BRB No. 19-0504 BLA

HENRY D. SELLERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTERS RESOURCES, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 03/26/2021
	)	
WALTER ENERGY, INCORPORATED	)	
	)	
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 Angela F. Donaldson, Administrative Law Judge, United States Department of Labor.

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

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

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

BOGGS, Chief Administrative Appeals Judge:

Employer and its Carrier (Employer) appeal Administrative Law Judge Angela F. Donaldson's Decision and Order Awarding Benefits (2018-BLA-06145) rendered on a

subsequent claim filed on January 18, 2017,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §901-944 (2018) (Act).

The administrative law judge found Claimant established thirty-one years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the administrative law judge's findings that Claimant established total disability and thereby invoked the Section 411(c)(4) presumption. It also argues she erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer has filed a reply brief, reiterating its contentions.[4]

[1] Claimant filed three previous claims, each of which was denied. Director's Exhibit 1-3. The district director denied Claimant's most recent prior claim, filed on March 22, 2010, for failure to establish total disability. Director's Exhibits 4, 45.

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

[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 that "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). Because Claimant's last claim was denied for failure to establish total disability, he had to submit new evidence establishing that element of entitlement in order to proceed with his current claim on the merits. *See* 20 C.F.R. §725.309(c)(3), (4); *White*, 23 BLR at 1-3.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that Claimant has thirty-one years of underground coal mine employment.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based upon pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Employer argues the administrative law judge erred in finding Claimant established total disability based on pulmonary function studies, medical opinions, and the record as a whole.[6]

See Skrack v. Island Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[5] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because Claimant's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 15.

[6] The administrative law judge found Claimant did not establish total disability based on the arterial blood gas studies or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); Decision and Order at 12, 27.

Pulmonary Function Studies

The administrative law judge considered four pulmonary function studies.[7] Dr. Barney's March 27, 2017 study was non-qualifying[8] before and after bronchodilators were administered. Director's Exhibit 16. Dr. Goldstein's August 15, 2017 study produced qualifying values before and after bronchodilators. Director's Exhibit 25. Dr. Player's August 17, 2017 study had qualifying values before and after bronchodilators. Claimant's Exhibit 4. Dr. Goldstein's October 5, 2017 study had non-qualifying values before and after bronchodilators. Director's Exhibit 26.

In weighing the pulmonary function study evidence, the administrative law judge "recognize[d] that Claimant's MVV values on both March 27, 2017 and October 5, 2017 are qualifying, even though the FEV1 values on those dates are non-qualifying." Decision and Order at 11-12. She concluded "the four pulmonary function studies preponderantly offer qualifying values to establish that Claimant has a totally disabling respiratory impairment pursuant to [20 C.F.R.] § 718.204(b)(2)." *Id.* at 12.

Initially, we agree with Employer that the administrative law judge erred in concluding the pulmonary function studies "preponderantly offer qualifying values." Decision and Order at 12; *see* Employer's Brief at 6-7. Based on the regulatory criteria, two studies are qualifying and two are not. 20 C.F.R. Part 718, Appendix B. The administrative law judge impermissibly found two non-qualifying studies support a finding of total disability since neither study has both a qualifying FEV1 and MVV. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 11-12.

Employer also contends the administrative law judge did not properly resolve the conflict in the evidence regarding the validity of the pulmonary function study evidence,

[7] The administrative law judge noted Claimant was over seventy-one years old when each study was performed. Decision and Order at 11. She also noted the studies recorded different heights for Claimant and averaged them to find an actual height of 73.5 inches. *Id., citing Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Because Claimant's actual height falls between the table heights of 73.6 and 73.2 inches listed in 20 C.F.R. Part 718, Appendix B, she correctly applied the values associated with the closest greater height of 73.6 inches. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-44 (2008); Decision and Order at 11.

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

and failed to explain her findings in accordance with the Administrative Procedure Act.[9] Employer's Brief at 9-11. Employer's arguments have merit, in part.

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 weight to assign the study. *See Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-55 (1987).

The administrative law judge rejected Dr. Rosenberg's opinion that Claimant gave poor effort on the August 15, 2017 pre- and post-bronchodilator studies and the October 5, 2017 pre-bronchodilator study.[10] Decision and Order at 33; Employer's Exhibit 1. She found that Dr. Rosenberg ignored the technicians' statements of good cooperation and good effort, and merely opined Claimant had performed the tests with less than maximal effort "based on his own interpretation of the shape of the flow-volume curves." *Id.* Employer correctly asserts that the administrative law judge's rationale is flawed to the extent a reviewing physician may challenge the validity of a pulmonary function study based on his or her examination of the tracings. *See* 65 Fed. Reg. 79,920, 79,927 (Dec. 20, 2000) ("[a] party may challenge another party's [pulmonary function] study by submitting expert opinion evidence demonstrating the study is unreliable or invalid."); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); *see also Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 885 (7th Cir. 1992) (assuming a technician was equally qualified as a reviewing doctor to assess the validity of pulmonary function studies without supporting evidence was error). Because the administrative law judge gave no specific rationale for crediting the technician's comments over Dr. Rosenberg's opinion, her finding

[9] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[10] Dr. Rosenberg did not specifically invalidate the October 5, 2017 post-bronchodilator study but, rather, noted it was performed "with more complete efforts" than the pre-bronchodilator study. Employer's Exhibit 1. Additionally, the administrative law judge misstated that Dr. Rosenberg invalidated the March 27, 2017 study, when he actually stated it "appeared valid." Decision and Order at 33; Employer's Exhibit 1.

does not satisfy the APA.[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We offer no opinion on whether Dr. Rosenberg's invalidation constitutes credible evidence undermining the presumption that the pulmonary function studies in question comply with the quality standards, *see* 20 C.F.R. §718.103(c); that is for the administrative law judge to decide in the first instance. But, the administrative law judge must explain her basis for either crediting or not crediting Dr. Rosenberg's opinion on the issue. *Wojtowicz*, 12 BLR at 1-165.

We also agree, in part, with Employer's argument that the administrative law judge did not adequately explain her reasons for rejecting Dr. Rosenberg's reliance on the Knudsen predicted equation to determine whether Claimant's pulmonary function studies are qualifying. Employer's Brief at 11-12. Pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old, in the absence of contrary evidence. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Dr. Rosenberg opined that the tables at 20 C.F.R. 718 Appendix B only provide values up to age 71, but that age continues to affect the normal and qualifying values. Employer's Exhibit 1. He explained that he calculated new values taking into account an 82 year old miner based upon the Knudson predicted equation and attached to his report extended table values based on the Knudson equation to account for Claimant's age and height. *Id*. The administrative law judge erred in summarily rejecting Dr. Rosenberg's opinion because he relied on "non-DOL approved values" without considering the credibility of his use of the Knudsen equation. Decision and Order at 33; s*ee Meade*, 24 BLR at 1-47; *Wojtowicz*, 12 BLR at 1-165.

We note, however, that Employer overstates the probative value of Dr. Rosenberg's application of the Knudsen equation. While Dr. Rosenberg opined, generally, that Claimant's "FVC and FEV1 are not qualifying" using the Knudsen equation, the only test he addressed with specificity is the October 5, 2017 test. Employer's Exhibit 1. That test was found by the administrative law judge to be non-qualifying; Dr. Rosenberg's use of the Knudsen values therefore would not change that finding. Decision and Order at 10. Additionally, because Dr. Rosenberg did not provide values for an 81 year old, reliance on the equation also would not change the administrative law judge's determination that the March 27, 2017 test is non-qualifying. The administrative law judge's finding with respect to the August 15, 2017 pre-bronchodilator values and August 17, 2017 pre- and post-

[11] Moreover, the administrative law judge did not consider the technician's notation that during the October 5, 2017 study Claimant was not able to get three FEV1 results within five percent and got tired on the MVV. Director's Exhibit 26.

bronchodilator values also would not change, as they remain qualifying for total disability using the Appendix B table values or Dr. Rosenberg's proposed Knudsen values.[12] Only the August 15, 2017 post-bronchodilator values, found by the administrative law judge to be qualifying, would become non-qualifying using Dr. Rosenberg's values. *But see* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). On remand, the administrative law judge must reconsider the probative value of Dr. Rosenberg's opinion taking into account that his reliance on the Knudson formula does not alter many of her determinations with regard to the pulmonary function study evidence.

Because the administrative law judge did not adequately explain how she resolved the conflict in the pulmonary function study evidence or properly address the validity of the tests, we vacate her finding that Claimant established total disability.[13] 20 C.F.R. §718.204(b)(2)(i); *Wojtowicz*, 12 BLR at 1-165.

Medical Opinions

The administrative law judge credited Dr. Barney's opinion Claimant is totally disabled over Dr. Rosenberg's contrary opinion because she found Dr. Barney's opinion better supported by the objective evidence. Decision and Order at 34; Director's Exhibit 21; Employer's Exhibit 1. To the extent the administrative law judge's improper assessment of the pulmonary function studies influenced her weighing of the medical opinion evidence, we vacate her determination that Claimant established total disability

[12] Further, Dr. Rosenberg does not appear to have reviewed the August 17, 2017 study, as he does not summarize its results or offer an opinion on its validity or whether it qualifies for total disability.

[13] Dr. Goldstein opined in his examination report that it was "unclear" why Claimant's August 15, 2017 pulmonary function study results showed a restrictive defect. Director's Exhibit 24. He stated that "one must wonder if this is related to the procedure that [Claimant] just had two weeks ago replacing his pacemaker." *Id*. Based on the subsequent pulmonary function study which showed only an obstructive impairment, Dr. Goldstein considered his hypothesis confirmed. *Id.* Given the evidence from the subsequent test and Dr. Goldstein's remarks after reviewing that evidence, we agree with Employer that the administrative law judge failed to adequately explain why she found Dr. Goldstein's opinion speculative regarding the cause of Claimant's restrictive impairment on the August 15, 2017 study. Employer's Brief at 7-9.

based on Dr. Barney's opinion.[14] 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 34. We therefore vacate the administrative law judge's findings that Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §725.309(c). Accordingly, we vacate the award of benefits.

Remand Instructions

The administrative law judge must reconsider whether the pulmonary function studies support a finding that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2)(i). In so doing, she must adequately consider Dr. Rosenberg's opinion regarding Claimant's effort, the technicians' comments, and the conflict in the evidence regarding the validity of the August 15, 2017 studies and October 5, 2017 pre-bronchodilator study. *See Brinkley*, 972 F.2d at 885. She also must reconsider Dr. Rosenberg's use of the Knudsen equation and whether he had an accurate understanding of whether the studies were qualifying or non-qualifying for total disability. *See Meade*, 24 BLR at 1-47. Further the administrative law judge must determine if the medical opinions support finding total disability at 20 C.F.R. §718.204(b)(2)(iv). If Claimant establishes total disability based on either the pulmonary function studies or medical opinions or both, she must then determine whether Claimant is totally disabled in light of the totality of the evidence, including contrary probative evidence. 20 C.F.R. §718.204(b); *Rafferty*, 9 BLR at 1-232. If Claimant establishes total disability and invokes the Section 411(c)(4) presumption, she must then determine if Employer has rebutted it. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. If Claimant does not establish total disability, a necessary element of entitlement at 20 C.F.R. Part 718, benefits are precluded. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27

[14] Employer correctly asserts the administrative law judge improperly discredited Dr. Rosenberg's total disability opinion based on her unrelated criticisms of his views relating to the existence of legal pneumoconiosis and disability causation, as these are separate and distinct issues. Decision and Order at 33-34; Employer's Brief at 12-13. Additionally, if on remand the administrative law judge again finds Dr. Barney's opinion adequately reasoned, she must provide an explanation of that finding based on consideration of all of the relevant evidence. The administrative law judge's initial explanation failed to consider the doctor's findings of normal pulmonary examination, normal pulmonary function, and normal blood gas studies when assessing whether his determination was reasoned. supplemental Director's Exhibit 21; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (factfinder is required to examine the validity of the reasoning of a medical opinion in light of the objective evidence upon which the opinion is based).

(1987). In rendering all of her findings on remand the administrative law judge must comply with the APA. *Wojtowicz,* 12 BLR at 1-165.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. While I agree with certain aspects of the majority's analysis, on the fundamental question of whether Claimant is totally disabled I would affirm the administrative law judge's finding that he is. I therefore would affirm her finding Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, as well as her finding Employer failed to rebut it.

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 claimant may establish total disability based upon pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231,

1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Dr. Goldstein

The administrative law judge permissibly found Dr. Goldstein's opinion on total disability speculative and unsupported. Decision and Order at 11-12, 31-32. After examining Claimant on August 15, 2017, Dr. Goldstein opined Claimant's qualifying pulmonary function study reveals "a pulmonary impairment" in the form of "a mixed restrictive and obstructive defect." Director's Exhibit 25 at 3. He stated it was "unclear" why Claimant's testing revealed a restrictive defect and "wondered" whether it may be related to Claimant's pacemaker surgery two weeks prior. *Id.* at 4. He did not, however, offer an explanation as to why a pacemaker surgery would cause a temporary restrictive defect. *Id*. After having Claimant undergo additional testing on October 5, 2017, which was non-qualifying for total disability but "remained abnormal," Dr. Goldstein concluded Claimant's impairment as of August 15 was only temporary and not due to pneumoconiosis because pneumoconiosis is "not a reversible disease." Director's Exhibit 26. As to whether Claimant is totally disabled, Dr. Goldstein stated he "do[es] not believe [the testing] meet[s] the guidelines required by the [Department] to determine disability" but "will leave that final decision to you," i.e., Employer's counsel to whom he had addressed the letter. *Id*.

Based on Dr. Goldstein's statement that it was "unclear" why Claimant's August 15, 2017 pulmonary function study revealed a restrictive impairment and his unexplained "wondering" whether it was a temporary impairment caused by an earlier pacemaker surgery, the administrative law judge found Dr. Goldstein "speculated Claimant's [qualifying August 15, 2017] pulmonary function study results were affected by his recent pacemaker replacement procedure" without presenting "objective medical evidence to support his speculation." Decision and Order at 11. While Dr. Goldstein purported to rely on the improvement seen on Claimant's October 5, 2017 testing as evidence the impairment was temporary, the administrative law judge accurately noted Dr. Goldstein's own assessment that while the test showed improvement in certain areas, it continued to show "an obstructive impairment with *non-significant improvement* in the pulmonary function flow rates." *Id*., *quoting* Director's Exhibit 26 at 2 (emphasis added).

Due to Dr. Goldstein's unsupported "speculation regarding a possible connection between Claimant's pacemaker procedure and his pulmonary function results," the administrative law judge rationally declined to assign "less weight" to the qualifying study conducted on August 15, 2017 by Dr. Goldstein, and the qualifying study conducted two days later on August 17, 2017 by Dr. Player. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 286-87 (4th Cir. 2010) (affirming rejection of opinion as "speculative" where

physician's diagnosis was not supported by the objective evidence or a sufficient rationale); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507 (6th Cir. 1997) (physician's opinion must be based on more than "mere speculation"); Decision and Order at 12. For that same reason – Dr. Goldstein's reliance on "mere speculation" relating to Claimant's pacemaker procedure and "[inability] to explain" the ongoing defects revealed on the pulmonary function studies – the administrative law judge rationally found his opinion "minimally well-reasoned and [minimally] well-documented." *Cox*, 602 F.3d at 286-287; *Smith*, 127 F.3d at 507; Decision and Order at 31-32.

These findings are squarely within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.10 (4th Cir. 1998) ("An ALJ has discretion to disregard an opinion unsupported by a sufficient rationale."); *Risher v. OWCP*, 940 F.2d 327, 331 (8th Cir.1991) ("An ALJ may disregard a medical opinion that does not adequately explain the basis for its conclusion."). Thus, I disagree with the majority's holding and would affirm the administrative law judge's determination to give Dr. Goldstein's opinion little weight on the issue of total disability.

Dr. Barney

I would also hold that the administrative law judge permissibly found Dr. Barney's opinion that Claimant is totally disabled "well-documented and sufficiently well-reasoned" and thus entitled to "substantial weight." Decision and Order at 30. Remand for further consideration of Dr. Barney's opinion is therefore unwarranted.

After examining Claimant on March 27, 2017 as part of the Department-sponsored complete pulmonary evaluation, Dr. Barney concluded Claimant's pulmonary function study was "normal" while his blood gas study revealed "mild resting" hypoxia. Director's Exhibit 16 at 3. He diagnosed a "moderate impairment" due to pneumoconiosis and further stated Claimant suffers "short[ness] of breath with basic [activities of daily living] and has daily sputum production." *Id*. at 4. This "pulmonary impairment," according to Dr. Barney, renders Claimant totally disabled, i.e., it "prevents him from performing his previous coal mining job" as a mechanic. *Id*.; *see* 20 C.F.R. §718.204(b)(1). At the Department's request, Dr. Barney provided an updated opinion after reviewing Dr. Goldstein's reports. Director's Exhibit 22. While Claimant's pulmonary function studies and blood gas studies were "normal," Dr. Barney maintained that Claimant's "chronic sputum production and dyspnea with mild to moderate exertion in a [coal dust-related] chronic bronchitis phenotype" renders him "unable to perform coal mining work." *Id*. at 1.

The administrative law judge appropriately considered whether Dr. Barney provided a reasoned explanation as to whether Claimant could perform his previous coal

mining job which, among other things, required standing six hours per day, walking three to four miles per shift while carrying a bag of tools, lifting 75-pound drive lines with another person's help, and shoveling and carrying buckets of coal weighing 20 pounds. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 28-30. She also acted well within her discretion in finding Claimant unable to perform those duties in light of Dr. Barney's assessment that Claimant is totally disabled from his chronic, daily sputum production and shortness of breath with even mild exertion, including basic activities of daily life. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1141 (4th Cir. 1995) (administrative law judge must consider whether physician-identified exertional limitations prevent miner from performing his usual coal mine work); *Poole v. Freeman United Coal Min. Co.*, 897 F.2d 888, 894 (7th Cir. 1990) (rejecting argument that "merely listing [a miner's] physical limitations does not properly address the severity of the impairment"); *see also Jordan v. Benefits Review Bd. of the U.S. Dep't of Labor*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether the medical report is sufficiently documented and reasoned is one of credibility for the fact finder.").

While the majority would remand for the administrative law judge to consider whether Dr. Barney's identification of Claimant's objective testing as "normal" impacts the credibility of his opinion, *see supra* at 8 n.14, the administrative law judge did not ignore this fact. She accurately acknowledged that while Dr. Barney's supplemental opinion indicates Claimant's objective testing was normal, he nevertheless concluded Claimant remained totally disabled due to his chronic bronchitis-induced "chronic sputum production and dyspnea with mild to moderate exertion." Decision and Order at 15 *quoting* Director's Exhibit 22 at 1. The administrative law judge therefore complied with her obligation to fully consider Dr. Barney's opinion. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Moreover, there is nothing inherently suspect with a physician basing his total disability opinion on a miner's respiratory symptoms of shortness of breath. *See Scott*, 60 F.3d at 1141 (physician's identification of the miner's symptoms of "shortness of breath," "acute shortness of breath," and "mild shortness of breath" with various activities constitutes a "reasoned medical opinion"); *Jordan*, 876 F.2d at 1460 (physician's "recitation of [the miner's] symptoms" constituted relevant evidence that must be considered by the administrative law judge absent a specific "basis for a finding that the listed limitations are the patient's rather than the doctor's conclusions"). To constitute a "reasoned" medical opinion, a physician need only base his diagnosis on "medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §718.204(b)(2)(iv). This is so even when the objective testing does not qualify for total disability or there is no objective testing at all due to it being medically contraindicated. *Id*. Consistent with *Scott*, *Poole*, and *Jordan*, the administrative law judge considered the entirety of Dr. Barney's

opinion and permissibly credited his assessment that Claimant's inability to exert mild effort or perform basic daily functions without becoming short of breath renders him unable to perform his previous coal mine work. Decision and Order at 30.

Dr. Rosenberg

I would also affirm the administrative law judge's rejection of Dr. Rosenberg's opinion. He opined Claimant is not totally disabled due to his pulmonary function studies "being invalid" and because, despite their invalidity, his "FVC and FEV1 [values] are not qualifying" when applying the Knudson predicted formula for an 82 year-old. Employer's Exhibit 1 at 5. With respect to validity, the administrative law judge did not simply credit the technician's notation of "good effort" over Dr. Rosenberg's opinion that the efforts were not maximal. *See supra at 5-6.* Rather, she permissibly found his opinion unexplained in light of his failure to address or even acknowledge the technician's contrary statement that Claimant's efforts were good. *Hicks*, 138 F.3d at 533; *see also Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986) (administrative law judge may assign less weight to physician's opinion which reflects an incomplete picture of miner's health).

To find the study valid, the administrative law judge need not deem the technician's notation more credible than Dr. Rosenberg's opinion. The technician's statement that Claimant gave good effort is consistent with the regulatory presumption that all pulmonary function studies comply with the quality standards and, therefore, does not constitute "evidence to the contrary" undermining the study's validity. 20 C.F.R. 718.103(c). Dr. Rosenberg's opinion, on the other hand, must stand on its own as a reasoned and documented explanation for why the study is not valid. 20 C.F.R. §718.204(b)(2)(iv) (physicians must exercise "reasoned medical judgment"); *Vivian v. Director, OWCP*, 7 BLR 1-360, 1-361 (1984) (the party challenging the validity of a study has the burden to establish the results are suspect or unreliable); *Jeffries v. Director, OWCP*, 6 BLR 1-1013, 1-1014 (1984). To that end, beyond ignoring the technician's conclusion, he offered one sentence as to why the qualifying August 15, 2017 pre- and post-bronchodilator studies and the non-qualifying October 5, 2017 pre-bronchodilator study are invalid: "The efforts were not maximal based on the shape of the flow volume curves."[15] Employer's Exhibit 1 at 2. In asserting the credibility of Dr. Rosenberg's opinion, Employer does not explain how merely pointing to the "shape" of the flow volume curves – with no explanation as to what the shape is or why it was produced by sub-maximal effort – provides the fact-finder

[15] Dr. Rosenberg made this statement with respect to the August 15, 2017 studies. He provided a similarly sparse explanation with respect to the October 5, 2017 study: The submaximal effort was "evident based on the pre-bronchodilator flow volume curves." Employer's Exhibit 1 at 2.

with information from which she could discern why the physician considered the efforts insufficient.

With respect to Dr. Rosenberg's reliance on the Knudson predicted formula, the administrative law judge incorrectly suggested a physician may not rely on estimated qualifying values beyond those listed in Appendix B to 20 C.F.R. Part 718 for a 71 year-old. *K.J.M.* [*Meade*] v. *Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). That said, as the majority properly concludes, Employer vastly overstates the probative value of Dr. Rosenberg's reliance on that equation to conclude Claimant's FVC and FEV1 values are not qualifying. First, Dr. Rosenberg's use of the Knudson formula for an 82 year-old was limited to the October 5, 2017 study, which was similarly found by the administrative law judge to be non-qualifying. Decision and Order at 10. Second, even if we were to infer that Dr. Rosenberg intended to apply his Knudson values to the August 15 and 17, 2017 studies, only the post-bronchodilator results from the August 15 test would become non-qualifying. *See* 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980) (The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability because "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis."). The pre-bronchodilator results from that test, as well as the pre- and post-bronchodilator values from the August 17 test, remain qualifying for total disability using either the Appendix B table values or Dr. Rosenberg's proposed Knudson values. Third, Dr. Rosenberg provided predicted values only for an 82 year-old; his reliance on the Knudson equation therefore cannot be applied to the March 27, 2017 study which was performed when Claimant was 81. I therefore would hold Employer has not established the necessity of remanding for reconsideration of Dr. Rosenberg's opinion. *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").

Pulmonary Function Studies and Evidence as a Whole

Finally, while I agree that the administrative law judge did not adequately explain her finding that the pulmonary studies "preponderantly offer qualifying values" when two studies are qualifying and two are not, remand for further explanation is unnecessary. Decision and Order at 12; see Employer's Brief at 6-7. As noted above, the administrative law judge permissibly accorded greatest weight to Dr. Barney's opinion that, despite "normal" objective testing, Claimant is unable to perform his previous coal mining work due to chronic sputum production and shortness of breath. Because Dr. Barney did not rely on the objective testing to diagnose total disability, a finding on remand that the studies are in equipoise – or even that they are preponderantly non-qualifying – would not constitute contrary evidence undermining his opinion. 20 C.F.R. §718.204(b)(2) ("in the absence of contrary probative evidence," a reasoned medical opinion "shall establish a miner's total

disability"). Therefore, I would affirm the administrative law judge's finding Claimant has a totally disabling respiratory or pulmonary impairment. As Claimant also established greater than fifteen years of qualifying coal mine employment, he invoked the Section 411(c)(4) presumption.

REBUTTAL OF SECTION 411(c)(4)

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal[16] nor clinical pneumoconiosis,[17] or that "no part of [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 failed to establish rebuttal by either method.

The entirety of Employer's one-page argument focuses on its belief that the administrative law judge errantly found Dr. Rosenberg's diagnosis of an impairment due to non-coal-dust-related tracheomalacia and bronchomalacia unexplained. Employer's Brief at 14. Employer does not address, however, the administrative law judge's discrediting of Dr. Rosenberg's opinion on legal pneumoconiosis as inconsistent with the regulation that recognizes pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."[18] 20 C.F.R. §718.201(c). Nor does Employer challenge the administrative law judge's findings that Employer failed to rebut clinical pneumoconiosis or total disability due to clinical and legal

[16] "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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[17] "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).

[18] Dr. Rosenberg stated Claimant does not have legal pneumoconiosis in part because "it is unlikely that a miner who has no impairment when he leaves coal mining will suddenly develop an obstruction related to coal dust years after the last exposure." Employer's Exhibit 1 at 5.

pneumoconiosis. These findings therefore must be affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As Claimant invoked the Section 411(c)(4) presumption and Employer failed to rebut it, he is entitled to benefits. Therefore, I dissent.

GREG J. BUZZARD
Administrative Appeals Judge