U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0275 BLA

JOHN OSBORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EAGLE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/05/2016
	)	
and	)	
	)	
SECURITY INSURANCE COMPANY OF HARTFORD	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Denise Kirk Ash, Lexington, Kentucky, for employer/carrier.

Maia S. Fisher, Acting Associate Solicitor, and MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5993) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed on December 3, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined that claimant established 14.63 years of underground coal mine employment, based on his application of the formula set forth in 20 C.F.R. §725.101(a)(32)(iii) and the use of Exhibit 609 of the *Coal Mine* ([*Black Lung Benefits Act*]) *Procedure Manual* (*BLBA Procedure Manual*). Based on this finding, the administrative law judge concluded that claimant did not establish fifteen years of qualifying coal mine employment, which is one of the prerequisites for invoking the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge then considered whether claimant could establish entitlement to benefits under 20 C.F.R. Part 718, without the aid of the rebuttable presumption, and found that claimant failed to prove that he suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant initially contended that the administrative law judge erred in using Exhibit 609 to calculate claimant's coal mine employment in 1982 and 1985 and, therefore, erred in finding that he established a total of only 14.63 years of coal mine employment. Additionally, claimant alleged that the administrative law judge erred in finding that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), filed a limited response addressing the administrative law judge's length of coal mine employment finding. The Director agreed with claimant that the administrative law judge erred in using Exhibit 609 to calculate claimant's coal mine employment in 1982 and 1985, and erred in crediting claimant with less than fifteen years of qualifying coal mine employment. The Director therefore

[1] Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

requested that the Board vacate the denial of benefits and remand the case to the administrative law judge for consideration of whether claimant has invoked the Section 411(c)(4) presumption.[2] In claimant's reply brief, he agreed with the Director's position regarding the length of coal mine employment and also reiterated his previous allegations of error with respect to the administrative law judge's findings regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer/carrier (employer) responded, urging affirmance of the administrative law judge's calculation of the length of claimant's coal mine employment, and the denial of benefits.

Upon considering the parties' briefs on appeal, the Board determined that the issue of whether the administrative law judge should use 125 days as the divisor by which fractional years of coal mine employment are to be calculated under 20 C.F.R. §725.101(a)(32)(iii) required additional briefing. In an order issued on July 8, 2015, the Board asked the parties to file briefs addressing whether the method of calculation advocated by the Director and claimant is consistent with the plain language of 20 C.F.R. §725.101(a)(32). *Osborne v. Eagle Coal Co.*, BRB No. 15-0275 BLA (July 8, 2016) (unpub. Order). The Board further requested that the parties consider the Department of Labor's statement in the preamble to revised 20 C.F.R. §718.101(a)(32) that partial periods of coal mine employment must total one year before "the factfinder determine[s] whether the miner spent at least 125 working days as a coal miner during the year." *Id*. at 2, *quoting* 65 Fed. Reg. 79,920, 79,960 (Dec. 20, 2000) (citations omitted).

Claimant, the Director, and employer filed supplemental briefs in response to the Board's order. Claimant and the Director continue to maintain that calculating fractional portions of a year by using 125 days as the divisor is appropriate. Both also propose new methods for calculating claimant's coal mine employment in 1982 and 1985, with claimant advocating the use of the 125-day calculation method set forth in the *BLBA Procedure Manual*. However, the Director now recommends a method of calculation that does not involve using the 125-day baseline divisor. Employer continues to urge the Board to hold that the administrative law judge used a reasonable method of computation to determine that claimant had less than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

[2] The Director, Office of Workers' Compensation Programs (the Director), specifically stated: "[Claimant] is accordingly entitled to consideration under the fifteen-year presumption. The Director urges the Board to vacate the [administrative law judge's] decision and remand the case for the [administrative law judge] to determine whether [claimant] has invoked the fifteen[-]year presumption." Director's November 18, 2015 Letter Brief at 3.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

I. Length of Coal Mine Employment

A. The Administrative Law Judge's Findings

Upon reaching the issue of the length of claimant's coal mine employment, the administrative law judge observed that: claimant alleged eighteen years of coal mine employment; the district director credited claimant with fourteen years of coal mine employment; and employer stipulated to fourteen years of coal mine employment. Decision and Order at 4; Director's Exhibit 55; Hearing Transcript at 11. The administrative law judge further noted that the length of claimant's coal mine employment was relevant to invocation of the Section 411(c)(4) presumption and stated, "[a]lthough the parties have stipulated to [fourteen] years of coal mine employment, since the parties dispute the length of coal mine employment past [fourteen] years, I must make a specific finding on this issue." Decision and Order at 4-5. The administrative law judge summarized the regulatory provisions that he was required to apply, noting that 20 C.F.R. §725.101(a)(32) "defines a year of coal mine employment as 'a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine for at least 125 working days." *Id*. at 5, *quoting* 20 C.F.R. §725.101(a)(32). The administrative law judge then stated that, when he could not determine the beginning and ending dates of claimant's work with a particular employer, he was permitted to use the formula set forth in 20 C.F.R. §725.101(a)(32)(iii) to calculate the length of claimant's coal mine employment by dividing his coal mine employment income by the yearly wage base as reported in Exhibit 609 of the *BLBA Procedure Manual*. *Id.* at 5, *citing* 20 C.F.R. §725.101(a)(32)(ii), (iii) and *Mullins v. Silver Eagle Mining Co.*, BRB No. 11-0164 BLA (Dec. 1, 2011) (unpub.).

The administrative law judge found that he did not need to use this formula when determining the length of claimant's coal mine employment in 1983, 1984, 1986, and from 1987 through 1998, because he could identify the beginning and ending dates of claimant's employment in these years. Decision and Order at 6-7. Accordingly, he credited claimant with a total of 1.75 years of coal mine employment for 1983 and 1984,

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

one year in 1986, and 11.5 years from 1987 through July of 1998. *Id*. at 7. These figures total 14.25 years of coal mine employment.

With respect to claimant's coal mine work in 1981 and 1982, the administrative law judge noted claimant's testimony that he could not recall the specific beginning and ending dates of his employment with Meally Coal Company (Meally), but that he began working for Meally in June 1981, and continued sporadically until he went to work for Midway Coal (Midway) in August 1982. Decision and Order at 5; Hearing Transcript at 15-16. The administrative law judge then determined that there was insufficient evidence to establish the beginning and ending dates of claimant's coal mine employment in 1981 or 1982 because claimant's Social Security Administration (SSA) earnings records and his paystubs verified only that he worked for Meally in June 1982 and Midway in August 1982. Decision and Order at 5. The administrative law judge further noted that the SSA earnings records for 1981 indicated that claimant worked in non-coal mine employment for the Commonwealth of Kentucky's Transportation Cabinet. *Id*.; *see* Director's Exhibits 5-7. Relying on claimant's SSA earnings records and paystubs, the administrative law judge concluded that claimant worked for Meally in June 1982 and Midway in August 1982, earning a total of $3,389.00 from coal mine employment in 1982. Decision and Order at 6. The administrative law judge stated, "[t]hus, I divide the [c]laimant's earnings from coal mine employment in 1982, $3,389.00, by the yearly wage base in 1982, $32,400.00, as reported in Exhibit 609. Therefore, I credit him with 0.1[0] years of coal mine employment in 1982." *Id.*

Regarding 1985, the administrative law judge noted claimant's entry on a CM-911a form that he had worked for Gillette Coal Company, Red River Fuels Incorporated, Tip Top Coal Company, Jaymar Mining Incorporated, Wilderness Coal, Salt Lick Coals Incorporated, Northern Cross Coal Enterprises, and Haddix Mining and Development, and claimant's hearing testimony that he could not recall the beginning and ending dates of his tenure with any of these employers.[4] Decision and Order at 6; Hearing Transcript at 20; Director's Exhibits 6-7. Because there was insufficient evidence in the record to establish the beginning and ending dates of claimant's 1985 coal mine employment, the administrative law judge added claimant's earnings from all eight employers together and found that claimant made a total of $11,274.67 ($4,065.80 + $1,995.00 + $1,144.60 + $1,383.55 + $1,471.88 + $960.00 + $85.00 + $168.84 = $11,274.67), while working as a miner in 1985.[5] Decision and Order at 6. He then divided this figure by "the yearly wage

[4] The administrative law judge also noted claimant's testimony that he had taken ten weeks off in 1985 due to a leg injury. Decision and Order at 6; Hearing Transcript at 20.

[5] The Social Security Administration (SSA) earnings records indicate that in 1985, claimant earned: $4,065.80 with Gillette Coal Company, $1,995.00 with Red River Fuels

base in 1985, $39,600.00, as reported in Exhibit 609," and credited claimant "with 0.28 years of coal mine employment." *Id*. Adding 0.10 years from 1982 and 0.28 years from 1985 to the 14.25 years already credited to claimant, the administrative law judge found that claimant had 14.63 years of coal mine employment and, therefore, could not establish invocation of the Section 411(c)(4) presumption. *Id*.

B. The Parties' Arguments

Claimant and the Director both allege that the administrative law judge erred in using Exhibit 609 to compute claimant's coal mine employment in 1982 and 1985 under 20 C.F.R. §725.101(a)(32)(iii). Claimant also maintains that calculating fractional portions of a year by using 125 days as the divisor is reasonable because it is consistent with the prior method set forth in 20 C.F.R. §718.301 (2000)[6] and the method set forth in the *BLBA Procedure Manual*.[7] Claimant asserts that the administrative law judge should apply the latter method, which would result in him being credited with an additional year of coal mine employment, bringing his total to over fifteen years.

The Director contends that under circumstances in which the length of coal mine employment cannot be directly identified, it is reasonable for the fact-finder to infer the

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Inc., $1,144.60 with Tip Top Coal Company, $1,383.55 with Jaymar Mining Incorporated (Jaymar), $1,471.88 with Wilderness Coal, $960.00 with Salt Lick Coals Incorporated, $85.00 with Northern Cross Coal Enterprises, and $168.84 with Haddix Mining and Development. Director's Exhibits 5-7.

[6] Pursuant to 20 C.F.R. §718.301 (2000), "[i]f a miner worked in or around one or more coal mines for fewer than 125 days in a calendar year, he or she shall be credited with a fractional year based on the ratio of the actual number of days worked to 125."

[7] In Chapter 2-700, Paragraph 11 of the *Coal Mine* ([*Black Lung Benefits Act*]) *Procedure Manual* (*BLBA Procedure Manual*), claims examiners are instructed to divide the miner's annual earnings by the daily average coal mine industry wage to arrive at the number of days that the miner worked, with any portion of a day being rounded up to a whole day. For the miner to be credited with a cumulative year of coal mine employment, "the record must reflect four quarters of earnings and 125 days of work based on the applicable daily rate for the year in which the quarter is reported." *BLBA Procedure Manual*, Ch. 2-700, ¶11. Combining the earnings reported on his paystubs for 1982 and 1985, claimant alleges that he worked for 127 days over the course of five quarters, thereby entitling him to an additional year of coal mine employment. Claimant's Supplemental Brief at 4-5.

length by using 125 days as the divisor to calculate fractional portions of a year. The Director further alleges that there is no inconsistency between treating 125 days as equivalent to a year of coal mine employment and the requirement in 20 C.F.R. §718.101(a)(32) that an employment relationship equivalent to one year be established before consideration is given to the number of days worked. The Director concedes, however, that his use of 125 days as a divisor in his initial response brief "was flawed because it ignored other record evidence." Director's Letter Brief in Response to Board's July 8, 2016 Order at 3. The Director suggests that there is sufficient evidence of claimant's coal mine employment on his paystubs from 1982 and 1985, such that the administrative law judge need not apply the formula set forth in 20 C.F.R. §725.101(a)(32)(iii).

Employer argues that the administrative law judge applied a reasonable method of computation to credit claimant with less than the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer contends that the method advocated by claimant and the Director "is not reasonable because it collapses the two-step analysis required by 20 C.F.R. §725.493(b) (2000)[8] to determine whether one year of coal mine employment is established."[9] Supplemental Brief on Behalf of Respondents at 7.

[8] Under 20 C.F.R. §725.493(b) (2000), a year of employment was defined as:

> [A] period of 1 year, or partial periods totaling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented . . . and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for purposes of paragraph (a) of this section.

20 C.F.R. §725.493(b) (2000). This regulation pertained to the identification of the responsible operator, and was superseded by revised regulations that went into effect in 2001.

[9] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 1.75 years of coal mine employment in 1983 and 1984, one year of coal mine employment in 1986, and 11.5 years of coal mine employment from early

C. Analysis

Under the regulations and the relevant case law, claimant bears the burden of establishing the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). Because the Act does not provide specific guidelines for calculating the time spent in coal mine employment, the administrative law judge is granted broad discretion in deciding this issue, and his or her determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

In the present case, claimant and the Director are correct in alleging that the administrative law judge's reliance on Exhibit 609 to determine the length of claimant's coal mine employment in 1982 and 1985 does not provide the basis for a reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 n.1 (1988) (en banc). The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by *the coal mine industry's average daily earnings for that year*, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added). The administrative law judge rationally determined that he was permitted to use the formula for 1982 and 1985, because he could not determine the beginning and ending dates of claimant's coal mine employment in those years. *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432; Decision and Order at 6. However, Exhibit 609 from the *BLBA Procedure Manual*, entitled "*Average Wage Base*," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R. §725.101(a)(32)(iii). Exhibit 609 reports the SSA's wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax. In contrast, the table at Exhibit

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1987 through July 1998, for an undisputed 14.25 years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5-6.

610 of the *BLBA Procedure Manual*, entitled *Average Earnings of Employees in Coal Mining*, contains the information specified in 20 C.F.R. §725.101(a)(32)(iii).[10]

We hold, therefore, that reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry.[11] In light of the administrative law judge's application of Exhibit 609 and 20 C.F.R. §725.101(a)(32)(iii) to calculate claimant's coal mine employment in 1982 and 1985, we vacate his findings of 0.10 years and 0.28 years, respectively, and his finding that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27; *Dawson*, 11 BLR at 1-60. Accordingly, we remand this case to the administrative law judge for recalculation of claimant's coal mine employment in 1982 and 1985.[12]

On remand, the only requirement of the administrative law judge is that he use a reasonable method of computation in determining the length of claimant's coal mine employment in 1982 and 1985. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11. In this regard, we decline to instruct the administrative law judge to use a method treating 125 days as the divisor for the purpose of calculating a fractional portion of a year. As the Director maintains, direct evidence of claimant's

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[10] The Director explains:

> Exhibit 609 actually sets out the limit on income subject to Social Security tax for each year since 1937. As explained in the [BLBA] Procedure Manual, this table's purpose is to caution that the Social Security earnings record may underreport a miner's true wages because the earnings record "will not normally show income greater than the wage base amount for a given year." In short, Exhibit 609 does not address the average yearly earnings of coal miners and should not have been used by the [administrative law judge] to calculate [claimant's] length of employment.

Director's November 18, 2015 Letter Brief at 2 (citations omitted).

[11] To the extent that there are prior Board decisions that are inconsistent with our present holding, they are overruled.

[12] The administrative law judge, on remand, must ensure compliance with the requirement, pursuant to 20 C.F.R. §725.101(a)(32)(iii), that a copy of Exhibit 610 "be made a part of the record *if* the adjudication officer uses this method to establish the length of the miner's work history." 20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

actual coal mine work history exists in the form of the paystubs reflecting his coal mine employment earnings in 1982 and 1985 that can provide the basis for computing the fractional years of that employment.[13] The preference for the use of direct evidence is consistent with 20 C.F.R. §725.101(a)(32)(ii), which provides, "[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony."

If, on remand, the administrative law judge finds that claimant has established at least fifteen years of qualifying coal mine employment, he must determine whether claimant has established invocation of the Section 411(c)(4) presumption by proving that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[14] 20 C.F.R. §718.305(b)(1)(iii). If claimant is unable to establish total respiratory disability, a requisite element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718.[15] 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202,

[13] The Director suggests that claimant's paystubs establish that in 1982, he worked for Midway Coal Company for three weeks and for Meally Coal for seven weeks. Dividing the ten week total by fifty-two, the number of weeks in a year, produces a fractional year of 0.19. Director's Letter Brief in Response to Board's July 8, 2016 Order at 5; Director's Exhibit 5. Applying this same method to 1985, a year in which claimant worked for thirty-one weeks for eight different coal companies, results in a fractional year of 0.59. Director's Letter Brief in Response to Board's July 8, 2016 Order at 6; Director's Exhibit 5. When 0.19 and 0.59 are added to the undisputed 14.25 years of coal mine employment the administrative law judge credited to claimant, the total is 15.03 years of such employment. Director's Letter Brief in Response to Board's July 8, 2016 Order at 6.

[14] If the administrative law judge reaches the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) on remand, he must address claimant's allegation that the exercise blood gas study obtained by Dr. Dahhan on February 26, 2010 is not valid because claimant's blood was drawn after exercise, which contravenes the quality standards set forth in 20 C.F.R. §718.105(b).

[15] To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

718.203, 718.204. Should the administrative law judge determine that claimant has invoked the presumption on remand, he must then assess whether employer has rebutted the presumption by affirmatively establishing that claimant has neither legal[16] nor clinical[17] pneumoconiosis, or that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting).

II. The Existence of Pneumoconiosis

Because the administrative law judge may determine on remand that claimant does not have the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption, the validity of the denial of benefits on the merits must be addressed. The administrative law judge denied benefits based on his determination that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

A. Clinical Pneumoconiosis

With respect to the existence of clinical pneumoconiosis, claimant alleges that the administrative law judge erred in finding that the preponderance of the x-ray evidence was negative under 20 C.F.R. §718.202(a)(1). The relevant x-ray evidence consists of seven readings of two x-rays. Dr. Rasmussen, a B reader, read the March 31, 2010 x-ray as positive for pneumoconiosis. Director's Exhibit 11. This x-ray was read as negative by Dr. Wiot, who is dually-qualified as a B reader and Board-certified radiologist, and as positive by Dr. Miller, who is also a dually-qualified radiologist. Director's Exhibits 16-

[16] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

17. The November 21, 2013 x-ray was read as positive for pneumoconiosis by Dr. Miller and Dr. Halbert, a dually-qualified radiologist, and as negative by Drs. Tarver and Meyer, both dually-qualified radiologists. Claimant's Exhibits 2-4; Employer's Exhibit 2-3.

The administrative law judge stated that for the purpose of analyzing the x-ray evidence:

> Readers who are [B]oard[-]certified radiologists and/or B readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to, if not superior to, a physician certified as a B reader. I may accord greater weight to x-ray interpretations of dually[-] qualified physicians.

Decision and Order at 14. Consequently, in evaluating the March 31, 2010 x-ray, the administrative law judge gave more weight to the readings of Drs. Wiot and Miller and, "because equally dually[-]qualified doctors found the x-ray to be both positive and negative," determined that it was inconclusive. *Id*. at 15. In evaluating the November 21, 2013 x-ray, the administrative law judge found that it was also inconclusive "because equally[-]qualified doctors found the x-ray to be positive and negative." *Id*. In summary, the administrative law judge observed, "[b]oth x-ray readings are inconclusive for clinical pneumoconiosis. Therefore, the x-ray evidence demonstrates neither the presence nor absence of pneumoconiosis. While the readings do not establish the presence of clinical pneumoconiosis, they do not disprove it, either." *Id*.

Claimant contends that the administrative law judge erred in failing to accord any weight to the positive reading of the March 31, 2010 x-ray by Dr. Rasmussen because he is only a B reader. Claimant's Brief at 27. We disagree. Contrary to claimant's allegation, the administrative law judge permissibly evaluated the x-ray evidence by according greater weight to the x-ray readings of physicians who are dually-qualified B readers and Board-certified radiologists, than to the x-ray reading of Dr. Rasmussen, who is a B reader. *See Staton v. Norfolk & W. Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-300 (2003). Further, as the x-ray readings of the dually-qualified readers were evenly divided between positive and negative readings for pneumoconiosis, the administrative law judge rationally found that the x-ray evidence was inconclusive on the issue of clinical pneumoconiosis. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). In the context of entitlement on the merits, therefore, we affirm the administrative law judge's determination that claimant did not establish the existence of clinical

pneumoconiosis at 20 C.F.R. §718.202(a)(1).[18] If the administrative law judge reaches the issue of the existence of clinical pneumoconiosis on rebuttal of the Section 411(c)(4) presumption, however, the burden shifts to employer to affirmatively disprove the presumed existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-150.

B. Legal Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the opinion of Dr. Rasmussen that claimant has an impairment attributable to coal dust exposure, and the contrary opinions of Drs. Dahhan and Jarboe. The administrative law judge discredited all three opinions, finding that they were not well-reasoned on the existence of legal pneumoconiosis. Decision and Order at 16-17.

Specifically with respect to Dr. Rasmussen, the administrative law judge found that he did not "officially" diagnose legal pneumoconiosis because he "simply stated in his medical opinion that the [c]laimant suffered from minimal impairment in oxygen transfer and loss of lung function, but he did not attribute it to any particular pulmonary condition." Decision and Order at 16. The administrative law judge also determined that Dr. Rasmussen did not explain the connection between claimant's condition and the finding by some experts that a gas exchange impairment can be related to emphysema, even in the absence of an obstructive ventilatory impairment. *Id*. Furthermore, the administrative law judge observed that Dr. Rasmussen never actually diagnosed emphysema or any other chronic, permanent pulmonary condition. *Id*.

Claimant contends that the administrative law judge erred in finding that Dr. Rasmussen did not render a well-reasoned diagnosis of legal pneumoconiosis. We agree. The administrative law judge appears to have based his finding, in part, on a belief that a physician must diagnose a distinct "lung disease" or "pulmonary condition" in order to satisfy the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2). Decision and Order at 16. This is not correct, as the regulation defines legal

[18] Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that Dr. Rasmussen's opinion diagnosing clinical pneumoconiosis, and the contrary opinions of Drs. Dahhan and Jarboe, are inconclusive because they based their diagnoses solely on the x-ray evidence, which the administrative law judge deemed inconclusive on the existence of clinical pneumoconiosis. Decision and Order at 16; Director's Exhibits 11, 13; Claimant's Exhibit 1; Employer's Exhibit 1. We affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish the existence of clinical pneumoconiosis as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

pneumoconiosis as including "any chronic lung disease *or impairment and its sequelae* arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (emphasis added). Thus, on its face, Dr. Rasmussen's diagnosis of a gas exchange impairment related to dust exposure in coal mine employment is consistent with the regulatory definition of legal pneumoconiosis. Director's Exhibit 11 at 1, 37; Claimant's Exhibit 1 at 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). Moreover, the administrative law judge's finding that Dr. Rasmussen did not diagnose a chronic or permanent gas exchange impairment is unsupported. Contrary to the administrative law judge's suggestion, the exercise blood gas study upon which Dr. Rasmussen relied did not have to be qualifying[19] for total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) to document the existence of a chronic respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §718.201(a)(2); *see Cornett*, 227 F.3d 569 at 576, 22 BLR at 2-121; Decision and Order at 16.

The administrative law judge's citation to other blood gas study evidence also does not conclusively support his finding that the impairment diagnosed by Dr. Rasmussen was not chronic or permanent. On remand, he must address claimant's allegation that the exercise study obtained by Dr. Dahhan on February 26, 2010, is not valid. *See* slip op. at 10 n.14. He must also address claimant's argument that the most recent, non-qualifying blood gas study, performed by Dr. Jarboe on November 21, 2013, is not inconsistent with the presence of a gas exchange impairment because it was obtained at rest.

We vacate, therefore, the administrative law judge's finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-2-372 (4th Cir. 2006); *Cornett*, 227 F.3d at 576, 22 BLR at 2-121; Decision and Order at 16; Employer's Exhibit 1. If the administrative law judge reaches the issue of the existence of pneumoconiosis on remand in the context of entitlement on the merits, he must reconsider whether Dr. Rasmussen provided a well-reasoned diagnosis of legal pneumoconiosis. If the administrative law judge reaches the issue of the existence of legal pneumoconiosis in the context of rebuttal of the Section 411(c)(4) presumption, he must shift the burden of proof and determine whether employer has affirmatively established that claimant does not have legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Minich*, 25 BLR at 1-150.

[19] A "qualifying" arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge