

BRB No. 11-0105 BLA

POWELL P. MORGAN)
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 Claimant-Respondent)
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 v.)
)
 ISLAND CREEK KENTUCKY MINING) DATE ISSUED: 10/24/2011
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia,
for claimant.

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer.

Dominique Sinesi (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: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5058)
of Administrative Law Judge Thomas M. Burke, with respect to a claim filed on January
18, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-
944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified

at 30 U.S.C. §§921(c)(4) and 932(l) (the Act). After crediting claimant with twenty-seven years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge initially determined that claimant established that he has a totally disabling pulmonary impairment at 20 C.F.R. §718.204(b)(2). Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),¹ the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing that retroactive application of the recent amendments is unconstitutional, as it denies employer due process and constitutes a taking of private property. Employer also states that the rebuttal methods set forth in amended Section 411(c)(4) of the Act apply only to the Secretary of the United States Department of Labor (DOL) and not to responsible operators. Further, employer asserts that the administrative law judge erred in finding that the rebuttable presumption of total disability due to pneumoconiosis was invoked, and that employer failed to rebut it, because the administrative law judge did not discuss the rebuttal standard and no regulations have been promulgated concerning the standard. Employer maintains that the administrative law judge incorrectly presumed the existence of legal pneumoconiosis and erred in finding that employer did not rebut the presumption of total disability due to pneumoconiosis. Claimant responds, stating that the recent amendments apply to responsible operators and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, asserting that the recent amendments apply to coal mine operators and that application of the amendments does not violate employer's due process rights or constitute an unconstitutional taking of private property.²

¹ In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

² We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant established that he is suffering from a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. Constitutionality of the Amendments

Employer argues that retroactive application of the amendments to the Act is unconstitutional because it denies employer due process and constitutes an unconstitutional taking of private property. Claimant and the Director assert that these arguments have no merit. We agree. Employer's allegations are nearly identical to those that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-197-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir. June 13, 2011).⁴ Therefore, we reject them here for the reasons set forth in that decision. *Id.* at 1-197-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

³ The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Although *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir. June 13, 2011) involved the automatic survivors' entitlement provision at 30 U.S.C. 932(l), as the Director, Office of Workers' Compensation Programs, states, "amended Section 411(c)(4) has essentially the same legitimate legislative purpose – it compensates claimants for disabilities bred in the past by providing a less rigorous path to entitlement for long-term miners . . . who suffered from a totally disabling respiratory or pulmonary impairment." Director's Brief at 6-7.

II. Application of Amended Section 411(c)(4) to Responsible Operators

Employer asserts that, because amended Section 411(c)(4) of the Act provides that “the Secretary” can rebut the presumption by making certain showings, but does not include a reference to coal mine operators, the rebuttal provisions of Section 411(c)(4) do not apply to responsible operators. Employer maintains, therefore, that applying this section to responsible operators violates principles of statutory construction. Employer’s Brief at 6, *citing Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976).

Claimant responds and argues that his claim is a Part C claim, which does not limit rebuttal to the Secretary, and that controlling case law does not support employer’s interpretation of amended Section 411(c)(4). Claimant states that in *Rose v. Clinchfield Coal Company*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980), the United States Court of Appeals for the Fourth Circuit applied Section 411(c)(4) to a responsible operator and ultimately held that the coal company did not meet its burden in rebutting the presumption. The Director also argues that the Board should reject employer’s argument. The Director indicates that employer did not cite case law supporting its contention and that in *Usery*, the one decision employer referenced, the United States Supreme Court actually held that “the Section 411(c)(4) presumption applies to operator cases under Part C of the [Act] notwithstanding the statutory reference to the Secretary.”⁵ Director’s Brief at 5, *citing Usery*, 428 U.S. at 37-38, 3 BLR at 2-58-59. The Director also cites cases in which the Fourth Circuit applied the Section 411(c)(4) rebuttal provision to an operator. *See Rose*, 614 F.2d at 940, 2 BLR at 2-44; *Colley & Colley Coal Co. v. Breeding*, 59 Fed Appx. 563, 567 (4th Cir. Mar. 11, 2003).

We reject employer’s allegation that the rebuttal provisions of amended Section 411(c)(4) do not apply to a claim brought against a responsible operator. As claimant and the Director have indicated, the courts have consistently applied Section 411(c)(4), including the language pertaining to rebuttal, to operators, despite the reference to “the Secretary.” *See Usery*, 428 U.S. at 37-38, 3 BLR at 2-58-59; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 24 BLR (6th Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *Rose*, 614 F.2d at 940, 2 BLR at 2-44; *Breeding*, 59 Fed Appx. at 567; *U. S. Steel Corp. v. Gray*, 588 F.2d 1022, 1 BLR 2-168 (5th Cir. 1979). Therefore, we reject employer’s contention that application of the

⁵ The United States Supreme Court held in *Usery* that the 15-year presumption applies to responsible operators and that, “the Act does not itself limit the evidence with which an operator may rebut the [Section] 411(c)(4) presumption.” *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 35-38, 3 BLR 2-36, 2-57-59. We note that employer has not alleged that there are appropriate methods, other than those identified in Section 411(c)(4), for establishing rebuttal.

rebuttal provisions of amended Section 411(c)(4) to a responsible operator is impermissible.

III. Rebuttal Standard and Promulgation of Regulations

Employer asserts that, assuming the rebuttal provisions in Section 411(c)(4) apply to operators, the administrative law judge erred in determining that employer did not rule out the existence of pneumoconiosis, because he did not “discuss the parameters of the rebuttal standard, and the parties have received no guidance from [DOL] concerning the standard.” Employer’s Brief at 6-7. Employer argues that, as a result, the administrative law judge’s decision also violates the Administrative Procedure Act (APA).⁶ Employer further contends that, because there is a split between the Fourth and Seventh Circuits concerning the rebuttal standard, relevant to amended Section 411(c)(4), the administrative law judge should have discussed the applicable standard before examining the facts and reaching conclusions.⁷ In addition, employer argues that 20 C.F.R. §718.305 does not apply to this claim, in its current form, because it provides that it “is not applicable to any claim filed on or after January 1, 1982.” Employer’s Brief at 10, *quoting* 20 C.F.R. §718.305(e) (2010). Lastly, employer argues that the administrative law judge erred in presuming the existence of legal pneumoconiosis, because amended Section 411(c)(4) provides only for the presumption of total disability due to clinical pneumoconiosis.

⁶ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of “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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

⁷ Employer states that in *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980), the Fourth Circuit held that, because the presumption applied and it was uncontested that claimant suffered from simple pneumoconiosis, the claim could only be defeated by “respondents’ production of substantial evidence that the decedent’s ‘impairment did not arise out of or in connection with, employment in a coal mine.’” Employer’s Brief at 9, *quoting* *Rose*, 614 F.2d at 939, 2 BLR at 2-43. Employer further maintains that in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), the United States Court of Appeals for the Seventh Circuit held that, in order to rebut the presumption, the operator must prove, by a preponderance of the evidence, that coal dust exposure was not a contributing cause of claimant’s disabling respiratory impairment “by showing . . . that a claimant’s smoking would have disabled him, by itself, even if he had spent his life as an accountant rather than a miner.” Employer’s Brief at 9-10, *quoting* *Blakley*, 54 F.3d at 1320, 19 BLR at 2-205.

Claimant responds, asserting that, in light of employer's acknowledgement that this claim arises within the jurisdiction of the Fourth Circuit, its allegation that Seventh Circuit case law creates a "split in the circuits" is a "red herring," as Seventh Circuit case law is not binding in this claim. Claimant's Brief at 8, 10. Claimant maintains that the administrative law judge properly cited to governing law concerning the presumption and to the definition of pneumoconiosis at 20 C.F.R. §718.201. In addition, claimant contends that the administrative law judge provided a thorough analysis of the evidence and a discussion of the elements of entitlement that was consistent with the Fourth Circuit's holding in *Rose*, 614 F.2d at 940, 2 BLR at 2-44. While not addressing this issue directly, the Director comments, in a footnote, that the decisions in *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995), *Rose*, 614 F.2d at 940, 2 BLR at 2-41-45, and *Breeding*, 59 Fed Appx. at 567, "refute the [e]mployer's spurious suggestion that the rebuttal standard is 'murky' or that it need not disprove the existence of 'legal' pneumoconiosis to rebut the presumption." Director's Brief at 5 n.2.

We agree with the Director that there is no merit to employer's claim that, because DOL has not promulgated regulations implementing the recent amendments to the Act, there is no guidance concerning the proper rebuttal standard. It is well-established in the case law that the party opposing entitlement must prove either that the miner does not or did not have pneumoconiosis or that the miner's impairment did not arise out of, or in connection with, coal mine employment. See *Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpub.); *DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987). Accordingly, we reject employer's argument that the presumption at Section 411(c)(4) does not apply until DOL issues guidelines or promulgates new regulations implementing the statutory amendments.

Further, employer's contention, that a split exists between the Fourth and Seventh Circuits regarding the standards for establishing rebuttal of the presumption of total disability due to pneumoconiosis that renders the standard unclear has no merit. Because claimant's employment as a miner was solely in West Virginia, his claim arises within the jurisdiction of the Fourth Circuit and Seventh Circuit case law is not controlling. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The administrative law judge properly quoted amended Section 411(c)(4) and explained, in accordance with Fourth Circuit case law, that once claimant invoked the rebuttable provision, the burden shifted to employer to demonstrate that claimant's disability did not arise out of coal mine employment or that claimant does not suffer from legal pneumoconiosis. See *Rose*, 614 F.2d at 939, 2 BLR at 2-43; Decision and Order at 14-15. Further, employer's argument that amended Section 411(c)(4) does not presume legal pneumoconiosis is without merit. The Fourth Circuit has held that the presumption of total disability due to pneumoconiosis effectuated by Section 411(c)(4) includes a presumption of both clinical

and legal pneumoconiosis. *See Barber*, 43 F.3d at 900, 19 BLR at 2-65. We affirm, therefore, the administrative law judge's application of the rebuttal provisions of amended Section 411(c)(4) to employer in this case.

IV. Rebuttal of the Presumption

A. Legal Pneumoconiosis – 20 C.F.R. §718.202(a)(4)

1. The Administrative Law Judge's Findings

The administrative law judge initially determined that, because all of the physicians agreed that claimant has disabling emphysema, the issue is whether claimant's coal mine employment played a role in causing the emphysema. Decision and Order at 21. The administrative law judge explained that, because the rebuttable presumption of pneumoconiosis includes legal pneumoconiosis, employer bears the burden of ruling out the existence of legal pneumoconiosis. *Id.* The administrative law judge found that the opinions of Drs. Zaldivar and Hippensteel failed to rebut the presumption because the sole reason they gave for excluding coal dust as a cause of claimant's impairment was their shared opinion that coal dust inhalation does not cause bullous emphysema. *Id.* at 24. The administrative law judge found that Dr. Rasmussen's opinion, that claimant's emphysema was caused by smoking and coal dust exposure, was more persuasive. *Id.* The administrative law judge noted that Dr. Rasmussen cited medical literature in support of his opinion, that coal dust exposure can cause bullous emphysema, and determined that Dr. Rasmussen's conclusion is more consistent with DOL's position, that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that coal dust exposure, in combination with cigarette smoking, has a synergistic effect in causing obstructive impairments. *Id.*, citing 65 Fed. Reg. 79,938-79,943 (Dec. 20, 2000). In addition, the administrative law judge found that Dr. Rasmussen's opinion is more credible, and "particularly persuasive," because many of the x-ray and CT scan images showed scarring in the lungs, which was consistent with Dr. Rasmussen's statement that, in contrast to cigarette smoking, coal dust inhalation causes interstitial fibrosis. Decision and Order at 24.

2. Arguments on Appeal

Employer asserts that the administrative law judge's reasons for crediting Dr. Rasmussen's opinion, that claimant's chronic obstructive pulmonary disease (COPD)/emphysema is due to coal dust exposure, over the contrary opinions of Drs. Zaldivar and Hippensteel, are irrational. Employer argues that Drs. Zaldivar and Hippensteel also cited medical literature in support of their assessments. Employer further contends that Dr. Rasmussen's opinion is equivocal, as he did not identify the specific cause of claimant's obstructive and gas exchange impairments. Employer also

maintains that it was inconsistent for the administrative law judge to credit Dr. Rasmussen's opinion, after determining that the evidence did not establish the existence of clinical pneumoconiosis, contrary to Dr. Rasmussen's original diagnosis. Employer asserts that, in contrast, Drs. Zaldivar and Hippensteel provided reasoned and documented opinions specific to claimant and ruled out coal dust exposure as a cause of claimant's emphysema. In addition, employer contends that the administrative law judge substituted his opinion for that of the medical experts, and selectively analyzed the medical opinions, by finding Dr. Rasmussen's diagnosis of legal pneumoconiosis more persuasive, based on the x-ray and CT scan images showing scarring in the lungs. Employer alleges that physicians with superior credentials interpreted the x-rays and CT scans as negative for changes consistent with coal workers' pneumoconiosis and opined that the fibrosis was most likely consistent with post-inflammatory scarring, sequelae of aspiration, or bibasilar cystic-emphysematous change.

Employer's contentions are without merit. The administrative law judge rationally accorded greater weight to Dr. Rasmussen's opinion that bullous changes can develop due to coal dust exposure, as supported by the medical literature and consistent with DOL's position, as expressed in the preamble to the regulations. *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order at 24. The administrative law judge also permissibly determined that the opinions of Drs. Zaldivar and Hippensteel were not consistent with DOL's findings in the preamble to the regulations, "that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms and that the risk of developing airways obstruction caused by coal dust exposure is additive with cigarette smoking." Decision and Order at 24, *citing* 65 Fed. Reg. 79,938-79,943; *see J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd*, *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 257, 383, 24 BLR 2-369, 383 (3d Cir. 2011). Therefore, we affirm the administrative law judge's finding that the opinions of Drs. Zaldivar and Hippensteel did not rebut the presumption by affirmatively establishing that claimant does not have legal pneumoconiosis. *Barber*, 43 F.3d at 900, 19 BLR at 2-65; *Rose*, 614 F.2d at 939, 2 BLR at 2-43.

B. Disability Causation – 20 C.F.R. §718.204(c)

1. The Administrative Law Judge's Findings

The administrative law judge determined that, because he had found that claimant had established that his emphysema was due, in part, to his coal dust exposure, the opinions of Drs. Zaldivar and Hippensteel, that claimant's disabling impairment was unrelated to coal dust inhalation, were not persuasive. Decision and Order at 25; *see* Employer's Exhibits 1, 4-6, 8, 11, 12. The administrative law judge also found that the

credibility of Dr. Hippensteel's opinion, that claimant's coronary artery disease may contribute to his hypoxia, was diminished by the conclusion of Dr. Karam, claimant's cardiologist, that claimant's hypoxia and dyspnea were not due to a cardiac condition. Decision and Order at 25; *see* Employer's Exhibits 4, 5, 6, 12. Based on his discrediting of the opinions of Drs. Zaldivar and Hippensteel on the issue of disability causation, the administrative law judge determined that employer did not rebut the presumption that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). *Id.*

2. Arguments on Appeal

Employer asserts that the administrative law judge erred when he "mechanically rejected" the opinions of Drs. Zaldivar and Hippensteel because he did not agree with their conclusion that claimant did not have pneumoconiosis. Employer's Brief at 22. Employer maintains that disability causation is a separate element of entitlement that must be separately considered. In support of its position, employer asserts that the administrative law judge "may credit physicians' assessments regarding disability or death causation, even if the physicians' opinions are contrary to the administrative law judge's findings regarding the existence of pneumoconiosis, 'if the doctors had diagnosed the claimants with or found symptoms consistent with legal pneumoconiosis.'" Employer's Brief at 24, *quoting* *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383 (4th Cir. 2002). Employer maintains that, because Drs. Zaldivar and Hippensteel diagnosed a totally disabling respiratory impairment, and agreed that claimant has emphysema, the administrative law judge should have considered their opinions concerning disability causation. Employer's Brief at 24, *citing* *Scott*, 289 F.3d at 269-70, 22 BLR at 2-383-84; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. (Hobbs II)*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Claimant responds, stating that employer's reliance on the Fourth Circuit's holdings in *Hobbs*, *Ballard*, and *Scott*, is misplaced. Claimant asserts that, because Drs. Zaldivar and Hippensteel attributed claimant's disabling impairment to emphysema caused solely by smoking, which is contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), the administrative law judge acted properly in discrediting their opinions at 20 C.F.R. §718.204(c).

Employer is correct in stating that an administrative law judge may accord weight to a physician's opinion regarding disability causation, even when his or her conclusion as to the existence of pneumoconiosis is in conflict with the administrative law judge's finding. *See* *Scott*, 289 F.3d at 269-70, 22 BLR at 2-383-84. However, in this case, the administrative law judge did not err in discrediting the opinions of Drs. Zaldivar and Hippensteel under 20 C.F.R. §718.204(c). Both Drs. Zaldivar and Hippensteel opined

that claimant's disabling emphysema was not due to coal dust exposure, a conclusion that is directly contrary to the administrative law judge's finding that claimant's emphysema was due, in part, to coal dust exposure. Decision and Order at 24; Employer's Exhibits 1, 4, 5, 6, 8, 11, 12. Further, the Fourth Circuit has held that where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, the administrative law judge may "only give weight to the causation opinion of the physicians who [did] not diagnose[] pneumoconiosis 'if he provide[s] specific and persuasive reasons for doing so, and those opinions could carry little weight at the most.'" *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006), quoting *Scott*, 289 F.3d at 269, 22 BLR at 2-384. Accordingly, the administrative law judge acted within his discretion in determining that the opinions of Drs. Zaldivar and Hippensteel were insufficient to establish that claimant's totally disabling impairment is not related to, or aggravated by, coal dust exposure. See *Barber*, 43 F.3d at 900, 19 BLR at 2-65.

Therefore, we affirm the administrative law judge's finding that employer did not rebut the fifteen-year presumption set forth in amended Section 411(c)(4), as employer did not make an affirmative showing that claimant does not suffer from pneumoconiosis, or that his totally disabling impairment did not arise out of, or in connection with, his coal mine employment.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge