and blood gas studies. Claimant's Exhibits 1 at 5; 11 at 3. Dr. Zaldivar opined that, because claimant's blood gas study values are abnormal, he is unable to perform his usual coal mine work from a pulmonary standpoint. Employer's Exhibit 13 at 7. In contrast, Dr. Repsher opined that claimant does not suffer from a totally disabling respiratory impairment. Employer's Exhibits 4 at 4; 11. Specifically, Dr. Repsher noted that claimant's pulmonary function studies reflect "very mild and clinically insignificant" obstruction, and that his blood gas studies are normal when adjusted for age and altitude. Employer's Exhibit 4 at 2-4; Employer's Exhibit 11 at 2. Further, Dr. Repsher opined that, to the extent claimant's blood gas studies reflect mild hypoxemia, it is due to heart disease. Employer's Exhibit 6; Employer's Exhibit 11 at 2.

[8] The administrative law judge also considered the medical opinions of Drs. Cohen and Gagon, and determined that neither physician addressed whether claimant is totally disabled. Decision and Order on Remand at 17-18; Director's Exhibit 10; Employer's Exhibit 12. On appeal, no party has challenged this aspect of the administrative law judge's decision.

The administrative law judge found the opinions of Drs. James and Zaldivar, that claimant is totally disabled, to be supported by claimant's qualifying blood gas study values. The administrative law judge accorded "less weight" to Dr. Repsher's opinion that claimant is not totally disabled, because he found that Dr. Zaldivar "better explained that[,] even adjusting for age and barometric pressure, [c]laimant's blood gas study values were abnormal." Decision and Order at 18. Further, the administrative law judge discounted Dr. Repsher's opinion, that any blood gas study abnormality present is due to heart disease, because there was no evidence that claimant has been diagnosed with, or treated for, a cardiac condition. The administrative law judge therefore found that the medical opinion evidence established that claimant is totally disabled.

Initially, employer contends that the administrative law judge mischaracterized Dr. Zaldivar's opinion. Employer's Brief at 9 n.4. We disagree. Employer points to Dr. Zaldivar's statement that claimant's pulmonary function studies do not indicate total disability. *Id*. However, a review of Dr. Zaldivar's medical report, as a whole, reveals his opinion that, although claimant's pulmonary function study values do not indicate total disability, his blood gas studies indicate the presence of an impairment that would prevent claimant from performing his usual coal mine work.[9] Employer's Exhibit 13 at 7. Therefore, substantial evidence supports the administrative law judge's characterization of Dr. Zaldivar's opinion.

We also reject employer's argument that the administrative law judge failed to address whether the medical opinions were documented and reasoned. Employer's Brief at 9-10. As summarized above, the administrative law judge found the opinions of total disability to be supported by claimant's qualifying blood gas study values. Further, he determined that Dr. Zaldivar explained that claimant's blood gas study values were abnormal even if adjusted for age and altitude. Therefore, the administrative law judge considered the documentation and reasoning of the medical opinions. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024-25, 24 BLR 2-297, 2-315 (10th Cir. 2010). However, because the administrative law judge relied on the qualifying blood gas studies to weigh the conflicting medical opinions, and we have vacated his finding that claimant's blood gas studies establish total disability, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[9] Specifically, Dr. Zaldivar stated that claimant's pulmonary function studies, "[b]y themselves. . . do not reveal any pulmonary abnormality that would prevent even heavy manual labor. . . . The blood gas study values[,] however[,] do show that there is an abnormality present . . . ." Employer's Exhibit 13 at 7. Dr. Zaldivar concluded that, "[f]rom the blood gas standpoint, [claimant] would not be able to do his usual coal mining work as he described it . . . ." *Id*.

On remand, after the administrative law judge has reconsidered the blood gas study evidence, he must reconsider the medical opinions on the issue of the existence of total disability[10] pursuant to 20 C.F.R. §718.204(b)(2)(iv). In considering the medical opinions regarding total disability, the administrative law judge should determine the exertional requirements of claimant's usual coal mine employment, which are of record, and analyze the physicians' opinions in light of those requirements. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); *Budash v Bethlehem Mines Corp.*, 9 BLR 1-48, 1-51-52, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); Director's Exhibit 4; Hr'g Tr. at 44-48. When weighing the medical opinions, the administrative law judge must consider the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Gunderson*, 601 F.3d at 1024, 24 BLR at 2-315.

Additionally, on remand, the administrative law judge must weigh all contrary probative evidence, like and unlike, including the non-qualifying pulmonary function studies, in making a determination regarding the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Bosco*, 892 F.2d at 1479, 13 BLR at 2-208; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(en banc). Because we have vacated the administrative law judge's finding of total disability, we also vacate his determination that claimant invoked the Section 411(c)(4) presumption.

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

In the interest of judicial economy, we will address employer's arguments regarding rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds that claimant has invoked the Section 411(c)(4) presumption. Once claimant invokes the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), the burden of proof shifts 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); *see Bosco*, 892 F.2d at 1481, 13

[10] Employer challenges the administrative law judge's decision to discount, at 20 C.F.R. §718.204(b)(2)(iv), Dr. Repsher's opinion that any blood gas study abnormality that claimant has is due to heart disease. Reply Brief at 5. Contrary to employer's argument, the proper inquiry at the invocation stage of Section 411(c)(4) is the existence of a totally disabling respiratory or pulmonary impairment, not its cause. *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1480-81, 13 BLR 2-196, 2-212-13 (10th Cir. 1989). Therefore, the administrative law judge, on remand, need not address the cause of disability at 20 C.F.R. §718.204(b)(2)(iv).

BLR at 2-213 (holding that employer must "affirmatively establish[] the lack of either pneumoconiosis or a link with [claimant's coal] mine employment"). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge applied an improper standard by requiring it to disprove the existence of legal pneumoconiosis. Employer's Brief at 13-17, 30-31. Contrary to employer's contention, invocation of the Section 411(c)(4) presumption provides claimant with a presumption of both clinical and legal pneumoconiosis.[11] Consequently, in order to rebut the Section 411(c)(4) presumption, employer must disprove the existence of both clinical and legal pneumoconiosis.[12] *See Antelope Coal Co. v. Goodin*, 743 F.3d 1331, 1345 (10th Cir. 2014); *Bosco*, 892 F.2d at 1481, 13 BLR at 2-213. Employer's reliance on *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), to support its argument that legal pneumoconiosis may not be presumed under Section 411(c)(4), is misplaced, as *Andersen* did not address Section 411(c)(4).[13]

Employer also contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is

[11] "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). "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).

[12] The implementing regulation that was promulgated after the administrative law judge issued his decision specifically requires the party opposing entitlement in a miner's claim to establish "both that the miner does not . . . have: (A) Legal pneumoconiosis as defined in § 718.201(a)(2); and (B) Clinical pneumoconiosis as defined in § 718.201(a)(1), arising out of coal mine employment (see § 718.203)." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(i)).

[13] In *Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006), the Tenth Circuit addressed the application of Section 411(c)(1) of the Act, 30 U.S.C. §921(c)(1), which provides that where a miner has at least ten years of coal mine employment, it is rebuttably presumed that his or her pneumoconiosis arose out of that employment. The Tenth Circuit held that the Section 411(c)(1) presumption is limited to cases in which the miner establishes the existence of clinical pneumoconiosis. *Andersen*, 455 F.3d at 1106-07, 23 BLR at 2-343.

substantially similar to the one that the Board rejected 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), and we reject it here for the reasons set forth in that decision.[14] We now turn to the administrative law judge's rebuttal findings.

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge accurately found that the x-ray evidence of record was negative for pneumoconiosis.[15] The administrative law judge summarized negative readings of CT scans, Decision and Order on Remand at 14-15, but a review of his decision discloses no finding as to whether the CT scan evidence assisted employer in disproving the existence of clinical pneumoconiosis. We agree with employer that, on remand, the administrative law judge should address the CT scan evidence and make a finding as to whether it disproves the existence of clinical pneumoconiosis. Further, as we are remanding this case for further consideration, we instruct the administrative law judge to also address the medical opinion evidence on the issue of clinical pneumoconiosis, and make a specific finding as to whether employer has disproved the existence of clinical pneumoconiosis. *See* 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)(1)(i)).

In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Gagon, James, Repsher, Zaldivar, and Cohen. Dr. Gagon diagnosed claimant with chronic bronchitis due to coal mine dust exposure, Director's Exhibit 10, and Dr. James diagnosed him with chronic obstructive pulmonary disease due to coal mine dust exposure.[16] Claimant's Exhibits 1 at 4; 11 at 3. In contrast, Dr. Repsher concluded that claimant does not have legal pneumoconiosis, but has mild obstruction reflected on one pulmonary function study, that he opined was likely due to insufficient effort on the test, and has mild hypoxemia that is due to heart disease and is unrelated to coal mine employment. Employer's Exhibits 4, 6, 11. Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but has hypoxemia due solely to pulmonary fibrosis unrelated to coal

[14] Moreover, the regulations implementing amended Section 411(c)(4) 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)).

[15] In making this finding, however, the administrative law judge stated that "claimant has failed to establish that he suffers from pneumoconiosis under § 718.202(a)(1)." Decision and Order on Remand at 20.

[16] Both physicians noted that claimant never smoked. Director's Exhibit 10; Claimant's Exhibits 1, 11.

mine dust exposure. Employer's Exhibit 13. Dr. Cohen indicated that he could not determine the etiology of claimant's blood gas impairment from the information he reviewed, but stated that it would be "difficult to attribute" it to pneumoconiosis, given claimant's normal pulmonary function studies and diffusion capacity tests. Employer's Exhibit 12 at 3. Under the heading "Conclusion," Dr. Cohen diagnosed "mild gas exchange abnormalities of undetermined etiology." *Id*.

The administrative law judge found that Dr. Cohen determined that a diagnosis could not be made, based on the evidence available to him. The administrative law judge discounted Dr. Zaldivar's opinion, because he found that Dr. Zaldivar did not adequately explain his opinion that the pattern of claimant's impairment is inconsistent with legal pneumoconiosis. Further, the administrative law judge discounted Dr. Repsher's opinion, that claimant's impairment is due solely to heart disease, because there was no record evidence of a significant heart condition, "given Dr. James' explanation that, while [c]laimant experienced a mild diastolic dysfunction, his ejection fraction was normal and such diastolic dysfunction would not result in [c]laimant's pO2 levels." Decision and Order on Remand at 22. The administrative law judge further found that Dr. James's opinion was documented and reasoned, and established the existence of legal pneumoconiosis.[17]

Employer contends that the administrative law judge did not sufficiently analyze Dr. Cohen's opinion.[18] Employer's Brief at 24. This contention lacks merit. Employer must affirmatively establish that claimant does not have legal pneumoconiosis. *Bosco*, 892 F.2d at 1481, 13 BLR at 2-213. Dr. Cohen concluded that claimant has "gas exchange abnormalities of undetermined etiology," and stated only that it was "difficult" to attribute them to pneumoconiosis. Employer's Exhibit 12 at 3. Thus, the administrative law judge did not err in finding that Dr. Cohen's report does not support

[17] The administrative law judge also determined that Dr. James's opinion was supported by Dr. Gagon's opinion and Dr. Morgan's treatment records. Decision and Order on Remand at 23.

[18] A substantial portion of employer's brief is devoted to arguing that the medical opinions diagnosing claimant with legal pneumoconiosis are not documented and reasoned. Employer's Brief at 18-19, 22, 24-27. The proper inquiry on rebuttal, however, is the sufficiency of employer's evidence, as employer bears the burden to affirmatively show that claimant does not suffer from pneumoconiosis or that his disabling respiratory disease is unrelated to coal mine work. *See* 30 U.S.C. §921(c)(4). Thus, we focus on the administrative law judge's credibility findings with regard to the opinions of Drs. Cohen, Repsher, and Zaldivar.

employer's rebuttal burden. *See* 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(3)).

Additionally, employer argues that the administrative law judge did not provide a valid reason for discounting Dr. Zaldivar's opinion. Employer's Brief at 23; Reply Brief at 14-15. We disagree. In concluding that claimant does not have legal pneumoconiosis, Dr. Zaldivar stated that legal pneumoconiosis "refers to an abnormality of both the blood gas and ventilatory studies," in which the pulmonary function studies "should become abnormal first, followed by a blood gas abnormality." Employer's Exhibit 13 at 7. In part because claimant's pulmonary function study values were normal and his blood gas studies were abnormal, Dr. Zaldivar concluded that claimant does not have legal pneumoconiosis. *Id*. Contrary to employer's contention, the administrative law judge permissibly found that Dr. Zaldivar did not adequately explain the basis for his opinion that legal pneumoconiosis is characterized by the particular pattern of impairment he described. *See Northern Coal Co. v. Director, OWCP* [*Pickup*], 100 F.3d 871, 876, 20 BLR 2-334, 2-344 (10th Cir. 1996). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Thus, we affirm the administrative law judge's credibility determination regarding Dr. Zaldivar's opinion.

Employer argues further that, in discounting Dr. Repsher's opinion as unsupported by evidence of significant heart disease in the record, the administrative law judge did not address Dr. Repsher's explanation that there was evidence of ventricular heart failure, or address treatment record echocardiograms that detected cardiac abnormalities. Employer's Brief at 21. This argument has merit. *See* Employer's Exhibits 4, 8, 11, 14. Further, a review of the administrative law judge's decision discloses no explanation of his basis for crediting Dr. James's interpretation of the cardiac testing evidence over that of Dr. Repsher. As the administrative law judge set forth no other reason for discounting Dr. Repsher's opinion, we must vacate his finding with respect to Dr. Repsher, and instruct the administrative law judge, on remand, to reconsider whether Dr. Repsher's opinion disproves the existence of legal pneumoconiosis, and to explain his findings. *See Gunderson*, 601 F.3d at 1024-25, 24 BLR at 2-315. On remand, regardless of whether the administrative law judge finds that claimant has heart disease, he is instructed to determine whether Dr. Repsher has set forth an opinion establishing that claimant's impairment was not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2).

Employer lastly contends that the administrative law judge failed to address whether employer rebutted the Section 411(c)(4) presumption by proving that claimant's disabling impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 28-29. After the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis, he considered whether employer could

"rebut the presumption through a physician's documented and reasoned medical report" addressing "the cause or causes of [the] miner's total disability. . . ." Decision and Order on Remand at 23. The administrative law judge determined that, because "the evidence . . . establishes the existence of legal pneumoconiosis, a finding which necessarily requires a finding that [c]laimant's impairment arose out of his coal mine employment," employer "failed to rebut the Section 411(c)(4) presumption." *Id*. Therefore, contrary to employer's contention, the administrative law judge addressed whether employer proved that claimant's disabling impairment was unrelated to his coal mine employment. *See Goodin*, 784 F.3d at 1346.

However, because we have vacated the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we also vacate his finding as to disability causation and instruct the administrative law judge, on remand, that if the issue is reached, he should address whether employer has proved that claimant's impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). To prove that claimant's disability did not arise out of coal mine employment, employer must establish that "no part of the miner's . . . total disability was caused by pneumoconiosis. . . ." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); *Goodin*, 743 F.3d at 1346.

Accordingly, the administrative law judge's Decision and Order On Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge