U.S. Department of Labor

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

BRB No. 20-0264 BLA

JAMES R. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE/CHARTIS	)	DATE ISSUED: 06/25/2021
	)	
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 Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

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

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer and its Carrier.

Sarah M. Hurley (Elena S. Goldstein, Deputy 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 GRESH, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Jonathan C. Calianos's Decision and Order Awarding Benefits (2017-BLA-05929) rendered on a claim filed on June 15, 2016 pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (BLBA or Act).

The administrative law judge credited Claimant with thirty-four years of underground coal mine employment and found he established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge lacked authority to hear and decide the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[2] It further asserts the removal provisions applicable to the administrative law judge rendered his appointment

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] 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.

unconstitutional. In addition, it argues the administrative law judge improperly invoked the Section 411(c)(4) presumption because he erroneously found Claimant established total disability.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response asserting the administrative law judge had authority to decide the case. Employer filed a reply brief reiterating its arguments.

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.[4] 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 requests the Board vacate the administrative law judge's Decision and Order and remand this case to be heard by a constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[5] Employer's Brief at 10-13; Employer's Reply Brief at 2-3.[6] It acknowledges the Secretary of Labor (the Secretary) ratified the prior appointment of all sitting Department of Labor (DOL)

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established thirty-four years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9, 22.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 32.

[5] *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 the 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. Comm'r*, 501 U.S. 868 (1991). The Department of Labor has conceded that the Supreme Court's holding applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[6] Employer raised this issue before the administrative law judge in a Motion to Remand. The administrative law judge denied Employer's motion in a September 14, 2018 Order.

administrative law judges on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment. *Id.*

The Director argues the administrative law judge had the authority to decide this case because the Secretary's ratification brought his appointment into compliance. Director's Brief at 2-3. We agree with the Director's arguments.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). 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). It 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). 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).

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. Thus, 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.

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[7] 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 Calianos.

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 Calianos and gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Calianos. The Secretary further acted in his "capacity as head of [DOL]" when ratifying the appointment of Judge Calianos "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's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] *nunc pro tunc*" all its earlier actions was proper).

We further reject Employer's argument that Executive Order 13843, which removes administrative law judges from the competitive civil service, supports its Appointments Clause argument because incumbent administrative law judges remain in the competitive civil service. 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). Moreover, Employer has not explained how the Executive Order undermines the Secretary's ratification of Judge Calianos's appointment, which we have held constituted a valid exercise of his authority, bringing the administrative law judge's appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded 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. Employer's Brief at 13-15. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are

unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Brief at 13-15. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd*., 561 U.S. 477 (2010). Employer's Brief at 13-15.

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, its holding "does not address that subset of independent agency employees who serve as administrative law judges" who, "unlike members of the [PCAOB] . . . perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10. Further, the majority in *Lucia* declined to address the removal provisions for administrative law judges. *Lucia*, 138 S. Ct. at 2050 n.1.

Although Employer generally summarizes *Free Enterprise Fund*, it has not explained how or why this legal authority should apply to administrative law judges or otherwise undermine the administrative law judge's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000)("Due respect for the decisions of a coordinate branch of Government demands that we invalidate [C]ongressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988), *quoting Hooper v. California*, 155 U.S. 648, 657 (1895). Here, Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied.[8]

[8] Moreover, even if the Board were to accept Employer's argument that Section 7521 of the Administrative Procedure Act, 5 U.S.C. §7521, cannot be applied in a constitutional manner, it has not articulated the remedy it seeks nor demonstrated how curing such an alleged defect would fall within the Board's authority. *See*, 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a) (authorizing the Board to hear appeals raising a substantial question of law or fact *arising under the BLBA*); *Kalaris v. Donovan*,

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. 20 C.F.R. §718.204(b)(1). A 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 the relevant evidence supporting total disability against the 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). Notwithstanding the non-qualifying pulmonary function and blood gas studies, the administrative law judge found Claimant established total disability based on the medical opinions and his weighing of the evidence as a whole.[9] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10-22.

Employer argues the administrative law judge erred in finding the medical opinions establish total disability. Employer's Brief at 15-26. Its arguments have no merit.

Before weighing the medical opinions, the administrative law judge addressed the exertional requirements of Claimant's usual coal mine employment. He found Claimant's usual coal mine employment was primarily working as an electrician, but Claimant occasionally ran a shuttle car. Decision and Order at 4-5. He found Claimant credibly testified that as an electrician, he had to "lift and manipulate a 30 pound loaded shovel, . . . handle the 500 pound wheel unit, occasionally change 400 pound tires, lift a heavy tool box onto a cart, and carry a 35-pound bucket of grease." *Id*. at 4-5 n.6, *citing* Hearing Tr. at 16-20. He took judicial notice of the 4th edition of the DOL's *Dictionary of Occupational Titles* (DOT) and its descriptions of the various degrees of labor in Appendix C, IV. *Id*. at 5 n.6. He found Claimant's usual coal mine employment met the definition of very heavy work. *Id*.

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697 F.2d 376, 388 (D.C. Cir. 1983)(Board is not an Article III court; its subject-matter jurisdiction is limited to rights that Congress created and does not extend "to all potentially related matters.").

[9] The administrative law judge found the pulmonary function and arterial blood gas studies do not establish total disability and there is no evidence Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 10-13.

Employer argues the administrative law judge erred in relying on the DOT to evaluate Claimant's usual coal mine employment. Employer's Brief at 24. We disagree. Pursuant to 29 C.F.R. §18.84, an administrative law judge is granted discretion to take official notice "of any adjudicative fact or other matter subject to judicial notice," provided the parties are "given an adequate opportunity to show the contrary of the matter noticed." 29 C.F.R. §18.84; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9 (1978).

In this case, the administrative law judge took official notice of the DOT in his Decision and Order. Decision and Order at n.6. He specifically advised the parties they "have 25 days from the date of issuance of this Decision to contest" his taking official notice of the DOT. Decision and Order at n.6. Employer did not contest this action. Nor does Employer "claim to have been unaware of the [DOT] or [its] contents," or assert the administrative law judge "misread or misinterpreted" the DOT. *Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 833, 846 (6th Cir. 2012). Because Employer does not directly challenge the manner in which the administrative law judge took official notice of the DOT, we reject Employer's argument. *See Maddaleni*, 14 BLR at 1-139; *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4-5 (1989). Moreover, based on the definition of very heavy work in the DOT and the corresponding strength ratings as compared to Claimant's job duties, the administrative law judge rationally found Claimant's usual coal mine employment required very heavy work.[10] *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997); Decision and Order at 4-5 n.6.

The administrative law judge next weighed Dr. Raj's medical opinion that Claimant is totally disabled by a respiratory or pulmonary impairment and the opinions of Drs. Fino and Jarboe that he is not. Decision and Order at 13-22; Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 5, 8, 10, 14. He found Dr. Raj's opinion reasoned and documented, and the opinions of Drs. Fino and Jarboe unpersuasive. Decision and Order at 19-22.

[10] The administrative law judge noted very heavy work is defined as "[e]xerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects," with physical demand requirements that "are in excess of those for [h]eavy [w]ork." Decision and Order at 5, n.6, *quoting Dictionary of Occupational Titles* (DOT) (4th Ed., Rev. 1991), Appendix C, IV.

We first reject Employer's argument that the administrative law judge erred in discrediting Dr. Fino's opinion. Employer's Brief at 24-25. In his initial report, Dr. Fino opined Claimant has a moderate obstructive lung defect evidenced by an FEV1 value that is 59% predicted on a February 22, 2017 pulmonary function study. Employer's Exhibit 5 at 9. He concluded Claimant is totally disabled from his usual coal mine employment that required very heavy manual labor by this impairment. *Id*.

In a supplemental report, Dr. Fino indicated he reviewed additional pulmonary function testing. Employer's Exhibit 10. Specifically he reviewed Dr. Jawad's May 23, 2016 study, Dr. Jarboe's November 30, 2017 study, and Dr. Raj's January 29, 2018 and February 27, 2018 studies. *Id*. Changing his opinion, Dr. Fino opined Claimant is not totally disabled. *Id*. He explained the more recent pulmonary function study taken on February 27, 2018 evidences a post-bronchodilator FEV1 value that is 79% of predicted, which he characterized as "essentially normal." *Id*. Although the pre-bronchodilator results for this study are 11% lower than the post-bronchodilator results, Dr. Fino explained an 11% bronchodilator response represents better effort from Claimant and not a clinically significant response to medication. *Id*. Thus he opined the February 27, 2018 post-bronchodilator result represents Claimant's "better effort" and a more accurate assessment of disability. *Id*.

The administrative law judge permissibly found Dr. Fino's opinion unpersuasive because he addressed only Dr. Raj's February 27, 2018 non-qualifying pulmonary function study, but did not address a qualifying study that he also reviewed, Dr. Raj's January 29, 2018 study taken one month earlier. *Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; *Greer v. Director, OWCP*, 940 F.2d 88, 90-91 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, a miner's functional ability on a pulmonary function study may vary, and thus could measure higher on any given day than its typical level); Decision and Order at 20. The administrative law judge also permissibly found Dr. Fino's opinion unpersuasive because he did not explain his basis for finding the post-bronchodilator February 27, 2018 study "represent[s] a better effort" with any analysis of the tracings of the pulmonary function testing of record. Decision and Order at 20; *Hicks*, 138 F.3d at 524; *Akers*, 131 F.3d at 438.

We also reject Employer's argument that the administrative law judge erred in weighing Dr. Jarboe's opinion. Employer's Brief at 18-23. Dr. Jarboe opined Claimant "has a moderate ventilatory impairment in the form of moderate airflow obstruction," but opined Claimant is not totally disabled because his pulmonary function studies "exceed the federal limits for disability." Employer's Exhibit 8 at 6. As the administrative law judge noted, total disability can be established under the regulations with reasoned medical opinions even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv);

Decision and Order at 19. The administrative law judge permissibly found Dr. Jarboe's opinion unpersuasive because he merely stated his conclusion and noted Claimant's pulmonary function study results did not meet DOL disability standards without otherwise addressing whether Claimant is totally disabled from his usual coal mine employment notwithstanding whether his objective testing is non-qualifying. *See Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40; *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22 (7th Cir. 2005) (a miner can establish total disability despite non-qualifying objective tests); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) ("even a 'mild' respiratory impairment may preclude the performance of the miner's usual duties"); Decision and Order at 20.

Dr. Jarboe also opined Claimant is not totally disabled based on his assumption that Claimant's usual coal mine employment was working as a shuttle car operator, and this job required heavy manual labor. Employer's Exhibits 8 at 1, 14 at 2. The administrative law judge noted that although Claimant "operated a shuttle car at times, perhaps one hour during a work day to cover for other miners, this was not the principal or even significant part of his coal mine duties during the final year of his work in the mines." Decision and Order at 20. Rather, as noted above, the administrative law judge found Claimant's usual coal mine employment was working as an electrician, which required very heavy work. *Id.* at 4-5 n.6. Thus Dr. Jarboe assumed Claimant's job required heavy manual labor when the administrative law judge found it required very heavy work.[11] Thus, the administrative law judge permissibly discredited Dr. Jarboe's opinion because he "did not have an accurate description of the exertional requirements of Claimant's coal mine employment."[12] Decision and Order at 20; *see Eagle v. Armco, Inc.*, 943 F.2d 509, 512-13 (4th Cir. 1991) (a physician who asserts a claimant is capable of performing assigned duties should state his knowledge of the physical efforts required and relate them to the miner's

[11] Employer repeatedly argues Dr. Jarboe had an accurate understanding of the exertional requirements of Claimant's usual coal mine employment because the doctor assumed Claimant had to perform "heavy manual labor." Employer's Brief at 20-23. Under the DOT, heavy work and very heavy work are distinct exertional levels; very heavy work involves "physical demand requirements that are in excess of those for [h]eavy [w]ork." DOT, Appendix C, IV. Thus substantial evidence supports the administrative law judge's finding Dr. Jarboe did not have an accurate understanding of the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 20.

[12] As the administrative law judge provided valid reasons for discrediting Dr. Jarboe's opinion, we need not address Employer's other argument with respect to his weighing of Dr. Jarboe's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 20.

impairment); *Walker v. Director, OWCP*, 927 F.2d 181, 184-85 (4th Cir. 1991); *see also Killman*, 415 F.3d at 721-22; *Cornett*, 227 F.3d at 587.

In contrast, Dr. Raj noted Claimant "was an electrician, shuttle car operator, [and] rock duste[r]," and his usual coal mine employment required him to "lift [fifty to one-hundred] pounds [in] any given day" in coal that was forty-eight to sixty inches high. Director's Exhibit 12 at 2. He also noted Claimant had symptoms of shortness of breath, cough, and wheezing. *Id*. at 5. He opined Claimant's August 22, 2016 arterial blood gas testing evidenced hypoxemia and his pulmonary function testing evidenced a moderate obstructive lung impairment. *Id*. He concluded Claimant's "physical capacity is reduced due to [his] total pulmonary impairment." *Id*. Based on this "reduced physical capacity," he concluded Claimant "cannot meet the exertional requirement[s] of his last coal mine employment job." *Id*. After evaluating Claimant a second time on January 29, 2018, Dr. Raj noted Claimant's blood gas study administered during this visit is "very consistent with" his August 22, 2016 blood gas study. Claimant's Exhibit 2. He stated Claimant's January 29, 2018 pulmonary function study again evidences a moderate obstructive impairment. *Id*. He reiterated his opinion that Claimant is totally disabled. *Id*. He evaluated Claimant a third time on February 27, 2018, again identifying hypoxemia on Claimant's blood gas testing and a moderate obstructive defect on his pulmonary function testing, and reiterated Claimant is totally disabled. Claimant's Exhibit 3.

The administrative law judge noted Dr. Raj had "an accurate understanding of the exertional requirements of Claimant's usual coal mine work and recognized that Claimant's moderate obstructive impairment, as shown in pulmonary function testing, was disabling." Decision and Order at 20-21. Contrary to Employer's argument, the administrative law judge permissibly found Dr. Raj's opinion reasoned and documented because he "addresses the results of his clinical testing in detail [and] provides a more complete analysis of the results, even where the tests provided results that do not 'qualify.'"[13] *Id*.; *see Hicks*, 138 F.3d at 530; *Akers*, 131 F.3d at 439-40. Thus, the

[13] We reject Employer's argument that the administrative law judge did not apply the same level of scrutiny to the conflicting medical opinions. Employer's Brief at 25. As discussed above, Dr. Fino opined Claimant is not totally disabled based on Claimant's post-bronchodilator February 27, 2018 pulmonary function study that Dr. Raj conducted. Employer's Exhibit 10. Dr. Fino was aware of the January 29, 2018 study that Dr. Raj also conducted which produced qualifying values, and the administrative law judge discredited his opinion for failing to address this study. Decision and Order at 20. Similar to Dr. Fino, Dr. Raj was aware of both the January 29, 2018 and February 27, 2018 pulmonary function studies. Claimant's Exhibits 2, 3. In contrast to Dr. Fino, Dr. Raj indicated both studies evidence a moderate obstructive impairment that indicates Claimant is totally disabled. *Id*. Thus the administrative law judge did not err in weighing the conflicting opinions of Drs.

administrative law judge's finding is supported by substantial evidence and the Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge, even if our conclusions would have been different.[14] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding the medical opinions establish total disability. 20 C.F.R.

Fino and Raj. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997).

[14] Indeed, our dissenting colleague's reasons for why she would vacate the administrative law judge's finding that Claimant established total disability amount to simply reweighing the administrative law judge's credibility findings. But even if we were empowered to subjectively reevaluate and vacate those findings, our colleague has not provided any reason to do so. The administrative law judge determined, within his discretion, that Claimant's job duties fit under the Department of Labor's *Dictionary of Occupational Titles* definition of "very heavy work." Employer has not alleged any error in that classification. Regardless, it was within the administrative law judge's authority to find lifting 50-100 pounds on any given day consistent with "very heavy work," which, among other things, requires expending "in excess of 100 pounds of force occasionally" or "in excess of 50 pounds of force, frequently." *Dictionary of Occupational Titles* (4th Ed., Rev. 1991), Appendix C, IV. That Dr. Jarboe testified Claimant could do "heavy" work, which is a different classification, or that our colleague contends Dr. Raj's description *could* support a "heavy" as opposed to "very heavy" classification, does not provide any legal basis to disregard the administrative law judge's findings. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999). The administrative law judge acted well within his discretion in finding Dr. Raj's opinion better reasoned and more persuasive than Dr. Jarboe's based on their understanding of the exertional requirements of Claimant's job alone. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Our colleague's assertion that the administrative law judge did not apply equal scrutiny to Dr. Fino's *evolving* opinion fares no better: among other dispositive reasons for discrediting Dr. Fino, the administrative law judge acknowledged Dr. Fino did not account for the entirety of the pulmonary function test results in this case, while Dr. Raj did. Unlike Dr. Fino, Dr. Raj did not simply ignore a later study as our colleague implies, but instead believed it demonstrated a disabling obstructive impairment given Claimant's job duties. *See, e.g.*, n.13, above.

§718.204(b)(2)(iv); Decision and Order at 22. We further affirm the administrative law judge's conclusion that the evidence, when weighed together, establishes total disability and Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 22. Moreover, because Employer does not challenge the administrative law judge's finding that it failed to establish rebuttal of the presumption, we affirm the award of benefits. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-31.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

Although I agree with my colleagues with respect to the constitutional issues raised by Employer, I respectfully dissent from their decision to affirm the administrative law judge's award of benefits. I would vacate his finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration of the conflicting medical opinions. Employer's argument that the administrative law judge

did not apply the same level of scrutiny to the conflicting medical opinions has merit. Employer's Brief at 17-23, 25.

The administrative law judge determined Claimant established total disability based on the medical opinion evidence and his weighing of the evidence overall.[15] 20 C.F.R. §718.204(b)(2); Decision and Order at 10-22. While Dr. Raj opined Claimant has a totally disabling respiratory or pulmonary impairment, Drs. Fino and Jarboe opined he does not. Director's Exhibit 12; Claimant's Exhibits 1, 2; Employer's Exhibits 5, 8, 10, 14. The administrative law judge found Dr. Jarboe's opinion unpersuasive because he did not have an accurate description of the exertional requirements of Claimant's usual coal mine employment. Decision and Order at 20. By contrast, he found Dr. Raj had "an accurate understanding of the exertional requirements of Claimant's usual coal mine work." *Id*. at 20-21.

Based on Claimant's Form CM-913 "Description of Coal Mine Work and Other Employment" and his hearing testimony, the administrative law judge found Claimant's usual coal mine employment as an electrician required very heavy work.[16] Decision and Order at 5 n.6. He noted very heavy work is defined as "[e]xerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects," with physical demand requirements that "are in excess of those for [h]eavy [w]ork." *Id*., *quoting Dictionary of Occupational Titles* (4th Ed., Rev. 1991), Appendix C, IV.

The administrative law judge noted Dr. Raj stated "Claimant 'was an electrician, shuttle car operator, and rock dusted'" during the last year of his coal mine employment. Decision and Order at 14, *citing* Director's Exhibit 12. He also noted Dr. Raj stated "Claimant 'had to lift 50-100 pounds at any given day' …." *Id*., citing Claimant's Exhibit 3. Regarding Dr. Jarboe, the administrative law judge noted the doctor's description of Claimant's coal mine work included the following: "he was classified *primarily* as an electrician"; he "worked as an equipment operator"; he operated a shuttle car during "the

[15] The administrative law judge determined the pulmonary function study and arterial blood gas study evidence does not establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 12, 13. He also determined there is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 13.

[16] The administrative law judge also noted Claimant occasionally sat and operated a shuttle car "for an hour or longer each day to cover for any miners who might be absent." Decision and Order at 4-5.

last job he performed from 2001 to 2013"; he operated "a continuous miner for a year or so"; and he "operated a coal drill for a couple of years." Decision and Order at 20 (emphasis added). The administrative law judge concluded that while Claimant operated a shuttle car at times, it was not the principal or even significant part of his coal mine duties during the final year of his work in the mines. *Id*. The administrative law judge's analysis failed to consider that in his supplemental opinion Dr. Jarboe clearly stated it was his opinion Claimant could do heavy work. Employer's Exhibit 14. Moreover, it failed to consider that Dr. Raj described Claimant's exertional requirements in terms that would qualify as heavy work.[17] Thus I would remand the case for the administrative law judge to explain why he determined Dr. Raj had a better understanding of the exertional requirements of Claimant's usual coal mine work than Dr. Jarboe. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

In addition, I would remand the case for the administrative law judge to explain why Dr. Raj's opinion is better reasoned than Dr. Jarboe's. *See Wojtowicz*, 12 BLR at 1-165. The administrative law judge concluded Dr. Jarboe did not "persuasively explain" whether Claimant's moderate ventilatory impairment would preclude him from returning to his usual coal mine employment. Decision and Order at 19. Specifically, he concluded Dr. Jarboe's disability assessment is poorly reasoned because the doctor noted that Claimant's pulmonary function study results do not meet the Department of Labor disability standards even though 20 C.F.R. §718.204(b)(2)(iv) permits a finding of total disability based on a physician's reasoned medical judgment notwithstanding non-qualifying objective testing. *Id*. He also gave less weight to Dr. Jarboe for not considering and discussing Dr. Raj's January 29, 2018 qualifying pulmonary function study. *Id*.

By contrast, the administrative law judge found Dr. Raj's opinion better reasoned because "he addresses the results of his clinical testing in detail, [and] provides a more complete analysis of the results, even where the tests provided results that do not 'qualify.'" Decision and Order at 20. Dr. Raj's January 29, 2018 pulmonary function study produced qualifying results, but his February 27, 2018 pulmonary function study produced non-qualifying results. Claimant's Exhibits 2, 3. The administrative law judge stated "Dr. Raj recognized that Claimant's moderate obstructive impairment, as shown in pulmonary function testing, was disabling." Decision and Order at 20-21. He did not, however, require Dr. Raj to "persuasively explain" how he reached the same conclusion that Claimant has disabling moderate obstructive impairment based on pulmonary function test results that are not qualifying and are much improved from earlier pulmonary function test

[17] Dr. Raj noted that Claimant had to "lift 50-100 pounds at any given day" (a description consistent with the exertional requirements of heavy work as opposed to very heavy work). Director's Exhibit 12; Claimant's Exhibits 1, 2, 3.

results. Similarly, he discredited Dr. Fino for not discussing the qualifying study obtained by Dr. Raj, but ignored that the qualifying study was followed by a non-qualifying study, and that Dr. Fino had found Claimant's pulmonary function tests "significantly variable."

An administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny in determining the credibility of the medical opinion evidence. 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc). Because the administrative law judge did not rationally explain how he resolved the conflict in the evidence, I would vacate his finding that Claimant established total disability and remand the case for further consideration of the medical opinion evidence. *See* 20 C.F.R. §718.202(a)(4); *Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). I would instruct him to explain the bases for all of his credibility determinations, setting forth in detail how he resolves the conflict in the evidence, as the Administrative Procedure Act requires. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR at 1-165.

Because I would vacate the administrative law judge's finding that Claimant established total disability, I would also vacate his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

For these reasons, I respectfully dissent from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge