U.S. Department of Labor

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

BRB No. 19-0045 BLA

RANDOLPH CLEVINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY LLC	)	DATE ISSUED: 07/02/2020
	)	
and	)	
	)	
NATIONAL UNION FIRE/CHARTIS	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kyle L. Johnson and John W. Beauchamp (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

ROLFE and JONES, Administrative Appeals Judges:

Employer and its carrier (employer) appeal the Decision and Order Awarding Benefits (2016-BLA-05066) of Administrative Law Judge Clement J. Kennington, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on September 24, 2014.[1]

The administrative law judge found claimant has twenty years of underground coal mine employment based on the parties' stipulation, and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in the applicable condition of entitlement.[3] 20 C.F.R. §725.309(c). The administrative law judge further found employer did not rebut the presumption and awarded benefits.

[1] This is claimant's third claim for benefits. On December 9, 2009, the district director denied his most recent prior claim, filed on May 29, 2009, because he did not establish total disability. 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 claimant establishes at least fifteen years in underground coal mine employment, or in surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. We affirm, as unchallenged on appeal and consistent with the parties' stipulation, the administrative law judge's finding that claimant established twenty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 10; Hearing Transcript at 9.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge 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

On appeal, employer argues the administrative law judge lacked the authority to decide the case because he was not appointed in accordance with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] Employer also contends the district director, the Department of Labor (DOL) official who processes claims, is an inferior officer who was not appointed in a manner consistent with the Appointments Clause.[5] Employer further challenges the administrative law judge's findings that claimant established total disability and invoked the Section 411(c)(4) presumption, and employer failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, asserting employer waived its Appointments Clause arguments.

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entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because claimant's prior claim was denied because he failed to establish total disability, he had to submit new evidence establishing this element of entitlement to have his case considered on the merits. 20 C.F.R. §725.309(c).

[4] 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.

[5] Employer initially raised the Appointments Clause issue in a motion requesting that the Board remand this case to a different, validly appointed administrative law judge in light of the United States Supreme Court's decision in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). The Board rejected employer's motion to remand as inadequately briefed because employer did not set forth a sufficient rationale for the Board to vacate and remand the administrative law judge's decision. *Clevinger v. South Akers Mining Co.*, BRB No. 19-0045 BLA, slip op. at 2 (May 30, 2019) (unpub. Order). In a concurring opinion, Judge Rolfe found the issue waived by employer's failure to respond to the administrative law judge's order to file a statement whether it sought reassignment based on *Lucia.*

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.[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 – Administrative Law Judge

Employer urges the Board to remand the case for assignment to a different, constitutionally appointed administrative law judge for a new hearing pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[7] Employer contends it timely raised its Appointments Clause challenge before the administrative law judge and the Board in the present appeal. Employer's Brief at 11-17.

The Director asserts employer waived or forfeited its Appointments Clause challenge by failing to timely respond to the administrative law judge's Order requiring employer to indicate if it sought reassignment to a different administrative law judge pursuant to *Lucia*. Director's Brief at 3-7. We agree with the Director's position.

The Appointments Clause issue is "non-jurisdictional" and thus is subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted). Following the issuance of the United States Supreme Court's decision in *Lucia*, the administrative law judge, in response to employer's Appointments Clause challenge, expressly ordered employer to "file a statement indicating whether it seeks reassignment . . . to a different [administrative law judge]" within fourteen days. Notice and Order dated August 23, 2018. The administrative

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 22.

[7] In *Lucia*, the United States Supreme Court held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia*, 138 S.Ct. at 2055. The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a different and properly appointed administrative law judge. *Id*.

law judge's Order further stated "if a timely response is not filed, this matter will proceed before the undersigned." *Id*.

Employer failed to file a response. As the Director correctly notes, had employer timely responded to the administrative law judge, the administrative law judge could have considered the issue and, if appropriate, provided the relief employer is now requesting. Based on these facts, we conclude employer waived its Appointments Clause challenge and deny the relief requested. *See Wilkerson*, 910 F.3d at 256.

Appointments Clause – District Director

Employer argues for the first time in this appeal that the district director lacked the authority to process this case because he was not properly appointed under the Appointments Clause. Relying on *Lucia*, employer asserts DOL district directors, in processing claims under the Act, are inferior officers of the United States similar to administrative law judges, and must be appointed in conformance with the Appointments Clause. Employer's Brief at 18-22. The Director asserts employer forfeited this Appointments Clause challenge by failing to raise it before the administrative law judge. The Director further argues district directors are not inferior officers because they perform "routine administrative functions" and do not have "significant adjudicative powers" equivalent to administrative law judges. Director's Brief at 8-14.

As noted, *supra*, an Appointments Clause issue is "non-jurisdictional" and thus subject to the doctrines of waiver and forfeiture. *See Lucia*, 138 S. Ct. at 2055; *Wilkerson*, 910 F.3d at 256. *Lucia* was decided approximately three months prior to the administrative law judge's Decision and Order Awarding Benefits, but employer failed to raise its appointments clause challenge with respect to the district director's appointment before the administrative law judge. At that time, the administrative law judge could have addressed employer's arguments. Instead, employer waited to raise its challenge to the district director's authority until after the administrative law judge issued an adverse decision on the merits of entitlement. Based on these facts, we conclude that employer forfeited its Appointments Clause challenge pertaining to the district director's authority by not timely raising it before the administrative law judge.[8] *See Powell v. Service Employees Int'l, Inc.*,

[8] As noted, *supra*, the administrative law judge's August 23, 2018 Notice and Order instructed employer to file a statement indicating whether it intended to seek reassignment of the case to a different administrative law judge based on the Supreme Court's holding in *Lucia*. August 23, 2018 Order. If employer did not respond, the case would "proceed before the undersigned." *Id*. Although that order related to the administrative law judge's

53 BRBS 13 (2019); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9 (2019). Furthermore, employer has not identified a valid basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging).

Invocation of the 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. *See* 20 C.F.R. §718.204(b)(1). A miner's total disability is established by qualifying pulmonary function studies,[9] qualifying 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 pulmonary function studies, medical opinions, and the record as a whole. Decision and Order at 17.

The administrative law judge considered four new pulmonary function studies dated November 3, 2014, April 2, 2015, April 29, 2016, and June 3, 2016.[10] Decision and Order at 4-5, 12. The administrative law judge also considered claimant's age when the pulmonary function studies were conducted, noting he was seventy-five years old at the time of the November 3, 2014 and April 2, 2015 studies and seventy-six years old at the

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authority to decide the case, employer was clearly aware of the substantive law it now cites to challenge the district director's authority and the opportunity to raise it.

[9] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[10] The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height is sixty-eight inches. Decision and Order at 12, *citing Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Because the miner's height falls between the table heights of 67.7 and 68.1 inches listed in 20 C.F.R. Part 718, Appendix B, the administrative law judge permissibly evaluated the studies using the table values for the closest greater height of 68.1 inches. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 12.

time of the April 29, 2016 and June 3, 2016 studies. *Id*. at 12; Director's Exhibits 11, 13; Claimant's Exhibits 1, 2. Using the Table values in Appendix B to 20 C.F.R. Part 718, which end at age seventy-one, the administrative law judge found the November 3, 2014 study, conducted by Dr. Green, qualifying only before bronchodilation. Decision and Order at 4-5; Director's Exhibit 11. The April 2, 2015, April 29, 2016, and June 3, 2016 studies, conducted by Drs. Dahhan, Raj, and Green, respectively, all produced qualifying values both before and after bronchodilation. Decision and Order at 4-5; Director's Exhibit 13; Claimant's Exhibits 1, 2. Determining that all but one of claimant's pulmonary function study results are qualifying based on the FEV_1 and MVV values, the administrative law judge found the pulmonary function studies supported a finding of total disability.[11] 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 12.

Employer contends the administrative law judge improperly credited the April 29, 2016 and June 3, 2016 pulmonary function studies as they are actually non-qualifying for disability and do not conform to the quality standards set forth in the regulations.[12] Employer's Brief at 22-27. Employer also maintains that because the administrative law judge relied on his erroneous crediting of these pulmonary function studies when crediting the diagnoses of total disability made by Drs. Green and Raj, his credibility determinations are also erroneous. *Id*. Employer's arguments have merit in part.

Contrary to employer's initial argument, the administrative law judge was not required to apply the "Knudson formula" to extrapolate qualifying values for a miner over the age of seventy-one.[13] Employer's Brief at 23-25. Dr. Broudy testified that "under the

[11] Dr. Dahhan's April 2, 2015 pulmonary function study had qualifying FEV_1 and FVC values both before and after bronchodilation, in addition to a qualifying MVV value prior to bronchodilation. Dr. Dahhan did not report an MVV value after bronchodilation. Director's Exhibit 13.

[12] We affirm, as unchallenged, the administrative law judge's determination that the November 3, 2014 study was qualifying before bronchodilation but not after, and the April 2, 2015 study produced qualifying values both before and after bronchodilation. *See Skrack*, 6 BLR at 1-711; Decision and Order at 4-5; Director's Exhibits 11, 13.

[13] Employer relies, in part, on Dr. Broudy's opinion that "according to Knudson criteria for an individual 75 years old and 67.5 inches tall," . . . the results "exceed the minimum federal criteria for disability" and "would not qualify for disability." Employer's Exhibit 4 at 3. While Dr. Broudy did not identify the pulmonary function study to which he was referring, Dr. Dahhan was the only physician who recorded a height of 67.5 inches and an age of seventy-five for a pulmonary function study. Director's Exhibit 13.

Knudson formula," the two most recent studies [dated April 29, 2016 and June 3, 2016] would have FVC values above disability levels.[14] Employer's Exhibit 5 at 14. Because the administrative law judge credited the 2016 studies with establishing total disability based on qualifying FEV_1 and MVV values, employer has not explained how Dr. Broudy's testimony that the FVC values would be non-qualifying under the Knudson formula would alter the administrative law judge determination that these studies are qualifying. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Moreover, Dr. Broudy did not explain the formula he used and employer offered no medical evidence in support of its use. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008) (absent contrary probative evidence, the values for a seventy-one year-old miner listed in Appendix B of the regulations should be used to determine if miners over the age of seventy-one qualify as totally disabled).

There is merit, however, to employer's contentions that the administrative law judge failed to adequately consider the validity of the pulmonary function studies in light of the relevant quality standards, which negatively impacted his evaluation of the medical opinions. Employer's Brief at 22-23, 25-27. When weighing pulmonary function studies, the administrative law judge must determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §§718.101(b), 718.103(c); 20 C.F.R. Part 718, Appendix B; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, it "constitute[s] evidence of the fact for which it is proffered." 20 C.F.R. §718.101(b). The administrative law judge must then, in his role as fact-finder, determine the probative weigh to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The administrative law judge found the 2016 pre-bronchodilator and post-bronchodilator pulmonary function studies to be qualifying based on their FEV_1 and MVV values. Decision and Order at 12; Claimant's Exhibits 1, 2. When crediting the pulmonary

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Employer has not explained how Dr. Broudy's testimony regarding the April 2, 2015 study supports its argument that the April 29, 2016 and June 3, 2016 pulmonary function studies are non-qualifying for disability. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480 (6th Cir. 2011); *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."). Moreover, we note Dr. Broudy's testimony is based on the height reported on the pulmonary function study, not on claimant's height as found by the administrative law judge. Decision and Order at 12.

[14] Dr. Broudy testified that under the Knudson formula, the FEV_1 values would be qualifying for both studies, while the FVC values and FEV_1/FVC ratios would not be. Employer's Exhibit 5 at 14.

function studies, the administrative law judge considered claimant's effort and cooperation, and correctly noted the regulations require, "[i]f the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient." Decision and Order at 16, *citing* 20 C.F.R. §718.103(b). He did not, however, address the testimony of Drs. Broudy and Dahhan that the April 29, 2016 and June 3, 2016 pulmonary function studies contain only one MVV trial for each exam, or Dr. Broudy's opinion the studies "wouldn't be considered valid" because only one trial was performed and "invalid studies probably shouldn't be used for disability determination purposes." Employer's Exhibits 5 at 16, 6 at 15-16. Because the administrative law judge did not consider all relevant evidence in finding the pulmonary function studies valid, we must vacate his finding that they established total disability at 20 C.F.R. §718.204(b)(2)(i) and remand the case for reconsideration of this evidence.[15] *See* 30 U.S.C. §923(b); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

We also agree with employer that the errors in evaluating the pulmonary function study evidence may have impacted the administrative law judge's evaluation of the medical opinions of Drs. Green and Raj.[16] Employer's Brief at 27. The administrative law judge relied on these opinions to find the credible medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 14-15. Because Drs. Green and Raj based their opinions, in part, on the April 29, 2016 and June 3, 2016 pulmonary function studies that the administrative law judge treated as valid and qualifying, we must vacate this finding. Thus, we vacate the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and by a preponderance of the evidence as a whole, and we remand the case for further consideration. We further vacate the administrative law judge's findings that claimant

[15] In contrast to our dissenting colleague, we believe employer squarely raised the allegation that the 2016 pulmonary function studies are not valid as they only include one MVV tracing. Employer's Brief at 23, 25-27. The administrative law judge erred in failing to consider whether these studies are valid or in substantial compliance with the quality standards as 20 C.F.R. §718.101(b) requires. *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987). Our colleague has provided his view of how he believes the failure to satisfy 20 C.F.R. §718.101(b) affects the weighing of the disability evidence as a whole. While his view is certainly reasonable, it is not the only reasonable way to weigh the evidence under these circumstances; remand is thus required. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

[16] We affirm, as unchallenged by employer on appeal, the administrative law judge's determination that the opinions of Drs. Broudy and Dahhan are entitled to minimal weight on the issue of total disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 16-17.

established a change in the applicable condition of entitlement at 20 C.F.R. §725.309 and invoked the Section 411(c)(4) presumption.

On remand, the administrative law judge must reconsider the April 29, 2016 and June 3, 2016 pulmonary function studies and determine whether they are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); 20 C.F.R. Part 718, Appendix B; *Keener*, 23 BLR at 1-237. If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of the miner's pulmonary function. *Orek*, 10 BLR at 1-54-55. He must also consider Dr. Broudy's testimony that these studies "probably shouldn't be used for disability determination purposes" and determine whether it is sufficient to constitute an invalidation of the studies. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); Employer's Exhibit 5 at 16. The administrative law judge must then reconsider whether the new pulmonary function study evidence as a whole establishes total disability at 20 C.F.R. §718.204(b)(2)(i). He must also reconsider the medical opinions of Drs. Green and Raj at 20 C.F.R. §718.204(b)(2)(iv), in light of his findings regarding the pulmonary function study evidence.

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

In the interest of judicial economy, we address employer's contention the administrative law judge erred in finding employer failed to establish rebuttal of the Section 411(c)(4) presumption if invoked. When a claimant invokes the Section 411(c)(4) presumption, the burden shifts to the employer to rebut it by establishing he has neither legal nor clinical pneumoconiosis,[17] or "no part of the [his] 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)(i), (ii). The administrative law judge found employer did not rebut the presumption under either method.

Employer generally asserts the opinions of Drs. Broudy and Dahhan are the "best evidence" and are "sufficient to rebut" the presumptions of legal pneumoconiosis and disability causation. Employer's Brief at 28-31. Employer has not identified any specific error of law or fact, however, in the administrative law judge's finding that their opinions

[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).

are not credible.[18] *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002); *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We therefore affirm the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i),[19] (ii). Decision and Order at 24-25.

In summary, if the administrative law judge finds on remand that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption and cannot establish entitlement under 20 C.F.R. Part 718. If the administrative law judge finds the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), however, claimant is entitled to invocation of the Section 411(c)(4) presumption. In light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, the administrative law judge may reinstate the award.

[18] We need not address employer's argument that the administrative law judge erred in not assigning probative weight to the opinions of Drs. Green and Raj, because those opinions cannot assist employer in establishing claimant does not have legal pneumoconiosis. *See Larioni*, 6 BLR 1-1276 (1984); Decision and Order at 23; Employer's Brief at 31.

[19] The administrative law judge found employer rebutted clinical pneumoconiosis. Decision and Order at 21. However, to rebut the existence of pneumoconiosis, employer must rebut both legal and clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A), (B).

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

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision to hold employer waived its challenge to the administrative law judge's appointment and forfeited its challenge to the district director's appointment. However, I respectfully dissent from its decision to vacate the award of benefits.

The primary question raised on appeal is whether the administrative law judge permissibly found the two most recent qualifying pulmonary function studies to be valid indicators of the miner's pulmonary disability. As employer has not identified any error in this finding, which is otherwise supported by substantial evidence and consistent with the law, it must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, a claimant must establish 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); 20 C.F.R. §718.305(b)(iii).

A claimant can establish total disability with, among other things, qualifying pulmonary function studies. 20 C.F.R. §718.204(b)(2)(i). Pulmonary function studies "developed . . . in connection with a claim" need not strictly conform to the technical quality standards outlined at 20 C.F.R. §718.103 and Appendix B to Part 718. 20 C.F.R. §718.101(b). Rather, as long as a study is in "substantial compliance," it "constitute[s] evidence of the fact for which it is proffered." *Id*. "In the absence of evidence to the

contrary, compliance with the requirements of Appendix B shall be presumed." 20 C.F.R. §718.103(c). Thus, "[a] party may challenge another party's [pulmonary function] study by submitting expert opinion evidence demonstrating the study is unreliable or invalid." 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000).

Regardless of whether the pulmonary function studies are qualifying, a claimant may also establish total disability "if a physician . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [his usual coal mine] employment." 20 C.F.R. §718.204(b)(2)(iv). To constitute probative evidence on the issue of total disability, the physician must "exercis[e] reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques." *Id*.

As the administrative law judge found, all four of claimant's pulmonary function studies were qualifying for total disability based largely on the FEV1 and MVV values.[20] 20 C.F.R. §718.204(b)(2)(i)(B). The November 3, 2014 study conducted by Dr. Green produced qualifying values before bronchodilation but non-qualifying values thereafter. Director's Exhibit 11. The April 2, 2015 study conducted by Dr. Dahhan, the April 29, 2016 study conducted by Dr. Raj, and the June 3, 2016 study conducted by Dr. Green produced qualifying values before and after bronchodilation. Director's Exhibit 13; Claimant's Exhibits 1, 2. Because the pre-bronchodilator studies are uniformly qualifying, and only the post-bronchodilator results of the oldest study are non-qualifying, the administrative law judge found the pulmonary function studies "favor a finding of total disability." Decision and Order at 12.

The administrative law judge further found the medical opinions establish total disability. He rejected Dr. Dahhan's opinion that there is "no evidence" of total disability because it was based in part on an inaccurate belief that pulmonary function studies must contain three MVV tracings to be valid.[21] Decision and Order at 16, *citing* 20 C.F.R. §718.103(b) (two MVV tracings "shall be sufficient"); Director's Exhibit 13; Employer's Exhibit 6 at 15. He also found that although Dr. Dahhan accurately identified claimant's usual coal mine work as a scoop operator, he did not demonstrate an adequate understanding of its exertional requirements, which the administrative law judge found was

[20] Dr. Dahhan did not report MVV values for the April 2, 2015 post-bronchodilator study. This test is nevertheless qualifying based on the FEV1 and FVC results. 20 C.F.R. §718.204(b)(2)(i)(A); Director's Exhibit 13.

[21] Dr. Dahhan made this statement in reference to the April 29, 2016 study conducted by Dr. Raj, and the June 3, 2016 study conducted by Dr. Green. Employer's Exhibit 6 at 15-16.

a "heavy duty job" requiring "a heavy level of work." *Id*. at 10-11, 16. These findings are supported by substantial evidence and are unchallenged on appeal. The Board therefore must affirm the administrative law judge's determination that Dr. Dahhan's opinion is entitled to "minimal probative value." *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order at 17.

The administrative law judge also rejected Dr. Broudy's opinion that claimant's pulmonary function studies are non-qualifying because he did not adequately explain why an extrapolation of the values using the Knudson formula reveals that the studies are actually non-qualifying. Decision and Order at 17. As the majority soundly holds, the administrative law judge permissibly rejected Dr. Broudy's opinion on this basis. Slip op. at 10-11. He also permissibly rejected Dr. Broudy's opinion as contradictory and lacking an adequate understanding of the exertional requirements of the miner's job as a scoop operator. Decision and Order at 17. Specifically, he accurately noted Dr. Broudy opined claimant is not totally disabled but then stated claimant does not have the respiratory capacity to do any heavy lifting which, the administrative law judge found, is among the requirements of claimant's usual coal mine work and thus renders him disabled. *Id*. at 10-11, 17. This finding must be affirmed as it is both supported by substantial evidence and unchallenged on appeal. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); *Skrack*, 6 BLR at 1-711.

Conversely, the administrative law judge credited the opinions of Drs. Raj and Green that claimant is totally disabled from his usual coal mine work. He found both physicians "entitled to greater weight than Drs. Dahhan and Broudy on the issue of total disability, as they 'did a better job of integrating all of the available evidence.'" Decision and Order at 15, *quoting Midland Coal Co. v. Shores*, 358 F.3d 486, 492 (7th Cir. 2004). He also found their opinions consistent with the objective evidence demonstrating an obstructive impairment and well-reasoned in light of his finding that claimant's coal mine employment required heavy exertion. *Id*.

Finally, weighing all the evidence together, the administrative law judge found "the [pulmonary function studies] weigh in favor of a finding of total disability and the preponderance of the reasoned and documented medical opinion evidence supports a finding" claimant is totally disabled. Decision and Order at 16. Based on his unchallenged finding claimant has twenty years of underground coal mine employment, the administrative law judge found claimant invoked the Section 411(c)(4) presumption he is totally disabled due to pneumoconiosis. *Id*.

Employer offers two arguments as to why the administrative law judge's total disability finding must be remanded. The first, already rejected by the majority, is that the administrative law judge should have found the pulmonary function studies non-qualifying

based on Dr. Broudy's purported application of the Knudson formula. Employer's Brief at 22-25. Its second argument, the administrative law judge should have credited Dr. Broudy's "cogent" opinion that the two most recent qualifying pulmonary function studies are invalid, is similarly without merit. *Id*. at 25.

First, for reasons that were rejected by the majority or are unchallenged on appeal, the administrative law judge found Dr. Broudy's opinion on total disability unreasoned as to whether the pulmonary function studies are qualifying, contradictory as to the existence of a totally disabling impairment, and lacking an adequate understanding of the exertional requirements of claimant's coal mine work. Employer makes no effort to explain why Dr. Broudy's opinion, wholly discredited as to whether the miner is totally disabled, could nevertheless be credited on the related issue of whether two of the pulmonary function studies are sufficiently probative to establish total disability. 20 C.F.R. §718.204(b)(2)(iv) (to be credited on the issue of total disability, physician must exercise reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (a reasoned opinion is one supported by the underlying documentation). Nor does employer allege that the administrative law judge erred in explicitly discrediting Dr. Dahhan's opinion that the April 29, 2016 and June 3, 2016 tests are invalid. *Skrack*, 6 BLR at 1-711.

Second, even assuming Dr. Broudy's statement on the validity of the tests could be credited, his opinion is significantly less cogent than employer believes. While employer points out that that Dr. Broudy stated pulmonary function studies with only one MVV tracing "probably shouldn't be used for disability determination purposes," it ignores that he immediately thereafter relied on those same studies to diagnose a "moderately severe impairment" which would prevent claimant from performing the heavy lifting required of his coal mine employment. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987)(Levin, J., concurring) ("The party objecting to the admission of an objective study . . . must demonstrate how th[e] defect or omission renders the study unreliable."); Employer's Exhibit 5 at 16, 18, 22-23. This opinion is either contradictory on its face or, as the administrative law judge found, actually supports a finding of total disability. Decision and Order at 17. Neither outcome supports employer's argument that the administrative law judge erred in finding claimant totally disabled. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2002).

Third, and perhaps most importantly, even accepting Dr. Broudy's statement that the April 29, 2016 and June 3, 2016 studies "probably shouldn't be used" does not undermine the administrative law judge's overall finding of total disability. Employer's Exhibit 5 at 16. As discussed, he found all four pulmonary function studies qualifying for total disability. Decision and Order at 12. Even if he were to exclude the two latest studies as unreliable, the record still contains two qualifying studies, the November 3, 2014 study

conducted by Dr. Green which produced qualifying values before bronchodilation and the April 2, 2015 study by Dr. Dahhan which produced qualifying values before and after bronchodilation. Director's Exhibits 13, 15. Thus, regardless of the validity of the April 29, 2016 and June 3, 2016 studies, all remaining valid studies of record still "favor a finding of total disability."[22] Decision and Order at 12; *see Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

The same is true for the medical opinions. To the extent the two indisputably valid pulmonary function studies produced qualifying values, there is no basis to vacate the administrative law judge's finding that Dr. Green's and Dr. Raj's opinions are supported by the objective evidence. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 15; Director's Exhibits 11, 13; Claimant's Exhibit 1. Further, as the administrative law judge found, Dr. Green based his opinion not just on the qualifying June 3, 2016 study's FEV1 and MVV values, but also on the qualifying November 3, 2014 study, the validity of which employer does not contest, as well as a "progressive deterioration in the FEV1 and FVC from 2007 up through 2014." Decision and Order at 14; Director's Exhibits 11, 13. The administrative law judge also accurately found Dr. Raj based his opinion not just on the April 29, 2016 study's FEV1 and MVV values, but on numerous factors: claimant's "abnormal" blood gas study, his "abnormal" pulmonary function study as reflected by the FEV1 and FVC values, and his "pulmonary symptoms of severe shortness of breath, cough and wheezing" and an inability to walk "25 feet uphill and 200 feet on level ground" without becoming short of breath. Decision and Order at 15; Claimant's Exhibit 1. As it is supported by substantial evidence, the Board must affirm the administrative law judge's finding that Dr. Green and Dr. Raj are "more probative and entitled to greater weight" because they "did a better job of integrating all of the available evidence." *Napier*, 301 F.3d at 713-14; Decision and Order at 15.

As discussed, the administrative law judge permissibly rejected Dr. Broudy's and Dr. Dahhan's opinions that claimant is not totally disabled and, with respect to Dr. Broudy, found at least one aspect of his opinion – claimant does not have the respiratory capacity to do any heavy lifting – supports a finding of total disability. Employer has not identified any error in the administrative law judge's discrediting of their opinions. Thus, even if the administrative law judge were to agree with employer on remand that Dr. Green and Dr.

[22] That the November 3, 2014 study also produced non-qualifying values after bronchodilation does not undermine the administrative law judge's finding, as "use of a bronchodilator does not provide an adequate assessment of the miner's disability." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

Raj are also not credible, the only remaining credible evidence on the issue of total disability consists of the qualifying pulmonary function studies from November 3, 2014 and April 2, 2015. Because these studies are uncontradicted, they establish total disability.[23] 20 C.F.R. §718.204(b)(2) ("In the absence of contrary probative evidence, evidence which meets the standards [for qualifying pulmonary function studies at paragraph] (b)(2)(i) . . . *shall establish a miner's total disability*[.]") (emphasis added); *Shinseki*, 556 U.S. at 413.

Employer's total disability argument is without merit. At best it is a red herring. I therefore would affirm the administrative law judge's finding of total disability and invocation of the Section 411(c)(4) presumption.

Finally, in arguing that the administrative law judge should have found the presumption rebutted, employer merely summarizes its evidence and concludes that Dr. Dahhan and Dr. Broudy are the "best expert opinions." Employer's Brief at 28-32. This, of course, does not establish error in the administrative law judge's findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986) (petitioner must make

[23] The administrative law judge rationally found the qualifying pulmonary studies are not contradicted by the preponderantly non-qualifying blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993) (blood gas studies measure a different type of impairment than pulmonary function studies); Decision and Order at 17.

specific allegations of error to invoke Board review); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (Board is not empowered to reweigh the evidence.).

Consequently, I would affirm the award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge