U.S. Department of Labor

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

BRB No. 20-0238 BLA

PRESTON D. HESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 08/11/2021
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 Granting Second Request for Modification of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder and Andrea L. Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Second Request for Modification (2016-BLA-05404) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(2018) (Act). This case involves Claimant's second request for modification of a miner's subsequent claim filed on April 10, 2008.[1]

The administrative law judge credited Claimant with thirty years of underground coal mine employment based on the parties' stipulation, and found he is totally disabled. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in conditions, 20 C.F.R. §725.310,[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant is totally disabled and in finding he invoked the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption.[4]

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[1] The district director denied Claimant's initial claim, filed on April 28, 2003, because the evidence was insufficient to establish any element of entitlement. Director's Exhibit 1. On March 15, 2011, Administrative Law Judge Paul C. Johnson, Jr., denied Claimant's subsequent claim because he found Claimant did not establish a change in applicable condition of entitlement. 20 C.F.R. §725.309; Director's Exhibit 72. Claimant requested modification on December 22, 2011, and the case was assigned to Administrative Law Judge John P. Sellers, III. Director's Exhibits 73, 75, 76, 78, 81. Judge Sellers denied modification on June 17, 2015, because Claimant failed to establish total disability, an essential element of entitlement. Director's Exhibit 95. Claimant filed a second request for modification on July 24, 2015, and the case was assigned to Administrative Law Judge William T. Barto. Director's Exhibits 100, 101, 103. Judge Barto conducted a hearing on April 4, 2017. The case was subsequently reassigned on January 4, 2019, to Administrative Law Judge Francine L. Applewhite (the administrative law judge), whose decision is the subject of this appeal. January 19, 2019 Notice of Reassignment at 1.

[2] The administrative law judge also found granting modification would render justice under the Act. Decision and Order at 15.

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

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant has thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 20; Hearing Transcript at 6-7.

Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response.

The Benefits Review 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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In a miner's claim, the administrative law judge may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). An administrative law judge has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

Invocation of the Section 411(c)(4) Presumption – Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The 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). The administrative law judge found Claimant established total disability based on the blood gas studies and medical opinions.[6] Decision and Order at 16-18.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 7.

[6] The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order

Blood Gas Study Evidence

The administrative law judge considered the eight blood gas studies submitted in conjunction with Claimant's April 10, 2008 subsequent claim and two modification proceedings. The administrative law judge observed Dr. Forehand's March 10, 2017 blood gas study produced qualifying results with exercise. Decision and Order at 7, 16. She also noted Dr. Basheda questioned whether the exercise values reflected a "fixed type of pulmonary process" but found the study reliable because no physician invalidated the study, and no evidence suggested that one of Claimant's medical conditions affected its results. Decision and Order at 16-17; Employer's Exhibit 11 at 32. As all remaining blood gas studies were conducted "at least one and a half years prior to the March 10, 2017 study," the administrative law judge found it merited determinative weight. Decision and Order at 16-17.[7] She therefore found Claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 17.

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at 6-7, 16. The pulmonary function tests were uniformly non-qualifying. *Id.* at 6-7; Director's Exhibits 13, 14, 41, 99; Employer's Exhibits 4, 7.

[7] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge's chart of the blood gas study evidence mischaracterized whether certain studies are qualifying or non-qualifying under the regulations. An accurate summary of the testing follows: Of the studies conducted only at rest, the May 7, 2009, April 15, 2013, and October 29, 2015 results were non-qualifying and the January 12, 2012 results were qualifying Director's Exhibits 41, 91, 99; Claimant's Exhibit 3. The May 15, 2008 study produced non-qualifying results at rest and qualifying results with exercise. Director's Exhibit 13. The October 15, 2008 study produced non-qualifying results at rest and with exercise. (The administrative law judge misstated this study as conducted on October 10, 2008.) Director's Exhibit 41. The June 12, 2015 and March 10, 2017 studies produced qualifying results both at rest and with exercise. Claimant's Exhibits 4, 11.

The administrative law judge mischaracterized the results of the May 15, 2008 resting study as *qualifying*. Decision and Order at 7. This study was conducted at an altitude between 0-2999 feet above sea level and yielded a resting pCO_2 value of 30.4. Director's Exhibit 13 at 15. A qualifying pO_2 value is equal to or less than 70. 20 C.F.R. Part 718, Appendix C. The administrative law judge incorrectly noted in her chart that the pO_2 value on this test was 45, when it was actually 75. Director's Exhibit 13 at 15.

Employer argues the administrative law judge erred in crediting Dr. Forehand's March 10, 2017 blood gas study because it "was not performed in conjunction with a complete medical history and physical examination of Claimant"[8] and neither Dr. Forehand nor the technician indicated whether Claimant was either suffering from, or recovering from, an acute respiratory or cardiac illness at the time the test was conducted. Employer's Brief at 6-8. Employer contends that absent information regarding Claimant's health at the time of the study, "a determination cannot be made regarding the reliability of the test results" because the record shows Claimant has a history of medical conditions that could

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Although the administrative law judge accurately noted the January 12, 2012 resting study yielded pCO_2 and pO_2 values of 31 and 67, she mischaracterized the study as *non-qualifying*. Decision and Order at 7; Claimant's Exhibit 3. The Notice of Hearing advised the parties that if the altitude of the testing site was not identified on the blood gas study report, it would be determined based on the altitude listings set forth at www.city-data.com. As the January 12, 2012 test did not list an altitude for the testing site, relying on this website the testing was conducted at an altitude of between 0-2999 feet above sea level. Claimant's Exhibit 3; *Abingdon-Virginia*, CITY-DATA.COM, http://www.city-data.com/city/Abingdon-Virginia.html (last visited Aug. 9, 2021). Under the regulations, a study conducted at that altitude, with a pCO_2 of 31 is qualifying if the pO_2 value is equal to or less than 69. 20 C.F.R. Part 718, Appendix C.

The administrative law judge mischaracterized the June 12, 2015 resting and exercise studies as *non-qualifying* and the March 10, 2017 resting study as *non-qualifying*. Decision and Order at 7. These studies were also conducted at an altitude between 0-2999 feet above sea level. The June 12, 2015 study yielded resting pCO_2 and pO_2 values of 33.8 and 60.1, and exercise values of 28.6 and 65.8. Claimant's Exhibit 4. A qualifying resting pO_2 value is equal to or less than 66, and a qualifying exercise pO_2 value is equal to or less than 71. 20 C.F.R. Part 718, Appendix C. The March 10, 2017 resting study yielded pCO_2 and pO_2 values of 26.9 and 72.5. Decision and Order at 7; Claimant's Exhibit 11. A qualifying pO_2 value is equal to or less than 73. 20 C.F.R. Part 718, Appendix C. Employer also conceded in its post-hearing brief that the March 10, 2017 and June 12, 2015 resting and exercise studies produced qualifying values. Employer Closing Brief at 11, Aug. 8, 2017.

[8] Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation on May 15, 2008. In conjunction with Claimant's modification request, he asked Dr. Forehand to conduct a blood gas study on March 10, 2017. There is no indication Dr. Forehand examined Claimant at the time of the March 10, 2017 study.

have affected its results. *Id.* at 7-8. Employer additionally asserts Dr. Basheda opined the March 2017 study is unreliable. *Id.* at 7. Employer's contention is without merit.

The applicable quality standard requires that a blood gas study "must not be performed during or soon after an acute respiratory or cardiac illness." 20 C.F.R. Part 718, Appendix C; Employer's Brief at 7. Dr. Basheda did not invalidate the March 2017 blood gas study, nor did any other physician. Employer's Exhibit 11 at 28-30. Dr. Basheda stated only that the study showed a disabling oxygen impairment that "might" have been due to "some unstable cardiopulmonary entity" or "uncontrolled asthma." *Id.* The administrative law judge permissibly found no evidence establishing that Claimant suffered from an acute condition when he performed the test. Further, she correctly noted that Dr. Forehand relied on the study in diagnosing Claimant with a permanent and disabling gas-exchange impairment.[9] Decision and Order at 10, 17; Claimant's Exhibit 13. Because we discern no error in the administrative law judge's determination that the study is valid and reliable, we affirm it.[10] *Vivian v. Director, OWCP*, 7 BLR 1-360, 361-62 (1984) (party challenging the validity of a study has the burden to establish the results are suspect or unreliable).[11] Because Employer raises no other challenge to the administrative law judge's weighing of the blood gas evidence, we affirm her finding that, considered in isolation, it establishes total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992).

[9] Dr. Castle did not comment on the March 10, 2017 pulmonary function study. Employer acknowledges he commented on only the January 12, 2012 and June 12, 2015 blood gas studies. Employer's Brief at 7; Employer's Exhibit 12 at 18.

[10] Because the administrative law judge permissibly accorded greater weight to the most recent exercise study, her errors in mischaracterizing the May 15, 2008 resting study as qualifying and mischaracterizing the January 12, 2012, June 12, 2015, and March 10, 2017 resting studies and the June 12, 2015 exercise study as non-qualifying are harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] Employer basically argues on appeal that the mere fact that Claimant has medical conditions that "could" affect his blood gas testing proves that they did. However, the Board's holding in *Vivian v. Director, OWCP*, 7 BLR 1-360, 361-62 (1984), makes clear that affirmative evidence is required to show that a medical study is unreliable. Dr. Basheda's speculative comments do not constitute affirmative evidence of unreliability.

Medical Opinion Evidence

The administrative law judge considered four medical opinions. 20 C.F.R. §718.204(b)(2)(iv). Drs. Forehand and Jonkers opined Claimant is totally disabled. Dr. Basheda diagnosed a disabling oxygen impairment based on the March 2017 blood gas study but opined it may not be a chronic condition. Dr. Castle opined Claimant can perform his usual coal mine employment from a respiratory or pulmonary standpoint. Director's Exhibits 41, 65, 70, 91, 99; Claimant's Exhibits 5, 12, 13; Employer's Exhibits 11, 12. The administrative law judge credited the opinions of Drs. Forehand and Jonkers and rejected the opinions of Drs. Basheda and Dahhan. Decision and Order at 16-18.

Employer argues that the administrative law judge conflated the issues of disability and causation, failed to discuss the qualifications of the physicians, erred in finding the opinions of Drs. Forehand and Jonkers credible, and gave improper reasons for discrediting its experts. Employer's arguments have merit, in part.

We agree with Employer that the administrative law judge improperly conflated the issues of total disability and disease or disability causation when evaluating Drs. Basheda's and Castle's opinions. 20 C.F.R. §718.204(b)(2), (c). In weighing these opinions relevant to total disability, the administrative law judge discounted Dr. Basheda's opinion because he focused on non-coal dust related diseases and conditions and did not explain why Claimant's thirty-plus year history of underground coal dust exposure did not contribute to his impairment. Decision and Order at 18. She similarly discounted Dr. Castle's opinion because he did not explain "his rationale for excluding coal mine dust exposure as a possible contributing factor" in Claimant's pulmonary or respiratory impairment. *Id.* at 16-17.

Contrary to the administrative law judge's analysis, the proper inquiry at 20 C.F.R. §718.204(b)(2) is whether Claimant has established a totally disabling respiratory or pulmonary impairment; the cause of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether the Section 411(c)(4) presumption has been rebutted. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii). In combining her analyses, the administrative law judge failed to assess whether the opinions of Drs. Basheda and Castle regarding the presence or absence of a disabling respiratory or pulmonary impairment are reasoned and documented, exclusive of their opinions as to the etiology of that impairment. 20 C.F.R. §718.204(b)(2)(iv).

With respect to Dr. Forehand, the administrative law judge found his opinion "well-documented and well-reasoned since it is supported by the blood gas study results and his review of the data and medical evidence in the record, and his history of treatment of the Claimant." Decision and Order at 17. Contrary to Employer's contention, the

administrative law judge permissibly found Dr. Forehand's opinion credible to the extent it was supported by his physical examination, a review of the records, and the March 2017 blood gas study, which the administrative law judge found determinative of disability at 20 C.F.R. §718.204(b)(2)(ii). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); Decision and Order at 17. The administrative law judge misstated, however, that Dr. Forehand was Claimant's treating physician. Dr. Forehand examined Claimant at the request of the Department of Labor. Claimant subsequently requested Dr. Forehand prepare supplemental reports in the course of litigating this subsequent claim. Because the administrative law judge mischaracterized Dr. Forehand's relationship with Claimant, and we are unable to discern the extent to which that error influenced her crediting of Dr. Forehand's opinion, we must vacate it. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Employer also challenges the administrative law judge's reliance on Dr. Jonkers's opinion to find Claimant totally disabled. In two one-page letters dated March 9, 2016 and March 9, 2017, Dr. Jonkers reported Claimant's shortness of breath progressively worsened over the five years she treated his COPD/severe bronchitis, which she noted "has severely limited his life," and he "now [becomes] dyspneic with talking." Claimant's Exhibits 5, 12. She opined that Claimant "is impaired to the point where he could not work in the mines or any other job," explaining that "[h]is FEV1% is less than 70% of predicted despite treatment with inhaled medications" and that "[p]erforming ADLs [activities of daily living] and speaking [are] difficult for him." Claimant's Exhibit 12. The administrative law judge gave Dr. Jonkers's opinion "substantial weight" because she found Dr. Jonkers's treatment records established a worsening of Claimant's COPD to the point of being totally disabling. Decision and Order at 17-18. The administrative law judge stated that Dr. Jonkers's "diagnosis and treatment of the Claimant for COPD is sufficient to support the presence of COPD of a level that was disabling to [Claimant]." *Id*. at 17.

Employer asserts the administrative law judge did not address whether Dr. Jonkers's opinion is reasoned and supported by objective evidence.[12] Employer's Brief at 15. We agree that while the administrative law judge has discretion to credit Dr. Jonkers's opinion as a treating physician, she must first adequately address whether Dr. Jonkers's opinion is

[12] Dr. Jonkers did not identify the date of the pulmonary function study she relies on, and the administrative law judge did not address whether she relied on objective evidence of record. Employer's Brief at 15 (stating "Dr. Jonkers appeared to rely on Claimant's pulmonary function testing – that his FEV1 is less than 70 percent – and his symptoms to find total disability. None of the pulmonary function testing, however, is disabling under the regulations.").

reasoned and documented[13] and explain her findings in accordance with the Administrative Procedure Act.[14] *See* 20 C.F.R. §718.104(d);[15] *Lane v. Union Carbide Corp*., 105 F.3d 166, 173 (4th Cir. 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 512 (4th Cir. 1991); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *Wojtowicz*, 12 BLR at 1-165.

Further, we agree with Employer that the administrative law judge did not resolve the conflict in the opinions of Drs. Forehand and Basheda as to the reliability of a walking pulse oximetry test, relative to that of a blood gas study. Claimant's Exhibit 13 at 4; Employer's Exhibit 11 at 24-25. She further failed to consider Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment. Director's Exhibit 99 at 33; Employer's Exhibit 11 at 19.

Based on the above-stated errors, we vacate the administrative law judge's finding that Claimant established total disability based on the medical opinion evidence, 20 C.F.R. §718.204(b)(2)(iv), and her overall determination that Claimant invoked the Section

[13] Employer also asserts Dr. Jonkers's opinion is not credible because she did not discuss the exertional requirements of Claimant's usual coal mine work. Employer's Brief at 15-16. Contrary to Employer's contention, if the administrative law judge finds Dr. Jonkers's opinion on total disability reasoned and documented, she may rely on Dr. Jonkers's statement that Claimant is unable to perform any type of coal mine work to support a finding that Claimant is totally disabled from his usual coal mine work.

[14] The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for her findings of fact and conclusions of law.

[15] An administrative law judge may give controlling weight to a treating physician's opinion based on the nature and duration of her relationship with the miner and the frequency and extent of her treatment. 20 C.F.R. §718.104(d)(1)-(4). The weight given to a treating physician's opinion, however, "shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

411(c)(4) presumption[16] and established a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 718.309. Thus, we vacate the award of benefits and her determination that Claimant is entitled to modification. 20 C.F.R. §§718.305, 725.310.

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

In the interest of judicial economy, we will address Employer's arguments pertaining to rebuttal of the presumption. Once the Section 411(c)(4) presumption is invoked, the burden shifts to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[17] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015). The administrative law judge found Employer failed to establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the 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).

We agree with Employer that the administrative law judge failed to adequately address the conflicting x-ray evidence. Employer's Brief at 18-19. The administrative law judge charted sixteen interpretations of six x-rays. Decision and Order at 4-6. Because dually-qualified Board-certified radiologists and B-readers interpreted each x-ray as positive and negative for pneumoconiosis, the administrative law judge found the "resulting interpretations are equipoised" and the x-rays overall do not rebut a finding of pneumoconiosis. Decision and Order at 6, 19. As Employer correctly notes, however, there are more negative interpretations by dually-qualified experts than there are positive

[16] The administrative law judge also did not weigh all of the evidence together at 20 C.F.R. §718.204(b)(2) prior to concluding Claimant established total disability and could invoke the presumption.

[17] 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). 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).

interpretations for some of the x-rays.[18] Employer's Brief at 18. Because the administrative law judge failed to consider the actual opinion of each dually-qualified physician to determine whether each individual x-ray is positive or negative for pneumoconiosis before weighing the x-ray evidence as a whole, we vacate her finding that the x-ray evidence is in equipoise and that Employer did not satisfy its burden of proof.[19] *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-49 (1987); *Jessee v. Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993) (administrative law judge has authority to reconsider all the evidence for any mistake of fact or change in conditions).

Employer also correctly contends the administrative law judge erred by not addressing the computed tomography (CT) scans, treatment records, and medical opinions as part of her overall consideration and weighing of the evidence of clinical pneumoconiosis.[20] *Minich*, 25 BLR at 1-157 n.11; *see also Compton*, 211 F.3d at 208-09 (administrative law judge must weigh all relevant evidence as a whole). Consequently, we vacate the administrative law judge's determination that Employer failed to disprove the existence of clinical pneumoconiosis.

[18] Dr. Forehand, a B-reader, and Dr. Miller, a dually-qualified physician, interpreted the May 15, 2008 x-ray as positive, while two dually-qualified physicians interpreted this x-ray as negative for pneumoconiosis. Director's Exhibits 13, 16, 55, 70. The February 2, 2009 and November 1, 2011 x-rays were each interpreted as positive by one dually-qualified physician and as negative by two dually-qualified physicians. Director's Exhibits 55, 70, 73; Employer's Exhibits 3, 18.

[19] We reject Employer's assertion that the administrative law judge erred in finding the dually-qualified experts equally qualified because such finding "ignores each physician's years of experience, publications and research in their practice area, as well as their academic and professional appointments." Employer's Brief at 18. The administrative law judge has discretion to determine the weight to accord the physicians' credentials and is required only to provide "some reasoned explanation" for her findings. *Adkins*, 958 F.2d at 52; *see Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

[20] Although the administrative law judge found the CT scan evidence of record does not support a finding of clinical pneumoconiosis, the administrative law judge did not make a finding at rebuttal as to whether it supports the absence of the disease. Decision and Order at 14. The administrative law judge similarly did not consider whether the treatment records or medical opinion evidence supports the absence of clinical pneumoconiosis.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-155 n.8.

The administrative law judge considered only Dr. Basheda's opinion relevant to whether Employer disproved legal pneumoconiosis. She found it not adequately reasoned to satisfy Employer's burden of proof.

Contrary to Employer's assertion, the administrative law judge did not apply an incorrect legal standard in rejecting Dr. Basheda's opinion. The administrative law judge accurately stated:

> [T]o rebut the existence of legal pneumoconiosis, the Employer has the burden of establishing that a pulmonary disease or respiratory impairment was *not* 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'

Decision and Order at 18 (emphasis in original) (citing 20 C.F.R. §718.201(a)(2),(b)); *see* 20 C.F.R. §718.305(d)(1)(i)(A); *Minich*, 25 BLR at 1-155 n.8. Moreover, the administrative law judge did not reject Dr. Basheda's opinion for failing to satisfy a legal standard. Rather, she concluded his opinion was not adequately reasoned. As discussed below, the administrative law judge acted within her discretion in making that determination.

Dr. Basheda opined Claimant's objective studies were consistent with a mild obstructive impairment and intermittent asthma that developed into persistent asthma. Employer's Exhibit 11 at 15, 20, 34. Although he agreed Claimant had sufficient coal mine dust exposure to cause lung disease, he opined Claimant's asthma was not caused or aggravated by coal dust because occupational asthma results in acute reactions to coal dust exposure that require medical therapy or hospitalization. *Id.* at 11, 20. He explained that Claimant would not have been able to exist in a coal dust environment or have had a career in coal mining for thirty years if his asthma was caused or aggravated by coal mine dust. *Id*. at 20. Contrary to Employer's contention, the administrative law judge permissibly found Dr. Basheda's opinion unpersuasive because he focused on diseases and conditions other than pneumoconiosis while not adequately explaining why coal dust exposure of such a significant duration and type did not impact Claimant's impairment in a manner constituting legal pneumoconiosis. Decision and Order at 19; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901

(4th Cir. 1995). It is true that in discounting Dr. Basheda's opinion the administrative law judge used language that could be interpreted as requiring the physician to "rule out" a contribution by coal dust exposure; however, because Dr. Basheda determined that coal dust exposure had no impact on Claimant's impairment, we understand the administrative law judge as simply rephrasing his opinion in finding it inadequately explained.

Employer correctly asserts, however, the administrative law judge failed to consider and weigh the opinion of Dr. Castle, who opined that Claimant does not have legal pneumoconiosis. Employer's Brief at 22; Director's Exhibits 41, 65, 70, 91; Employer's Exhibit 12. Because the administrative law judge failed to consider all relevant evidence, we vacate her determination that Employer failed to disprove the existence of legal pneumoconiosis. *See Minich*, 25 BLR at 1-155 n.8; *see also Hicks*, 138 F.3d at 533; *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

Disability Causation

Employer may also rebut the Section 411(c)(4) presumption by establishing that "no part of [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge discredited Dr. Basheda's opinion on disability causation; however, her discussion of this issue is incomplete and ends mid-sentence. Her analysis in its entirety is as follows:

> The Employer relies on the medical report of Dr. Basheda to establish that the Claimant's respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mining employment. I afford little weight to Dr. Basheda's opinion the Claimant's intermittent asthma, mild obstructive airways disease, or any other disease or condition is unrelated to 30+ years of underground [sic.]

Decision and Order at 20. Because we cannot ascertain the administrative law judge's basis for discrediting Dr. Basheda's opinion, we cannot affirm it. Moreover, the administrative law judge failed to weigh Dr. Castle's opinion and stated an incorrect rebuttal standard. The administrative law judge stated that "[a]s the Claimant has established by presumption, and the Employer has failed to rebut, a diagnosis of pneumoconiosis, the Employer may rebut the 15-year presumption a second way, by establishing that the Claimant's 'respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.'" *Id*. at 19. She further stated, "the burden is on [Employer] to 'rule out,' . . . the possibility that coal mine employment is

'significantly related to' or has 'substantially aggravated' a lung disease or impairment." *Id*.

The administrative law judge's statements conflate the standards for disproving legal pneumoconiosis and disability causation. 20 C.F.R. §718.305(d)(1)(i)(A), (ii). Contrary to the administrative law judge's analysis, the second method of rebuttal does not require Employer to eliminate "coal mine employment" as a contributing cause of Claimant's disability. Rather Employer must prove that no part of Claimant's disability was caused by *pneumoconiosis*. 20 C.F.R. §718.305(d)(1)(ii). Thus, Employer must establish that Claimant's respiratory disability is unrelated to either clinical pneumoconiosis or legal pneumoconiosis, which includes a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Id*. Because the administrative law judge has not made the proper findings on clinical or legal pneumoconiosis, and because she did not discuss all evidence under the correct legal standard for the second method of rebuttal, we vacate her finding that Employer did not rebut the presumption that Claimant's respiratory disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

Based on the above errors, we vacate the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption.

Remand Instructions

The administrative law judge must reconsider whether Claimant established a totally disabling pulmonary or respiratory impairment at 20 C.F.R. §718.204(b)(2). She must first identify the exertional requirements of Claimant's usual coal mine employment. She must then reconsider the medical opinions at 20 C.F.R. §718.204(b)(2)(iv) and determine whether the opinions of Drs. Jonkers, Basheda, and Castle are well-reasoned and documented. Next, she must explain the weight she accords each medical opinion based on her consideration of the physicians' comparative credentials, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). After reaching a determination on the medical opinions at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must then weigh *all* relevant evidence together to determine whether Claimant is totally disabled and has invoked the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. In so doing, the administrative law judge must resolve the conflict in the opinions of Drs. Basheda and Forehand as to the reliability of a pulse oximetry test relative to that of blood gas study. The administrative law judge must

also address Dr. Basheda's statements that the variability in Claimant's blood gas studies may reflect a variable, rather than fixed, impairment.

If the administrative law judge finds Claimant invoked the Section 411(c)(4) presumption, she must then determine whether Employer rebutted the presumption by establishing Claimant does not have clinical or legal pneumoconiosis. With regard to clinical pneumoconiosis, the administrative law judge must address the designated x-ray interpretations and determine whether the x-rays, taken individually and as a whole, establish the absence of pneumoconiosis. Similarly, the administrative law judge must consider the CT scans, treatment records, and medical opinions on the issue, and render findings as to whether the individual reports within each category of evidence, and whether the category of evidence as a whole, establish the absence of pneumoconiosis. The administrative law judge must then weigh all relevant evidence together and determine whether Employer carried its burden by a preponderance of evidence. *See* 20 C.F.R. §718.305(d)(1)(i)(B); *Minich*, 25 BLR at 1-157 n.11; *see also Compton*, 211 F.3d at 207-08.

Regardless of whether the administrative law judge, on remand, finds Employer has disproved clinical pneumoconiosis, she must make a finding as to whether it has disproved legal pneumoconiosis. *See Minich*, 25 BLR at 1-155 n.8. She must consider whether Employer has established Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A). Her analysis must consider all relevant evidence. *Minich*, 25 BLR at 1-157 n.11; *see also Compton*, 211 F.3d at 207-08.

If Employer fails to establish Claimant does not have either form of pneumoconiosis, the administrative law judge must then determine whether Employer has established "no part of [Claimant's] total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Minich*, 25 BLR at 1-159. In rendering her determinations on remand, the administrative law judge must explain the bases for her findings in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

We also note the administrative law judge did not discuss all the medical opinion evidence submitted in conjunction with the subsequent claim and prior modification request. On remand, the administrative law judge must consider and address all relevant evidence on the entitlement issues. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

Accordingly, the administrative law judge's Decision and Order Granting Second Request for Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I agree that the ALJ conflated the elements of disability and disability causation in evaluating the medical opinions and would remand for clarification of those issues.

JONATHAN ROLFE
Administrative Appeals Judge