U.S. Department of Labor

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

BRB Nos. 20-0009
and 20-0010 BLA

SHIRLEY A. DAVIS (Widow and o/b/o GARLAND M. DAVIS) Claimant-Respondent v. HONEY CAMP ENTERPRISES, INC., *et al*. Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/21/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Carrie Bland's Decision and Order Awarding Benefits (2017-BLA-05540 and 2017-BLA-05541) on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (the Act). This case involves a subsequent miner's claim filed on November 9, 2012[1] and a survivor's claim filed on October 30, 2014.[2]

The administrative law judge credited the Miner with 16.94 years of underground coal mine employment, and found he had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement[3] and invoked the presumption of total disability

[1] This is the Miner's third claim for benefits. On April 20, 1981, the district director denied the Miner's initial claim, filed on March 5, 1981, because he did not establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. The Miner filed his second claim on February 24, 2010, and the district director denied it on January 6, 2011, because he did not establish total disability or disability causation. MC Director's Exhibit 2. The Miner took no further action until he filed this subsequent claim on November 9, 2012. MC Director's Exhibit 4. On August 21, 2013 the district director issued a proposed decision and order denying benefits because the Miner did not establish total disability. MC Director's Exhibit 24. The Miner requested a hearing before the Office of Administrative Law Judges (OALJ), but he died on February 2, 2014 while the case was pending, and it was remanded to the district director on March 9, 2016. Director's Exhibits 26, 32; Survivor's Claim (SC) Director's Exhibit 8. It was retransmitted to the OALJ on March 8, 2017 along with the survivors claim. MC Director's Exhibit 33.

[2] Claimant is the Miner's widow who is pursuing the Miner's claim on behalf of his estate and a survivor's claim on her own behalf.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the administrative law judge must also deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish total disability or total disability causation; therefore, to obtain review of the merits of his claim, Claimant had to establish one of these elements of entitlement. *See White*, 23 BLR at 1-3; MC Director's Exhibit 2.

due to pneumoconiosis at Section 411(c)(4) of the Act.[4] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits in the Miner's claim. Because the Miner was entitled to benefits at the time of his death, the administrative law judge found Claimant automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the administrative law judge lacked the authority to preside over the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[5] It further asserts the removal provisions applicable to the administrative law judge rendered her appointment unconstitutional, and challenges the validity of the Section 411(c)(4) presumption as part of the Affordable Care Act (ACA). On the merits, Employer asserts the administrative law judge erred in calculating the length of the Miner's coal mine employment history. It also argues she erred in finding Claimant invoked the Section 411(c)(4) presumption, and that it did not rebut the presumption.

The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging rejection of Employer's constitutional challenges to the administrative law judge's appointment, and its challenge of the validity of the Section 411(c)(4) presumption. Employer has filed a reply brief reiterating its arguments on the issues the Director addressed. Claimant has not filed a response brief.

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[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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) (2012); *see* 20 C.F.R. §718.305.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

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.[6] 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).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer's Brief at 9-13; Employer's Reply Brief at 2-4. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (Department) administrative law judges on December 21, 2017,[8] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. Employer's Brief at 9-10.

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[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because the Miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibits 2, 5; SC Director's Exhibit 3; Hearing Transcript at 19.

[7] *Lucia* involved a challenge to the appointment of an administrative law judge at the Securities and Exchange Commission (SEC). The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[8] The Secretary issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Bland.

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought the appointment into compliance. Director's Brief at 4-5. She also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. Director's Brief at 5. We agree with the Director's positions.

As the Director notes, an appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 4, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Further, ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). Ratification is permissible so long as the agency head: 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Thus, under the "presumption of regularity," courts presume that public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

At the time he ratified the administrative law judge's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603. Congress has authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105.

Under the presumption of regularity, it thus is presumed the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Bland and gave "due consideration" to her appointment.[9] Secretary's December 21, 2017 Letter to Administrative Law Judge Bland.

[9] While Employer asserts that the Secretary's ratification letter was signed with "an autopen," Employer's Brief at 10, this does not render the appointment invalid. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1373, 1375 n.14 (Ct. Int'l Trade 2002) (autopenned signing of the Recess Appointment Order satisfies the requirement that an appointment be evidenced by an "open and unequivocal act").

The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Bland "as an Administrative Law Judge." *Id*. Having put forth no contrary evidence, Employer has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (mere lack of detail in express ratification is not sufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340.

Based on the foregoing, we hold that the Secretary's action constituted a valid ratification of the appointment of the administrative law judge. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board retroactively ratified the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions).

We further reject employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, "confirms" its Appointments Clause argument because incumbent administrative law judges remain in the competitive service pending promulgation of implementing regulations. Employer's Brief at 12-13. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Thus, we reject Employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded administrative law judges, asserting they are unconstitutional. Employer's Brief at 11-13; Employer's Reply Brief at 4-7. We decline to address this issue, as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); 20 C.F.R. §802.211(b).

Before the Board will consider the merits of an appeal, its 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. Further, 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). A reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (refusing to consider argument the Federal Trade Commission is unconstitutional because its members exercise executive powers, yet can be removed by the President only for cause).

Employer generally argues the removal provisions for administrative law judges contained in the Administrative Procedure Act (APA) are unconstitutional and cites Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 11-13; Employer's Reply Brief at 4-7. But Employer has not explained how it undermines the administrative law judge's authority to hear and decide this case.[10] Therefore Employer's argument does not comply with the Board's rules of practice and procedure. Thus we decline to address this issue. *See* 20 C.F.R. §802.211(b); *Cox*, 791 F.2d at 446; *Jones Bros.*, 898 F.3d at 677; *Hosp. Corp.*, 807 F.2d at 1392.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 13-14; Employer's Reply Brief at 10. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but

[10] The majority opinion in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S.Ct. at 2050 n.1. Justice Breyer commented in his concurrence in *Lucia* that administrative law judges are provided two levels of protection, "just what" the United States Supreme Court in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), interpreted the Constitution to forbid in the case of the Public Company Accounting Oversight Board. *Lucia*, 138 S.Ct. at 2060 (Breyer, J., concurring). Even if Justice Breyer's remarks could somehow be interpreted as suggesting Section 7521 was constitutionally infirm, he did not speak for the majority in *Lucia*.

vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

The Miner's Claim

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

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27.

In calculating the Miner's coal mine employment, the administrative law judge considered the Miner's Social Security Administration (SSA) earnings record, his self-reported employment history, and Claimant's hearing testimony. Decision and Order at 7-8; Director's Exhibits 5, 6, 7. For the years prior to 1978, she stated she credited the Miner with a full quarter of coal mine employment for each quarter in which he earned at least fifty dollars from coal mine operators as reflected in the SSA records, resulting in 16.25 years of coal mine employment. Decision and Order at 8-10. For the years 1980-81, the administrative law judge determined there was no direct evidence establishing the beginning and ending dates of the Miner's coal mine employment. *Id*. at 10. She therefore divided the Miner's annual SSA-reported earnings by the average daily wage in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* to determine the Miner

had an additional .69 years of coal mine employment for a total of "approximately" 16.94 years of underground coal mine employment. *Id*.

Employer argues the administrative law judge's calculation of the Miner's length of coal mine employment is irrational, because she credited him with the same amount of coal mine employment despite the Miner's "very disparate earnings" amounts. Employer's Brief at 16. It also asserts the administrative law judge assumed the Miner was employed for a full year even if he reported earnings from others during the same time period. *Id*. at 14-16. To the extent Employer is arguing the administrative law judge failed to explain her findings in compliance with the APA, we agree.

We initially note that for pre-1978 employment, crediting a miner with a full quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators is a permissible method if the record contains evidence of the miner's quarterly earnings. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). In the instant case, however, the administrative law judge did not explain how she determined the number of quarters to credit the Miner with for the years prior to 1978 in which he was self-employed. *See* Decision and Order at 8-10. The SSA earnings records the administrative law judge relied on only establish the Miner's *annual* self-employment earnings, and she does not provide any explanation for how she translated those annual earnings into quarterly earnings.[11] *See id*; MC Director's Exhibit 7. Additionally, she did not explain how she determined all of the Miner's self-employment she credited involved coal mine employment. *See* Decision and Order at 8-10.

The APA provides every adjudicatory decision must include 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." *See* 30 U.S.C. §923(b) (2018); 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Thus, because the administrative law judge has not explained how she determined the amount of coal mine employment to credit the Miner with for the years 1956, 1960-1963, 1965, 1966, and 1977,[12] during which the

[11] As Employer noted, "the [administrative law judge] credited the same year of self-employment when [the Miner] earned $1,652.42 as he did when he earned $4,556.42." Employer's Brief at 16.

[12] It does not appear the administrative law judge credited the Miner with any coal mine employment in 1977 when the SSA records only contain self-employment annual earnings. *See* Decision and Order at 8-10. She did not explain why she excluded this period of time. *Id*.

Miner was self-employed and his SSA earnings records do not include his quarterly earnings, her analysis does not comport with the APA. *Id.*

Employer also argues that, in calculating the length of the Miner's coal mine employment with Dale Energy Corp, the administrative law judge overlooked evidence the Miner earned $750 biweekly. Employer's Brief at 16; *see* MC Director's Exhibit 1. Beginning in 1978, for the years in which the beginning and ending dates of the Miner's coal mine employment could not be ascertained or his employment lasted less than a calendar year, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[13] to determine the number of days of employment. Decision and Order at 8-10. Relying on the Miner's SSA earnings records, the administrative law judge determined the Miner had a total of 0.69 years of coal mine employment in 1980 and 1981 while he was working for Dale Energy Corp, his only coal mine employment after 1978. *Id.* at 10; MC Director's Exhibit 7. However, as Employer correctly observed, the Miner stated on the Description of Coal Mine Work and Other Employment (CM-913) form he completed in conjunction with his initial claim that he earned $750.00 biweekly from October 1980 until February 1981. MC Director's Exhibit 1. Because the administrative law judge makes no mention of this evidence, we are unable to determine whether she considered it. *See* 30 U.S.C. §923(b); *Wojtowicz*, 12 BLR at 1-165. Thus, because we cannot discern the basis for the administrative law judge's finding that the Miner established 16.94 years of underground coal mine employment, we must vacate that determination and remand the case for reconsideration of this issue.[14]

Total Disability

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 miner may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and

[13] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, an administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii).

[14] We affirm, as unchallenged, the administrative law judge's determination that Claimant's coal mine employment was underground. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 10.

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 the pulmonary function study evidence was in equipoise[15] and the blood gas study evidence did not establish total disability.[16] 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 12-13. She further found no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13.

In weighing the medical opinion evidence, the administrative law judge considered the newly submitted medical opinions of Drs. Habre, Fino, and Tuteur. Dr. Habre opined the Miner had a significant pulmonary impairment that rendered him unable to return to his coal mine employment. MC Director's Exhibit 12. Dr. Fino opined the Miner had a mild to moderate respiratory impairment, but that he was not totally disabled. MC Director's Exhibit 13. Dr. Tuteur opined the Miner was totally disabled as a whole man from returning to his usual coal mine employment, but did not have a totally disabling respiratory impairment. MC Employer's Exhibits 11; 13. The administrative law judge credited Dr. Habre's opinion the Miner was totally disabled due to his pulmonary impairment, and discredited the contrary opinions of Drs. Fino and Tuteur. Decision and Order at 22-23. She then found the medical opinion evidence sufficient to establish total disability and therefore found Claimant established a change in an applicable condition of entitlement and further found total disability based on the record as a whole. 20 C.F.R. §§ 718.204(b)(2)(iv), 725.309(c); Decision and Order at 13-23.

[15] The pulmonary function studies administered by Drs. Habre and Craven on December 4, 2012 and May 9, 2013, respectively, produced qualifying results. MC Director's Exhibit 12; MC Claimant's Exhibit 2. The two studies administered by Dr. Fino on October 21, 2010 and June 20, 2013 produced non-qualifying values. MC Director's Exhibit 13; MC Employer's Exhibit 1.

[16] The December 4, 2012 study Dr. Habre administered produced qualifying values while the two studies Dr. Fino administered, dated October 21, 2010 and June 20, 2013 produced non-qualifying values. MC Director's Exhibits 12, 13; MC Employer's Exhibit 1.

Employer asserts the administrative law judge erred in her weighing of the medical opinion evidence and in failing to consider all relevant evidence. Employer's Brief at 16-19. Employer's allegations have merit, in part.

As Employer alleges, in evaluating Dr. Fino's opinion, the administrative law judge cited his reliance on an American Thoracic Society consensus statement concerning pulmonary function study interpretations, which she found violated the preamble. Decision and Order at 22; Employer's Brief at 17. In discrediting Dr. Fino's opinion on this basis, however, the administrative law judge failed to explain, in compliance with the APA, how or what portion of the preamble this statement violated. *Wojtowicz*, 12 BLR at 1-165. In addition, as Employer contends, she also accorded less weight to Dr. Fino's opinion because he did not discuss the Miner's symptoms. Decision and Order at 22-23; Employer's Brief at 18. The regulations require "reasoned medical judgement, based on medically acceptable clinical and laboratory diagnostic techniques" but do not require a discussion of symptoms. 20 C.F.R. §718.204(b)(2)(iv). Moreover, a mere recitation of symptoms, such as shortness of breath, is not a finding of the existence of an impairment, or a conclusion as to its severity. *See Heaton v. Director, OWCP*, 6 BLR 1-1222, 1-1224 (1984); *Bushilla v. North American Coal Corp.*, 6 BLR 1-365, 1-367 (1983). Thus, while the determination of whether a physician's opinion is sufficiently documented and reasoned is for the fact-finder, here the administrative law judge has not explained how it was essential for Dr. Fino to discuss Claimant's symptoms when he based his opinion on objective medical evidence. *See* MC Director's Exhibit 13. The administrative law judge's focus on symptoms similarly affected her weighing of the other medical opinions. Further, as Employer alleges, the administrative law judge failed to consider all the relevant evidence because she did not specifically consider Claimant's treatment records.[17] *See* 30 U.S.C. §923(b); Employer's Brief at 18-19; MC Claimant's Exhibits 4-6.

Because the administrative law judge's weighing of Dr. Fino's opinion, as well as her focus on symptoms in analyzing and weighing the other medical opinions, affected her weighing of the evidence as a whole, and because she failed to consider all relevant evidence, we must vacate her finding that the newly submitted medical opinion evidence

[17] We reject, however, Employer's argument that the treatment records do not contain any diagnoses of respiratory or pulmonary disease and therefore constitute "substantial evidence of the absence of any pulmonary impairment." Employer's Brief at 18. Contrary to Employer's assertion, however, the records document treatment for "[Chronic obstructive pulmonary disease] COPD with probable chronic bronchitis" and COPD that "is severe and limiting," include treatment with medications for breathing ailments, note "[p]ossible mild restrictive lung disease based on the FVC maneuver," and document the use of supplemental oxygen. MC Claimant's Exhibits 4-6.

established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, we need not address Employer's remaining arguments concerning the administrative law judge's weighing of the opinions of Drs. Habre and Tuteur.[18] In addition, we vacate the administrative law judge's determination that the physicians' opinions in isolation would support finding total disability and that considering the evidence as a whole Claimant has established total disability. Thus, we remand this case for further consideration.

Remand Instructions

On remand, the administrative law judge must determine the length of the Miner's qualifying coal mine employment, based on any reasonable method of calculation and considering all relevant evidence. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305; *Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. She must also reconsider the physician opinion evidence and the evidence as a whole, taking into account the treatment records, when evaluating whether the Miner suffered from a totally disabling respiratory or pulmonary impairment.[19] When evaluating the medical opinions, she should take into consideration the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). After reconsidering whether the newly submitted medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant

[18] The administrative law judge should consider Employer's additional arguments in her evaluation of the evidence.

[19] Contrary to Employer's contention that the lack of objective laboratory tests "should have weighed heavily against the [C]laimant," the regulations specifically provide:

> Where total disability cannot be shown under paragraphs (b)(2)(i) [pulmonary function tests], (ii) [arterial blood gas tests], or iii [the miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure] . . . total disability may nevertheless be found if a physician exercising reasoned medical judgement, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his or her usual coal mine work].

20 C.F.R. §718.204(b)(2)(iv); Employer's Brief at 17.

new evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[20] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

Because we have vacated the administrative law judge's findings concerning length of coal mine employment and total disability, we also vacate her findings that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). We therefore further vacate the award of benefits in the Miner's claim.

If the administrative law judge again finds Claimant has established the Miner was employed for fifteen or more years in qualifying employment and was totally disabled by a respiratory or pulmonary disability, she will have invoked the Section 411(c)(4) presumption. The administrative law judge must then consider whether Employer can rebut the presumption taking into consideration all relevant evidence, including the treatment records.[21] 20 C.F.R. §718.305(d)(1); *Copley v. Buffalo Mining Co.*, 25 BLR 1-81, 1-89 (2012); *see* MC Claimant's Exhibits 4-6.

Alternatively, if Claimant does not invoke the presumption on remand, the administrative law judge must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718.[22] *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

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[20] If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded in the miner's claim. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[21] We note the treatment records are also relevant when evaluating whether Employer has rebutted that the Miner's respiratory impairment was due to pneumoconiosis (i.e. the cause of any impairment). *See supra*; MC Claimant's Exhibits 4-6; *see also* 20 C.F.R. §718.204(a).

[22] In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, a claimant must establish disease (pneumoconiosis), disease causation (it arose out of coal mine employment), disability (a totally disabling respiratory or pulmonary impairment), and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*,

The Survivor's Claim

In light of our vacating the administrative law judge's award of benefits in the Miner's claim, we also vacate the administrative law judge's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*). On remand, if the administrative law judge awards benefits in the Miner's claim, Claimant is entitled to survivor's benefits. 30 U.S.C. §932(*l*). Should the administrative law judge deny benefits in the Miner's claim, she must consider whether Claimant can establish entitlement to survivor's benefits by establishing the Miner's death was due to pneumoconiosis, either under Section 411(c)(4)[23] or under 20 C.F.R. Part 718 without the benefit of the presumption. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[23] Section 411(c)(4) of the Act provides a rebuttable presumption the Miner's death was due to pneumoconiosis if he had 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); 20 C.F.R. §718.305.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge