U.S. Department of Labor

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

BRB No. 19-0320 BLA

HAROLD TEASTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 08/31/2020
WALTER ENERGY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Paisley Newsome and John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Aaron D. Ashcraft and John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Larry W. Price's Decision and Order Denying Modification (2018-BLA-05320) rendered on a subsequent claim[1] filed on April 14, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (Act).

In her May 12, 2017 Decision and Order Denying Benefits, Administrative Law Judge Adele Higgins Odegard found Claimant failed to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2); Director's Exhibit 38. Thus she found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2012). Because Claimant failed to establish an essential element of entitlement, she denied benefits. Director's Exhibit 38.

Claimant requested modification of that denial. Director's Exhibit 39. In his March 7, 2019 Decision and Order that is the subject of this appeal, Judge Price (the administrative law judge) credited Claimant with thirty-seven years of underground coal mine employment[3] based on the parties' stipulation. He found the pulmonary function study evidence supported a total disability finding, but concluded Dr. Fino's opinion that Claimant is not totally disabled outweighs the qualifying pulmonary function testing. Thus he found Claimant failed to establish total disability and did not invoke the Section 411(c)(4) presumption. Because Claimant again failed to establish an essential element of entitlement, the administrative law judge denied benefits.

On appeal, Claimant challenges the administrative law judge's finding he failed to establish total disability necessary to invoke the Section 411(c)(4) presumption. Employer

[1] On March 21, 1986, the district director denied Claimant's prior claim because he failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he establishes 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.

[3] The Benefits Review Board will apply the law of the Eleventh Circuit because Claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

responds in support of the denial of benefits.[4] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies,[5] evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions.[6] 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge 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). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2).

The administrative law judge considered two pulmonary function studies conducted on June 3, 2014, and January 26, 2015, that the parties initially submitted before Judge Odegard. 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 10; Director's Exhibits 13, 17. He also considered a July 17, 2017 study Claimant submitted in support of his modification request. Decision and Order on Modification at 3, 10;

[4] We affirm, as unchallenged, the administrative law judge's finding of thirty-seven years of underground coal mine employment based on the parties' stipulation. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Modification at 4-5.

[5] A "qualifying" pulmonary function study 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. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] The administrative law judge found none of the arterial blood gas studies of record are qualifying and there is no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order on Modification at 11. We affirm these findings as unchallenged. *See Skrack*, 6 BLR at 1-711.

Director's Exhibit 39. He noted the studies listed varying heights for Claimant, ranging from seventy and one-half to seventy-two inches.[7] Decision and Order on Modification at 10. He found Claimant's correct height is 71.3 inches by averaging the conflicting measurements. *Id*.

Based on Claimant's age and height, the administrative law judge found the June 3, 2014 study produced non-qualifying values pre-bronchodilator and post-bronchodilator; the January 26, 2015 study produced qualifying values pre-bronchodilator, but not post-bronchodilator; and the July 17, 2017 study produced qualifying values both pre-bronchodilator and post-bronchodilator. Decision and Order on Modification at 10. He assigned "considerable weight" to the July 17, 2017 qualifying study because it is the most recent study of record. Decision and Order on Modification at 10, 13-14. He determined Claimant established total disability based on the pulmonary function testing because the preponderance of the pre-bronchodilator studies, including the most recent study, is qualifying.[8] 20 C.F.R. §718.204(b)(2)(i); Decision and Order on Modification at 10, 13-14. As this finding is supported by substantial evidence and in accordance with applicable law, it is affirmed. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) ("[T]he use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis.").

Before weighing the medical opinions, the administrative law judge rendered a finding as to the exertional requirements of Claimant's usual coal mine employment as a communications supervisor. Decision and Order on Modification at 5. He found this job "did not involve heavy labor[,] but did require some physical activity." *Id*., *citing* Hearing Transcript at 16-18, 23, 30-33, 35. He explained Claimant "sat most of the day but got up to check computers and walked around to talk to people." *Id*. Moreover, although Claimant "worked in an office" that was "75 feet from the portal of the mine and 1,000 feet from the preparation plant," the administrative law judge found Claimant walked from his office to the mine site and "went into the underground mine three or four times in the last

[7] Claimant's height was listed as seventy and one-half inches on the June 3, 2014 study, seventy-one inches on the January 26 2015 study, and seventy-two inches on the July 17, 2017 study. Director's Exhibits 13, 17, 39.

[8] Claimant's treatment records include pulmonary function studies conducted on January 17, 2013, March 19, 2013, and July 12, 2016. Claimant's Exhibit 5. The March 19, 2013 study is the only study that produced qualifying pre-bronchodilator results. *Id*. No study produced qualifying post-bronchodilator results. *Id*. The administrative law judge assigned these studies "no weight" because they do not comply with the quality standards. 20 C.F.R. §718.103(b); Decision and Order on Modification at 10.

two months of his employment and walked a couple of thousand feet underground." *Id*. Taking official notice of the *Dictionary of Occupational Titles* (DOT), he found this work "was a sedentary job[9] that occasionally involved physical activity."[10] *Id*.

The administrative law judge then weighed Dr. O'Reilly's medical opinion that Claimant is totally disabled and Dr. Fino's opinion that he is not.[11] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 5. He found Dr. O'Reilly's opinion not reasoned and documented because the doctor relied on non-qualifying pulmonary function and arterial blood gas testing taken on June 3, 2014. Decision and Order on Modification at 12. He also found Dr. O'Reilly did not adequately explain why Claimant is totally disabled from his communications supervisor job based on the exertional requirements of that position. *Id*. In contrast, he credited Dr. Fino's opinion because he found the doctor correctly identified Claimant's usual coal mine employment and reviewed a "wider breadth of medical evidence" before rendering his opinion. *Id*. Thus he found Claimant failed to establish total disability based on the medical opinions. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Modification at 13.

Finally, weighing all the relevant supporting evidence against all the relevant contrary evidence, the administrative law judge found Dr. Fino's opinion outweighed the qualifying pulmonary function studies. Decision and Order on Modification at 14. He explained Dr. Fino "had before him qualifying [pulmonary function testing] but maintained his opinion that [Claimant] is not totally disabled from performing his previous coal mine job, which required sedentary work." *Id*. Although Dr. Fino was not aware of the

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[9] The administrative law judge noted the *Dictionary of Occupational Titles* defines sedentary work as "exerting up to 10 pounds of force occasionally" and "a negligible amount of force frequently," while "sitting most of the time" but possibly "walking or standing for brief periods of time." Decision and Order on Modification at 5 (internal quotations omitted). He noted jobs are "sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." *Id*.

[10] We affirm as unchallenged the administrative law judge's finding that Claimant's usual coal mine employment was as a communications supervisor. *See Skrack*, 6 BLR at 1-711.

[11] The record also includes a medical treatment note from Dr. Connolly stating Claimant's "functional status is quite limited. He can no longer do any manual labor." Director's Exhibit 39. The administrative law judge found the doctor's statement insufficient to establish total disability because it is not "the equivalent of a medical opinion or diagnosis of a totally disabling respiratory impairment." Decision and Order on Modification at 13. We affirm this finding as unchallenged. *See Skrack*, 6 BLR at 1-711.

subsequent July 17, 2017 study that produced qualifying values both pre- and post-bronchodilation, the administrative law judge gave Dr. Fino's opinion determinative weight, reasoning that "[a]n additional qualifying [pulmonary function test] does not tip the scale in [Claimant's] favor." *Id*. Thus he found Claimant did not establish total disability. 20 C.F.R. §718.204(b)(2).

As discussed below, we agree with Claimant's arguments that the administrative law judge erred in discrediting Dr. O'Reilly's diagnosis of total disability and in crediting Dr. Fino's opinion that Claimant is not totally disabled. 20 C.F.R. §718.204(b)(2)(iv); Claimant's Brief at 7-12. We thus must vacate the administrative law judge's finding that Dr. Fino's opinion outweighs the qualifying pulmonary function studies, and remand the case for reconsideration of the opinions of Drs. O'Reilly and Fino, and to weigh the evidence as a whole.

Dr. O'Reilly

Dr. O'Reilly opined Claimant is totally disabled from his usual coal mine employment because he has a moderate to severe obstructive respiratory impairment on pulmonary function testing, mild hypoxemia on blood gas testing, and chronic symptoms of coughing, dyspnea, wheezing, and sputum production. Director's Exhibits 14, 19; Claimant's Exhibit 4 at 12. The administrative law judge erred in discrediting this opinion because the doctor cited the June 3, 2014 non-qualifying testing to support his conclusion. Decision and Order on Modification at 12. As Claimant correctly argues, total disability can be established with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see* Claimant's Brief at 9-10. Thus, a doctor can offer a reasoned medical opinion diagnosing total disability even though the underlying objective studies are non-qualifying. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460-61 (11th Cir. 1989); *Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587 (6th Cir. 2000).

We also agree with Claimant's argument the administrative law judge erred to the extent he found Dr. O'Reilly's opinion was based only on the June 3, 2014 objective testing. Decision and Order on Modification at 12; Claimant's Brief at 10. In his initial report, Dr. O'Reilly noted Claimant's June 3, 2014 pulmonary function study had an FEV1 that is 52% predicted[12] and an arterial blood gas study taken on the same day had a pO2 value of 66.7. Director's Exhibit 14. In a subsequent opinion, however, he noted the FEV1 value on the January 26, 2015 study Dr. Goldstein obtained was 59% of predicted, further

[12] Although this study is non-qualifying under the regulations, it produced qualifying FEV1 values. 20 C.F.R. Part 718, Appendix B.

supporting the presence of a moderate to severe obstructive impairment. Director's Exhibit 19; *see also* Claimant's Exhibit 4. As noted above, the administrative law judge found the January 26, 2015 study qualifying under the regulations because it produced qualifying FEV1 and FEV1/FVC values. Thus the administrative law judge did not consider Dr. O'Reilly's opinion in its entirety when faulting Dr. O'Reilly for citing non-qualifying testing. 30 U.S.C. §923(b) (fact finder must address all relevant evidence); *Jordan*, 876 F.2d at 1460-61; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand); Decision and Order on Modification at 12.

Finally, there is merit to Claimant's assertion the administrative law judge erred in discrediting Dr. O'Reilly's opinion by finding the doctor did not adequately explain why Claimant was disabled from his job as a communications supervisor. Decision and Order on Modification at 12; Claimant's Brief at 11-12. The administrative law judge determined Dr. O'Reilly diagnosed total disability because he assumed Claimant had to walk "a mile to participate in fire drills" as part of his usual coal mine employment, and Claimant could not perform this task because of his obstructive impairment. *Id*.; *see* Claimant's Exhibit 4 at 26. The administrative law judge found this part of the doctor's opinion unpersuasive because Claimant's testimony did not establish he had to walk a mile for a fire drill "in his office job; rather, his testimony indicates that he walked a couple of thousand feet three or four times within the last two months of his employment." *Id*., *citing* Hearing Transcript at 18, 30.

Contrary to the administrative law judge's analysis, the record reflects Dr. O'Reilly's diagnosis of total disability was not based on an assumption that Claimant had to walk a mile to conduct fire drills. Rather, Claimant's counsel asked the doctor if Claimant hypothetically would have the respiratory capacity to walk a mile, and he responded Claimant would not. Claimant's Exhibit 4 at 26. The doctor did not opine walking a mile was a necessary part of Claimant's job. Director's Exhibits 14, 19; Claimant's Exhibit 4. Rather he recognized Claimant's usual coal mine employment was working as a communications supervisor. Claimant's Exhibit 4 at 9. He concluded Claimant would have "considerable difficulty" performing "light manual labor," including lifting twenty-pounds regularly and *walking short distances*,[13] based on the moderate to

[13] On cross-examination, Dr. O'Reilly conceded if all Claimant did was sit for twelve hours a day, he would "not necessarily" be disabled from his usual coal mine employment. Claimant's Exhibit 4 at 24-25. As discussed above, however, the administrative law judge found Claimant's usual coal mine employment was not limited to sitting in his office; he found this work "was a sedentary job *that occasionally involved physical activity*," including walking "a couple of thousand feet three or four times" in the underground mines. Decision and Order on Modification at 5, 12 (emphasis added).

severe obstructive impairment evidenced by his pulmonary function testing. *Id*. at 12-13. He explained Claimant would be short of breath with minimal exertion. *Id*. Thus in weighing Dr. O'Reilly's opinion, the administrative law judge mischaracterized the doctor's rationale for concluding Claimant is totally disabled and again failed to consider his opinion in its entirety.[14] *See* 30 U.S.C. §923(b); *Jordan*, 876 F.2d at 1460-61; *Director, OWCP v. Rowe*, 710 F. 2d 251, 255 (6th Cir. 1983); *McCune*, 6 BLR at 1-998; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985).

Dr. Fino

The administrative law judge also erred in crediting Dr. Fino's opinion. Dr. Fino reviewed a number of pulmonary function studies contained in Claimant's medical treatment records and opined they all show an obstructive ventilatory defect.[15] Employer's Exhibit 1 at 4. He also reviewed the June 3, 2014 pulmonary function study that revealed a moderate obstructive impairment and a January 26, 2015 study that evinced a significant obstructive impairment. *Id*. He noted Dr. Goldstein identified Claimant's usual coal mine employment as a supervisor doing some office work.[16] *Id*. He opined Claimant has an obstructive defect that prevents him from performing manual labor, but would not disable him from his supervisor job. *Id*.

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[14] When reweighing Dr. O'Reilly's opinion on remand, the administrative law judge should recognize that a medical opinion need not be phrased in terms of "total disability" before total disability can be established. An administrative law judge must consider all relevant evidence concerning a miner's respiratory capacity and may draw an inference of total disability from a physician's report as to the extent of a miner's impairment. *Black Diamond Mining Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985). Dr. O'Reilly indicated Claimant could not walk short distances because of his obstructive impairment. Claimant's Exhibit 4 at 12-13. The administrative law judge found Claimant was required to walk from his office to "the portal of the mine" that was seventy-five feet away. Decision and Order on Modification at 5. The administrative law judge also found Claimant went into the underground mine three or four times in the last two months of his employment and "walked a couple of thousand feet underground." *Id*.

[15] Dr. Fino reviewed treatment notes and testing from 1998 to 2016. Employer's Exhibit 1. This material "included [p]ulmonary records from the office of Dr. Krishnamurthy between 2004 and 2015." *Id*. These treatment notes also included pulmonary function testing performed on April 17, 2007, November 28, 2011, March 5, 2012, March 29, 2012, March 19, 2013, and July 12, 2016. *Id*.

[16] Dr. Goldstein indicated Claimant "ended up basically as a supervisor and did some 'office work.'" Director's Exhibit 17.

We agree with Claimant's argument the administrative law judge erred in crediting Dr. Fino's opinion because he found the doctor "understood that [Claimant] last worked as a [communications] supervisor in the office at a coal mine." Decision and Order on Modification at 13; *see* Claimant's Brief at 11-12. A physician who renders an opinion that a miner is not totally disabled from his usual coal mine employment must demonstrate an adequate understanding of the exertional requirements of that employment. *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 578; *Eagle v. Armco, Inc*, 943 F.2d 509, 513 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991). An administrative law judge may not deny benefits based on medical opinions that are predicated on a lack of knowledge or misunderstanding of a miner's job requirements. *Id*. Although the administrative law judge found Dr. Fino correctly identified the job title of Claimant's usual coal mine employment, he did not address whether Dr. Fino was aware of the exertional requirements of this job.[17] Decision and Order on Modification at 5; Claimant's Brief at 11-12. Because the administrative law judge failed to make this necessary finding, his decision fails to comply with the Administrative Procedure Act (APA).[18] *See Rowe*, 710 F. 2d at 255; *Wojtowicz v. Duquesne Light Co*., 12 BLR 1-162, 1-165 (1989).

The administrative law judge also gave greater weight to Dr. Fino's opinion because he had "reviewed a significant number of records, including treatment notes; Dr. O'Reilly's report, testing, and deposition; Dr. Goldstein's report and testing; and several pulmonary function studies, including one contained in treatment records dated [July 12, 2016], which apparently demonstrated qualifying values." Decision and Order on Modification at 13. He concluded that "[c]ompared to [Dr. O'Reilly]," Dr. Fino's conclusion is "more reliable insofar as he considered a wider breadth of medical evidence . . . ." *Id*. Although Dr. Fino reviewed relevant medical evidence, there is merit to Claimant's argument that the administrative law judge did not set forth the basis for his finding that Dr. Fino rendered a well-reasoned medical opinion that Claimant is able to perform his usual coal mine employment, notwithstanding that his pulmonary function testing is qualifying for total disability. *See Jordan*, 876 F.2d at 1460-61; *Rowe*, 710 F.2d at 255; *Wojtowicz*, 12 BLR at 1-165; Claimant's Brief at 10-11. The administrative law judge also did not explain

[17] When evaluating Dr. Fino's opinion, the administrative law judge should ascertain whether the doctor was aware of the most difficult job Claimant performed. *See Eagle v. Armco, Inc*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). He cannot base a denial of benefits solely on the least demanding aspects of the job. *Id*.

[18] The Administrative Procedure Act requires that every adjudicatory decision 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 on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

what medical evidence Dr. Fino reviewed that Dr. O'Reilly did not, or explain how the additional medical evidence Dr. Fino reviewed rendered his opinion "more reliable" than Dr. O'Reilly's. *Id*.

Our dissenting colleague states she would affirm the administrative law judge's rejection of Dr. O'Reilly's opinion, framing the issue as simply whether the doctor adequately explained why Claimant could not perform "sedentary work." The administrative law judge did not, however, identify Claimant's work as purely sedentary; instead, he found it also "occasionally involved physical activity." Decision and Order on Modification at 5. In particular, the administrative law judge noted that Claimant was required to go into the underground mine three or four times in the last two months of his employment and walk a couple of thousand feet underground. *Id*. In describing this specific task, Claimant testified he could "hardly walk" because the "ground [was] so unstable" and "was like a swamp area a lot of times." Hearing Transcript at 18. He reiterated that these conditions made it "difficult to walk" and "he fell once and collapsed [his] lung." *Id*. He further indicated he had difficulty breathing underground and in dusty environments, could only walk 100 feet before becoming short of breath, and specifically stated "[m]y tiredness, my walking, my breathing would be a problem if I had to go underground." *Id*. at 19-20. Thus, this aspect of Claimant's job did not entail a casual stroll around the mine office.

Furthermore, regardless of whether one characterizes the Miner's work as "sedentary," a physician offering an opinion on total disability must demonstrate knowledge of his actual work tasks in order to support a denial of benefits. *Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 587; *Eagle*, 943 F.2d at 513; *Walker*, 927 F.2d at 184-85. While Dr. O'Reilly's opinion that Claimant could not walk even short distances is consistent with an inability to perform the more difficult task of walking a couple thousand feet in an underground mine on unstable, swampy ground, which the Miner testified he had to do, it is unclear whether Dr. Fino demonstrated an adequate understanding of Claimant's work duties. Director's Exhibits 14, 19; Claimant's Exhibit 4; Employer's Exhibit 1. As noted above, the administrative law judge simply found Dr. Fino "understood that [Claimant] last worked as a [communications] supervisor in the office at a coal mine," but did not consider whether Dr. Fino was aware of the actual physical demands of his job. Decision and Order on Modification at 13; *see Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 587; *Eagle*, 943 F.2d at 513; *Walker*, 927 F.2d at 184-85.

We also disagree with our dissenting colleague's view that this appeal can be resolved solely by affirming the administrative law judge's rejection of Dr. O'Reilly's opinion, or even by affirming the administrative law judge's finding that Dr. Fino is entitled to greater weight than Dr. O'Reilly. As the administrative law judge found, because the pulmonary function studies are qualifying for total disability, Claimant is entitled to a finding that he is totally disabled based on those studies, unless there is contrary probative

evidence. Decision and Order on Modification at 14, *citing* 20 C.F.R. §718.204(b)(2) ("In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability[.]"). Thus, the administrative law judge's denial of benefits specifically hinges on his finding that "Dr. Fino's opinion constitutes sufficient contrary probative evidence [to outweigh the qualifying pulmonary function studies] notwithstanding the fact that [his opinion] predates the most recent qualifying [study]." *Id*. at 13.

Based on that finding, and regardless of the weight given to Dr. O'Reilly's opinion, we cannot affirm the denial of benefits without also addressing the several errors, identified above, the administrative law judge made in weighing Dr. Fino's opinion. On this point, we respectfully disagree with our dissenting colleague that Claimant has not adequately challenged the administrative law judge's crediting of Dr. Fino's opinion. Claimant argued before the administrative law judge that "Dr. Fino was not provided any sort of job description for . . . the physical requirements for a supervisory job. Dr. Fino did not have an opportunity to review [a] job description of the Claimant's final job in the mine nor review the Claimant's testimony regarding what his last job entailed." Claimant's Post Hearing Brief at 12. Claimant urged the administrative law judge to discredit Dr. Fino's opinion based on the doctor's "uninformed assumption of the job entailment" of his usual coal mine employment. *Id*. at 14. He highlighted to the administrative law judge his own testimony laying out in detail the difficulty he had walking underground. *Id*. at 2-3.

In his brief before the Board, Claimant highlighted the administrative law judge's finding that Dr. Fino "demonstrated a better understanding of Miner's last sedentary coal mine job." Claimant's Brief at 9, *quoting* Decision and Order on Modification at 13. Claimant then immediately argued that the administrative law judge's "analysis of the physician opinion evidence is in error." *Id*. Claimant further argued Dr. Fino was not aware of the "uncontradicted fact that [Claimant], in fact, entered the mine and had to walk underground the last year of his coal mine employment." *Id*. at 11. Claimant asserted Dr. Fino "failed to consider whether the disabling pulmonary function studies would prevent [Claimant] from performing his last coal mine job if walking into the underground mine, even on occasion, was required. *Id*. at 11-12. As such, we hold Claimant sufficiently preserved his arguments for appeal, and adequately raised them before the Board. *See* 20 C.F.R. §802.211(b) (a petition for review need only state the issues to be considered by the Board, present an argument with respect to each issue with references to the evidentiary record, include a short conclusion stating the precise result the petitioner seeks, and identify any authorities upon which the petition relies to support such proposed result).

Based on the foregoing, we vacate the administrative law judge's finding the medical opinions do not establish total disability, 20 C.F.R. §718.204(b)(2)(iv), and all the relevant evidence weighed together does not establish total disability. 20 C.F.R. §718.204(b)(2). On remand the administrative law judge must reconsider the medical

opinions of Drs. O'Reilly and Fino on the issue of total disability, taking into consideration the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Jordan*, 876 F.2d at 1460-61; *Rowe*, 710 F.2d at 255; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). He must then reweigh the evidence as a whole, setting forth his findings in detail, including the underlying rationales, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. In light of our decision to vacate the administrative law judge's total disability finding, we vacate his finding that Claimant did not establish a basis for modification. 20 C.F.R. §725.310.

If the administrative law judge determines Claimant is totally disabled, Claimant will have invoked the Section 411(c)(4) presumption. The administrative law judge must then determine whether Employer has rebutted it. 20 C.F.R. §718.305(d)(1)(i), (ii). Insofar as the administrative law judge finds Claimant has established entitlement to benefits on remand, he must address whether he is granting modification based on a change in conditions or a mistake in a determination of fact, and therefore determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(b).[19] If the administrative law judge finds the evidence does not establish total disability, he must deny benefits. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the administrative law judge's Decision and Order Denying Modification 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.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

[19] Although the administrative law judge found Claimant did not establish a basis for modification, he nonetheless found granting modification would render justice under the Act. Decision and Order on Modification at 6-8.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's denial of benefits. Claimant contends that the administrative law judge erred in discrediting the opinion of Dr. O'Reilly and not giving Dr. O'Reilly's opinion greater weight than that of Dr. Fino. Claimant's Brief at 9-12. Because the administrative law judge permissibly discredited the opinion of Dr. O'Reilly, I would affirm his determination that Claimant failed to establish total disability.

Before evaluating the medical opinions, the administrative law judge rendered a finding on the exertional requirements of Claimant's usual coal mine employment as a communications supervisor. Decision and Order on Modification at 5. He found in this job Claimant "sat most of the day but got up to check computers and walked around to talk to people." *Id*. He also acknowledged Claimant "went into the underground mine three or four times in the last two months of his employment and walked a couple of thousand feet underground." *Id*. He then compared these job duties to the definition of sedentary work contained in the *Dictionary of Occupational Titles* (DOT). *Id*. Specifically, "[s]edentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." *Id*. Because Claimant "sat most of the day" but occasionally "walked a couple of thousand feet" underground, the administrative law judge found the communications supervisor job met the definition of sedentary work. *Id*. This finding is not challenged by Claimant and should be affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant argues that the administrative law judge erred by finding Dr. O'Reilly's opinion less credible because it was made without the benefit of qualifying pulmonary function studies. Claimant's Brief at 9-10. However, Claimant mischaracterizes the administrative law judge's credibility finding. The administrative law judge discredited Dr. O'Reilly's opinion because he found the doctor "did not explain how he found [the]

Miner totally disabled from his last coal mine job in light of Miner's sedentary office duties" as discussed above. Decision and Order on Modification at 12-13.

Claimant does not specifically assign error to this credibility finding in his Brief in Support of Petition for Review. Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id*. To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009). Thus, I respectfully disagree with the majority's characterization of Claimant's argument and would affirm as unchallenged the administrative law judge's finding that Dr. O'Reilly "did not explain how he found [the] Miner totally disabled from his last coal mine job in light of [the] Miner's sedentary office duties." Decision and Order on Modification at 12-13; *see Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack*, 6 BLR at 1-711; 20 C.F.R. §802.211(b).

Even if Claimant had raised this argument, I would hold the administrative law judge's finding is supported by substantial evidence. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004) (substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion). As the administrative law judge noted, Dr. O'Reilly concluded in his initial report that the "severity of [Claimant's] pulmonary condition prevents him from performing his last coal mine job." Decision and Order on Modification at 12; *see* Director's Exhibit 13. Attached to his report was Claimant's Department of Labor (DOL) Description of Coal Mine Work form. Director's Exhibit 13. That form specifies that the communications supervisor job required Claimant to sit twelve hours per day. *Id*.

In his deposition, Dr. O'Reilly testified Claimant did not give him any additional background on his job duties. Claimant's Exhibit 4 at 9. Moreover, Dr. O'Reilly stated he did not have "the opportunity to review the [DOL] application for black lung benefits." *Id*. On cross-examination, he stated if all Claimant did was sit for twelve hours per day on the computer, his job could be characterized as sedentary. *Id*. at 24-25. He acknowledged a sedentary job "does involve some walking." *Id*. Most importantly, he stated Claimant would "not necessarily" be disabled from a sedentary job and would be able to sit twelve hours a day. *Id*. Thus his deposition testimony conflicts with his medical report. In light

of the fact that Dr. O'Reilly testified Claimant could sit for twelve hours a day and would "not necessarily" be disabled from a job that required "some walking," i.e., a sedentary job, the administrative law judge rationally found Dr. O'Reilly did not adequately explain his basis for finding Claimant is totally disabled from his usual coal mine work that was sedentary in nature.[20] *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order on Modification at 12-13.

The majority is correct that Dr. O'Reilly was asked at his deposition if Claimant could perform a job that required light manual labor. Claimant's Exhibit 4 at 12-13. Claimant's counsel defined light manual labor as "maybe lifting twenty pounds on a regular basis, having to walk short distances." *Id*. Dr. O'Reilly responded Claimant "would have considerable difficulty in doing *that*." *Id*. (emphasis added). He did not specify if Claimant would have difficulty lifting twenty pounds regularly or difficulty walking short distances. That distinction is important in this case as Claimant was not required to regularly lift twenty pounds as part of his usual coal mine employment. Although Dr. O'Reilly stated Claimant could not perform a job that required light or medium manual labor, the administrative law judge found, as noted above, Claimant's usual coal mine employment was at a sedentary level. *Id*. In light of the lack of clarity in this portion of Dr. O'Reilly's deposition, the administrative law judge's finding that Dr. O'Reilly did not adequately explain his opinion is rational and supported by substantial evidence. *Jones*, 386 F.3d at 992; *Jordan*, 876 F.2d at 1460; *Hicks*, 138 F.3d at 533. Based on the foregoing, I would affirm the administrative law judge's finding that Dr. O'Reilly's opinion is entitled to reduced weight, and Claimant failed to establish total disability based on the medical opinions.[21] 20 C.F.R. §718.204(b)(2)(iv). Claimant's only arguments regarding the

[20] As the administrative law judge correctly found, the only definitive physical restriction Dr. O'Reilly set forth in his report and testimony was his statement that Claimant could not walk for one mile to perform a fire drill. Decision and Order on Modification at 12; *see* Claimant's Exhibit 4 at 26. The administrative law judge found this duty was not an exertional requirement of Claimant's usual coal mine employment. *Id*.

[21] Because the administrative law judge provided a valid rationale for discrediting Dr. O'Reilly's opinion, Claimant's additional arguments concerning the administrative law judge's weighing of his opinion need not be addressed. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Similarly, as the administrative law judge permissibly discredited the opinion of Dr. O'Reilly, the only physician who offered an opinion finding Claimant totally disabled, we need not address Claimant's arguments regarding the weight given Dr. Fino's opinion. Claimant raises no issue as to the administrative law judge's weighing of Dr. Fino's opinion against other evidence of record.

physicians' opinions relate to the relative weight assigned the opinion of Dr. O'Reilly as compared to that of Dr. Fino in the context of weighing the physician opinion evidence.

Consequently, I would affirm the administrative law judge's decision that Claimant has failed to establish total disability.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge