U.S. Department of Labor

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

BRB No. 16-0506 BLA

BURLEY MULLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
J&W COAL COMPANY, INCORPORATED	)	DATE ISSUED: 08/31/2017
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Paul R. Almanza, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05198) of Administrative Law Judge Paul R. Almanza (the administrative law judge), rendered on a subsequent claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that employer is the properly designated responsible operator and credited claimant with 9.96 years of underground coal mine employment. The administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis and a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2), (c). Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c)[2] and awarded benefits, commencing November 2010, the date of filing of claimant's subsequent claim.

[1] Claimant filed a claim for benefits on November 22, 1994, that was ultimately withdrawn. Employer's Exhibit 6. Claimant filed a second claim for benefits on July 26, 2002, which was denied by the district director on September 30, 2003, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 1. Claimant's two timely requests for modification were denied on December 10, 2004 and on April 7, 2006. *Id.* Claimant did not take any further action until filing the current subsequent claim on November 23, 2010. Director's Exhibit 3.

[2] 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). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 2. Consequently, to obtain review of the merits of his claim, claimant had to submit new

On appeal, employer argues that the administrative law judge erred in finding that it is the responsible operator and in determining that claimant established entitlement to benefits. Employer also challenges the administrative law judge's determination of the commencement date for benefits. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's findings.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year that is capable of assuming liability for the payment of benefits. 20 C.F.R. §725.495(a)(1). 20 C.F.R. §§725.494(c), 725.495(a)(1); *see Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313, 25 BLR 2-521, 2-530 (6th Cir. 2014). The named responsible operator bears the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c)(2). Additionally, if the named responsible operator can prove that the miner did not engage in at least 125 days of coal mine work for it during a calendar year, then it did not employ the miner for the required year. 20 C.F.R. § 725.101(a)(32)(i), (ii).

Employer raises three arguments with respect to the administrative law judge's determination that it is the responsible operator: 1) that the Director is bound by a stipulation made in 1994 by Peter White Coal Mining Company (Peter White) that it is the responsible operator; 2) that claimant worked for another company for more than one year after working for employer; and 3) that claimant did not work at least 125 days for employer during a calendar year. These arguments are without merit.

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evidence establishing at least one of these elements of entitlement. 20 C.F.R. §725.309(c)(3), (4). *See White*, 23 BLR at 1-3; Decision and Order at 19.

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibits 4, 7. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

A. The Significance of the Concession in the 1994 Withdrawn Claim

In claimant's withdrawn claim for benefits, filed on November 22, 1994, the district director dismissed employer as a potential responsible operator and identified Peter White as the responsible operator. After accepting Peter White's concession on the issue at the hearing, Administrative Law Judge Michael P. Lesniak issued a Decision and Order on April 1, 1998 in which he observed, "[a]ll parties have agreed and I find that [Peter White] is the properly identified responsible operator for this claim." 1998 Decision and Order at 3 (located in Employer's Exhibit 6). Judge Lesniak denied benefits on the merits because claimant did not establish total disability. *Id*. at 7-8.

Claimant subsequently filed a request to withdraw the 1994 claim, which Administrative Law Judge John C. Holmes granted on August 18, 1999. Decision and Order at 11 n.11; Employer's Brief at 2 n.1. In conjunction with claimant's July 26, 2002 claim for benefits, employer was identified by the district director as the responsible operator liable for the payment of any benefits in the claim.[4] Director's Exhibit 1.

In the current claim, the administrative law judge noted that the district director determined that claimant worked for employer for "1.23 years from [November 28, 1981] to the beginning of May 1983," and that all subsequent operators employed claimant for less than a year. Decision and Order at 10; *see* Director's Exhibit 27. The administrative law judge found that employer could not rely on the designation of Peter White in claimant's withdrawn 1994 claim, because such claims are considered not to have been filed. Decision and Order at 11-12. The administrative law judge further found that because claimant worked at Peter White before he worked for employer, evidence relating to Peter White could not establish that claimant had worked for an operator subsequent to employer for at least one year. *Id*. at 11.

Employer alleges that the administrative law judge erred in imposing liability on employer in this subsequent claim when it was dismissed as the potentially liable responsible operator in the 1994 withdrawn claim. In support of its argument, employer contends that withdrawal of a claim is barred after an administrative law judge's decision on the merits becomes effective. Employer therefore maintains that Judge Holmes erred in granting claimant's withdrawal request in his 1999 Decision and Order, and that the

[4] Employer challenged its identification as the potentially liable responsible operator in the two requests for modification that claimant filed with respect to the denial of his prior claim. Director's Exhibit 1. After the dismissal of claimant's most recent request for modification, employer preserved the issue of its liability for the payment of benefits. *Id*.

stipulation by Peter White remained effective and binding in all subsequent proceedings. The Director disagrees and asserts the administrative law judge properly determined that the responsible operator issue was subject to adjudication in the current subsequent claim. We agree with the Director.

Employer argues that the decision by Judge Holmes in 1999 to grant claimant's request to withdraw the 1994 claim is inconsistent with the Board's subsequent holding in *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-194 (2002) (en banc) that a claim cannot be withdrawn under 20 C.F.R. §725.306 once a decision on the merits is filed in the district director's office. *Clevenger*, 22 BLR at 1-200. As the Director notes, however, employer is generally correct that courts apply the law in effect at the time of the decision -- *but only to cases pending before them*. Director's Brief at 12; *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 714 (1974) (noting general rule that a court must apply the law in effect at the time it renders its decision in pending cases). Claimant's 1994 claim is not currently pending at any level of adjudication, nor was it pending when *Clevenger* was decided in 2002. Thus, by operation of 20 C.F.R. §725.306(b), that claim is "considered not to have been filed." 20 C.F.R. §725.306(b). *Clevenger* therefore does not preclude the administrative law judge's finding that employer is the properly designated responsible operator.[5]

Moreover, Judge Lesniak's statement in his 1998 Decision and Order that Peter White is the properly identified responsible operator has no collateral estoppel effect in this claim now before the Board, as the adjudication of the responsible operator issue was not necessary to the denial of benefits in the 1994 claim. 1998 Decision and Order at 3; *see Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc); *see also Lawson*, 739 F.3d at 313, 25 BLR at 2-530 (collateral estoppel does not bar reconsideration of the responsible operator issue in a subsequent claim because the identification of a responsible operator is not a necessary finding where benefits are denied). We therefore hold that the administrative law judge did not err in adjudicating

[5] Even assuming that we could apply *Clevenger* such that the denial of the 1994 claim became final, Peter White's acknowledgment that it was the properly designated responsible operator would not preclude the Director from identifying another responsible operator in the present subsequent claim. The regulation at 20 C.F.R. §725.309 provides, "any stipulation made by any party in connection with the prior claim will be binding *on that party* in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5)(emphasis added). Because Peter White is not a party to the present subsequent claim, any stipulation it made with respect to the 1994 claim is not effective.

the issue of whether employer is the properly named responsible operator in the current claim.[6]

B. Substantial Evidence Supports the Identification of Employer as the Responsible Operator

Employer argues that the administrative law judge erred in finding that it did not prove that claimant worked for Coal Power or M&S Coal for more than one cumulative year after the end of his tenure with employer in May 1983. Employer's contention is without merit, as the administrative law judge's conclusion that the relevant evidence indicates that claimant did not work for more than a few months for any of the subsequent operators suggested by employer is rational and supported by substantial evidence.

When weighing the evidence relevant to employer's burden at 20 C.F.R. §725.495(c), the administrative law judge reasonably determined that he would credit employment appearing in claimant's employment history forms that is corroborated by either Social Security Earnings Statements or an affidavit. Decision and Order at 6. The administrative law judge then permissibly concluded that the record "contains no support that [c]laimant worked for Coal Power," as there are no Social Security Earnings Statements or documents from Coal Power to corroborate claimant's identification of Coal Power as an employer on his employment history form.[7] Decision and Order at 8 n.6; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989) (the Board may not substitute its judgment for that of the administrative law judge in weighing evidentiary issues); Director's Exhibit 4.

Regarding M&S Coal, the administrative law judge reasonably found that, contrary to employer's contention, affidavits submitted by claimant's brother were insufficient to establish that claimant worked for him at the company for approximately 2.5 years between May 1, 1987 and January 10, 1989.[8] *See Lafferty v. Cannelton Indus.*,

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[6] Based on this disposition of employer's arguments, we reject employer's contention that to name another potentially liable operator in claimant's current subsequent claim, the Director, Office of Workers' Compensation Programs, had to file a request for modification of the 1998 Decision and Order.

[7] Claimant reported on his coal mine employment history form that he worked for Coal Power from April 1984 to June 1985. Director's Exhibit 4.

[8] Claimant's brother reported that he was a co-owner of several coal companies, including M&S Coal. Director's Exhibit 6.

Inc., 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 11-12. As the administrative law judge observed, claimant's brother reported in his first affidavit that claimant worked for him at M&S Coal for only five months. Decision and Order at 8; Director's Exhibit 4. In his second affidavit, however, he stated that claimant was employed at M&S Coal "for a period of 2 ½ [years] during 5/1/87 to 1/10/89." Director's Exhibit 6. The administrative law judge rationally determined that the second affidavit was entitled to little weight because claimant did not include work for M&S Coal on his employment history form, and did not refer to M&S Coal as an employer in his hearing testimony.[9] *See Lafferty*, 12 BLR at 1-192 (administrative law judges are granted broad discretion in evaluating witness testimony). Accordingly, we affirm the administrative law judge's finding that employer failed to prove that claimant worked for M&S for at least one cumulative year subsequent to his tenure with employer.[10] *See Armco, Inc. v. Martin*, 277 F.3d 468, 475, 22 BLR 2-334, 2-344 (4th Cir. 2002) (holding that because one subsequent operator employed the miner for only six months and the other subsequent operator was unable to assume liability for payment, the employer was the properly designated responsible operator).

Finally, we reject employer's allegation that the administrative law judge failed to consider that claimant's work for employer was only part-time and did not total 125 days in a calendar year under 20 C.F.R. §725.101(a)(32). The regulation provides that "[i]f the evidence establishes that the miner's employment lasted for a calendar year or partial

[9] In addition, there is evidence in the record that conflicts with the second affidavit. A pay stub submitted by claimant indicates that he worked for C&S Coal in August and September 1987, and claimant reported on his employment history form that he worked for AMA Coal between December 1987 and April 1988. Director's Exhibit 8. Furthermore, claimant testified at a deposition in his 2002 claim that his brother operated several different coal companies and made the following statements about working with his brother: "[I]t all wasn't one time at one place;" "I don't remember the years or the date;" "[i]t was . . . back there between '78 and '90, in between those other jobs;" and "it was [o]n and off . . . [i]n between other jobs." Director's Exhibit 1 (October 28, 2002 Deposition of Claimant at 18, 26-27, 39). Claimant further testified at the hearing in the present claim that his employment with M&S Coal "didn't last too long because the mine inspector shut it down and that's when we went to AMA [Coal]." June 23, 2015 Hearing Transcript at 46.

[10] We decline to reach employer's argument that the administrative law judge erred in rejecting the second affidavit because it was not notarized, as the administrative law judge provided a valid alternative rationale for his credibility determination. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

periods totaling a 365-day period amounting to one year, *it must be presumed, in the absence of evidence to the contrary*, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii) (emphasis added).

Employer does not contest that claimant worked for it for at least a calendar year. In support of its contention that claimant did not work for 125 days during that year, employer cites claimant's statement at the hearing regarding the amount of time he worked for employer that "I can't say for sure – at least two or three days, a week probably." June 23, 2015 Hearing Transcript at 48. Employer, however, explicitly concedes that, on its face, claimant's statement "may or may not total 125 days in a year" and it does not attempt to explain how this statement alone satisfies its burden. Employer Brief at 21.

Indeed, employer does not identify any evidence showing that it employed claimant on a part-time basis, nor has employer identified any evidence contradicting the administrative law judge's finding that claimant "was continuously employed by [employer] from some time in 1981 to no later than May 10, 1983[.]" Decision and Order at 9. Employer thus has not met its burden. 20 C.F.R. §725.101(a)(32)(ii) We therefore affirm the administrative law judge's decision to credit claimant with 1.23 years of coal mine employment with employer, and we further affirm the administrative law judge's identification of employer as the responsible operator.[11] *See Bungo v. Bethlehem Mines Corp.*, 8 BLR 1-348, 1-350 (1986).

II. The Merits of Entitlement

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,

[11] Employer also alleges that the administrative law judge "adopted inconsistent approaches to the calculation of the length of [claimant's] employment to extract more work than the record otherwise demonstrated" and that "[e]ven then, he could not find at least ten years of coal mine employment. . . ." Employer's Brief at 21-22. We will not address this contention because employer does not identify any specific error in the administrative law judge's calculation of the total length of claimant's coal mine employment nor does employer explain how the administrative law judge's finding of 9.96 years of underground coal mine employment caused it harm. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference").

718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *See Anderson*, 12 BLR at 1-112; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

A. The Existence of Legal Pneumoconiosis

The administrative law judge found that claimant established the existence of legal pneumoconiosis[12] based on Dr. Forehand's opinion, which he found was reasoned, documented, and consistent with the preamble to the 2001 regulations.[13] Decision and Order at 19-21; Director's Exhibits 13, 17. The administrative law judge discredited the contrary opinions of Drs. Fino and Rosenberg because they relied on premises contrary to the preamble, and were not well-reasoned. Decision and Order at 19-21; Director's Exhibit 20; Employer's Exhibits 1, 4-5.

Employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §500-599, as incorporated into the Act by 30 U.S.C. §932(a), by relying on the preamble to the 2001 regulations when determining the probative value of the medical opinion evidence. Employer further contends that the administrative law judge erred in crediting the opinion of Dr. Forehand and in discrediting the opinions of Drs. Fino and Rosenberg.

We reject employer's allegation that the administrative law judge's reference to the preamble constituted a violation of the APA. The United States Court of Appeals for the Fourth Circuit, along with several other federal courts of appeals, has held that an administrative law judge may evaluate expert opinions in conjunction with the preamble, as it sets forth the resolution by the Department of Labor (DOL) of questions of scientific fact relevant to the elements of entitlement. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-129-30 (4th Cir. 2012); *A & E Coal Co. v.*

[12] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.*

[13] We decline to address employer's argument that the administrative law judge erred in finding that claimant established the existence of clinical pneumoconiosis. Decision and Order at 15, 19. Because we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis, *see* discussion *infra*, error, if any, in the administrative law judge's clinical pneumoconiosis finding is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Adams, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257, 24 BLR 2-369, 2-383 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the preamble does not constitute evidence outside the record requiring the administrative law judge to give notice and an opportunity to respond. *See Looney*, 678 F.3d at 316, 25 BLR at 2-132; *Adams*, 694 F.3d at 802, 25 BLR at 2-212. Accordingly, we reject employer's argument that the administrative law judge erred in consulting the preamble in his evaluation of the medical opinion evidence.

We further hold that the administrative law judge permissibly credited Dr. Forehand's opinion that coal dust exposure significantly contributed to claimant's disabling obstructive impairment. The administrative law judge reasonably determined that Dr. Forehand's diagnosis of legal pneumoconiosis was adequately explained and supported by the objective evidence and claimant's smoking and employment histories.[14] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-75-76 (4th Cir. 1997); Decision and Order at 19-20; Director's Exhibits 13, 17. The administrative law judge also rationally found that Dr. Forehand's opinion is consistent with the preamble to the 2001 regulations, which recognizes that cigarette smoking and coal dust exposure can have additive effects. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 20, *citing* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000).

The administrative law judge also rationally determined that Dr. Fino's opinion[15] was entitled to "diminished weight":

> Dr. Fino has not sufficiently explained his rationale for excluding coal mine dust exposure in [c]laimant's condition, except to generally state that smoking has more of an impact on lung function than originally thought.

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[14] Dr. Forehand opined that claimant's 8.36 years of coal mine dust exposure and his thirty-three pack-year history of cigarette smoking both played a significant role in causing claimant's obstructive lung disease and totally disabling impairment. Director's Exhibits 13, 17.

[15] Dr. Fino stated, "only 6-8% of miners exposed to coal mine dust at the present dust standards for 35 years will develop clinically important losses in FEV1. That means that 92-94% of miners will have average losses that are not clinically important." Director's Exhibit 20.

> Even if one were to accept Dr. Fino's premise that [the] average loss of FEV1 is statistically but not clinically significant, Dr. Fino fails to explain whether [c]laimant's FEV1 function is in the "above average loss" category or why he thinks that [c]laimant's work history is insufficient in duration or in the quantity of coal dust exposure so as to discount the contribution of [c]laimant's coal mine employment in his respiratory condition.

Decision and Order at 20, *citing* 65 Fed.Reg. 79,920, 79,941 (Dec. 20, 2000); *see Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting); Director's Exhibit 20. Regarding the opinion of Dr. Rosenberg, the administrative law judge observed correctly that he eliminated coal dust exposure as a source of claimant's obstructive impairment based on the marked decrease in claimant's FEV1/FVC ratio.[16] Decision and Order at 20-21; Employer's Exhibits 1, 5. The administrative law judge rationally found that Dr. Rosenberg's premise – that coal dust exposure causes proportional decrements in FEV1 and FVC, thereby preserving the FEV1/FVC ratio – conflicts with the scientific evidence credited by the DOL in the preamble. *See Looney*, 678 F.3d at 314-16, 25 BLR at 2-130; Decision and Order at 21, *citing* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000) (crediting studies showing that coal miners have an increased risk of developing chronic obstructive pulmonary disease, which "may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1/FVC."); Decision and Order at 21. We therefore affirm the administrative law judge's discrediting of Dr. Rosenberg's opinion.[17]

In light of our affirmance of the administrative law judge's credibility determinations with respect to the medical opinions of Drs. Forehand, Fino and Rosenberg, we affirm the administrative law judge's finding that claimant established the

[16] Dr. Rosenberg found that "[s]pecific to [claimant], one can appreciate that he has a significantly reduced FEV1 with a marked reduction of his FEV1/FVC ratio . . . . this pattern of obstruction is not consistent with one related to past coal mine dust exposure." Employer's Exhibit 1. Dr. Rosenberg reiterated this conclusion in his supplemental report. Employer's Exhibit 5.

[17] We decline to address employer's additional contention that the administrative law judge did not adequately explain her finding that Drs. Forehand, Fino and Rosenberg "are equally qualified to render a diagnosis on [c]laimant's pulmonary condition." Decision and Order at 19. Error, if any, by the administrative law judge in her consideration of the physicians' credentials is harmless in light of her permissible determination that the opinions of Drs. Fino and Rosenberg are not credible. *See Larioni*, 6 BLR at 1-278.

existence of legal pneumoconiosis under 20 C.F.R. §718.202(a). *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 21, 23. We further affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 19. Lastly, we affirm the administrative law judge's determination that claimant established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c) because the issue of disease causation was subsumed in the administrative law judge's finding of legal pneumoconiosis. *See Kiser v. L & J Equipment Co.*, 23 BLR 1-246, 1-259 n.18 (2006); Decision and Order at 23-24.

B. Totally Disabling Respiratory or Pulmonary Impairment

The administrative law judge determined that claimant established total disability through blood gas studies and medical opinion evidence, and that the record as a whole did not diminish those findings.[18] 20 C.F.R. §718.204(b)(2)(ii), (iv). The administrative law judge first observed that the five blood gas studies performed between January 17, 2011 and February 28, 2012, including two performed after exercise, are non-qualifying.[19] Decision and Order at 26; Director's Exhibits 13, 20; Employer's Exhibit 1. But the administrative law judge further noted the February 14, 2014 resting blood-gas study is both qualifying and "nearly two years" more recent than the February 28, 2012 study. Decision and Order at 26; Claimant's Exhibit 9. Reconciling the conflicting studies, the administrative law judge concluded, "I accord greater weight to the most recent study and find that the most probative blood[-]gas study indicates that [c]laimant is totally disabled." Decision and Order at 26, *citing Schetroma v. Director, OWCP*, 18 BLR 1-17 (1993).

[18] The administrative law judge determined that claimant did not establish total disability by the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i), as the five studies of record are non-qualifying because the results were in excess of the values specified in the tables at 20 C.F.R. Part 718, Appendix B. Decision and Order at 25. The administrative law judge further determined that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence that he has cor pulmonale with right-sided congestive heart failure. *Id.* at 26.

[19] A "qualifying" blood-gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge also found the medical opinions of Drs. Forehand and Fino, as supported by Dr. Rosenberg's opinion, sufficient to establish total disability. Decision and Order at 26-27; Director's Exhibits 13, 17, 20; Employer's Exhibits 1, 4, 5. The administrative law judge thus concluded, after weighing the evidence relevant to total disability together, that claimant satisfied his burden of proof under 20 C.F.R. §718.204(b)(2). Decision and Order at 27.

Employer argues that the administrative law judge did not explain why the most recent blood-gas study was entitled to greatest weight or address the fact that none of the physicians assessed claimant's functional abilities and the functional demands of his usual coal mine employment. The Director asserts that substantial evidence supports the administrative law judge's total disability finding. We agree with the Director and hold that employer's contentions are without merit.

As the administrative law judge recognized, *Schetroma* supports his decision to credit the most recent qualifying blood-gas study over the older non-qualifying studies. There, the Board held that "an administrative law judge may properly give greater weight to the most recent evidence," as more recent evidence is more probative of claimant's current condition. *Schetroma*, 18 BLR at 1-22; *see also Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-34-35 (2004) (en banc) (an administrative law judge may rely on more recent medical evidence in evaluating disability); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc) (considering a request for modification, the administrative law judge reasonably focused on the recent evidence showing a worsening in the miner's condition). We therefore affirm the administrative law judge's decision to afford the February 14, 2014 qualifying blood-gas study greater weight than the earlier, non-qualifying studies as consistent with our precedent. *Id.*

To support a finding of total disability, a medical opinion need only describe "either the severity of the impairment or the physical effects imposed by claimant's respiratory impairment sufficiently so that the administrative law judge can infer that claimant is totally disabled." *Budash v. Bethlehem Mines Corp.*, 13 BLR 1-44, 1-50 (1985) (en banc), *citing Wright v. Director, OWCP*, 8 BLR 1-245 (1984). In this case, the administrative law judge adequately considered that Drs. Forehand and Fino identified a respiratory impairment; had general knowledge of claimant's work history; and specifically opined that claimant is totally disabled from returning to the jobs they identified in their reports.[20] No more is required. *See Jericol Mining, Inc. v. Napier*, 301

[20] Dr. Forehand reported that claimant's last coal mine job was as a section foreman in an underground mine. Director's Exhibit 13. He stated that "[i]nsufficient residual ventilatory capacity remains [for claimant] to return to [his] last coal mining job. Unable to work." *Id*. Dr. Fino noted that claimant "last worked as a mechanic and

F.3d 703, 713, 22 BLR 2-537, 2-552 (6th Cir. 2002) (explaining that when a certain position, such as an underground repairman, has a "precise meaning in the context of coal mining," an administrative law judge may rationally conclude that doctors adequately understand the demands of that job); Decision and Order at 16-19, 26; Director's Exhibits 13, 20; Employer's Exhibit 4.

Moreover, the administrative law judge permissibly determined that Dr. Rosenberg's opinion that "overall from a respiratory perspective [claimant] very well may be disabled from a pulmonary perspective," was consistent with the opinions of Drs. Forehand and Fino. Employer's Exhibit 5; *see Hicks*, 138 F.3d at 528, 21 BLR at 2-326; Decision and Order at 26. Because employer raises no other allegations of error, we affirm the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). Decision and Order at 27.

C. Total Disability Causation

Relying on Dr. Forehand's opinion, the administrative law judge determined that claimant established that he is totally disabled due to legal pneumoconiosis under 20 C.F.R. §718.204(c). Decision and Order at 27. The administrative law judge discredited the opinions of Drs. Fino and Rosenberg because they did not diagnose legal pneumoconiosis, which was contrary to his finding at 20 C.F.R. §718.202(a). *Id.*

Employer argues that the administrative law judge's finding must be vacated because he erroneously applied a standard requiring claimant to prove that his total disability is due, only "in part," to pneumoconiosis. Employer's Brief at 29. We agree with employer that the wording of the administrative law judge's analysis at 20 C.F.R. §718.204(c) could suggest that he relied on an "in part" standard when weighing Dr. Forehand's opinion.[21] The administrative law judge's imprecise wording in one portion of his decision does not mandate remand, however, as he stated the correct standard in another portion of his decision and he rendered findings conclusively establishing that

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section boss for [six] years, and [claimant] described the breakdown of his work as follows: very heavy labor-20%; heavy labor-40%; moderate labor-30%; and light labor-10%." Director's Exhibit 20. Dr. Fino concluded, "from a respiratory standpoint, this man is disabled from returning to his last mining job or a job requiring similar effort." *Id.*

[21] The administrative law judge stated, "Dr. Forehand . . . is the only physician who attributes [c]laimant's total disability, in part, to his pneumoconiosis[,]" and "the most reasoned and documented opinion in this case establishes that [c]laimant's total disability is due in part to his pneumoconiosis." Decision and Order at 27.

legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability, as required by 20 C.F.R. §718.204(c).[22]

Drs. Forehand and Fino agree that claimant has a totally disabling respiratory or pulmonary impairment, while Dr. Rosenberg acknowledges the possibility that claimant is totally disabled "from a pulmonary perspective." Employer's Exhibit 5; Director's Exhibits 13, 20. The administrative law judge's accurate summary of the medical opinion evidence reflects that the doctors agreed that cigarette smoking was a major source of claimant's disabling impairment, but disagreed as to whether claimant's years of coal mine dust exposure also played a role. As discussed *supra*, the administrative law judge credited Dr. Forehand's opinion over the opinions of Drs. Fino and Rosenberg as establishing that claimant's disabling obstructive impairment was significantly related to, or substantially aggravated by, claimant's coal mine dust exposure. Decision and Order at 19-20.

In sum, there is no unresolved conflict among Drs. Forehand, Fino and Rosenberg that claimant's totally disabling impairment is due to an obstructive impairment. The administrative law judge permissibly found that the impairment constitutes legal pneumoconiosis. Because the record reveals no other condition that could have caused claimant's disability, Dr. Forehand's opinion thus establishes disability causation at 20 C.F.R. §718.204(c). *See Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 820 F.3d 833, 847, 25 BLR 2-799, 2-816-18 (6th Cir. 2016) (physician's determination that pneumoconiosis had an adverse effect on the miner's respiratory condition and

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[22] Prior to evaluating the medical opinions at 20 C.F.R. §718.204(c), the administrative law judge articulated the proper standard for establishing disability causation, i.e., claimant must establish that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); Decision and Order at 27. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

contributed to the miner's disabling impairment satisfies substantially contributing cause standard); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489-90, 25 BLR 2-135, 2-154-55 (6th Cir. 2012). Thus, we need not vacate the administrative law judge's conclusion that Dr. Forehand's opinion is sufficient to satisfy claimant's burden of establishing total disability causation pursuant to 20 C.F.R. §718.204(c). *See Collins v. Pond Creek Mining Co*., 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014) (holding that it is appropriate to forego remand when no further factual development is necessary). Accordingly, we affirm the administrative law judge's finding and further affirm the award of benefits under Part 718. *See Trent*, 11 BLR at 1-27.

III. Commencement Date for Benefits

The administrative law judge awarded benefits, commencing November 2010, the date of filing of claimant's subsequent claim, because he determined that there was no evidence indicating the precise date on which claimant became totally disabled due to pneumoconiosis. Decision and Order 27-28. Employer argues that the administrative law judge erred in designating November 2010 as the date for the commencement of benefits because claimant's non-qualifying blood-gas study from February 2012 establishes that he was not totally disabled subsequent to the filing of his claim. The Director urges affirmance of the administrative law judge's finding.

We reject employer's argument. Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603, 12 BLR 2-178, 2-184 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

In this case, the earliest diagnosis of total disability due to pneumoconiosis is contained in Dr. Forehand's report of his January 17, 2011 examination of claimant. *See* Director's Exhibit 13. We have affirmed the administrative law judge's crediting of Dr. Forehand's diagnosis. The existence of a non-qualifying blood-gas study performed subsequent to his examination of claimant does not establish that he rendered a misdiagnosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Smith v. Director, OWCP*, 8 BLR 1-258, 1-261 (1985). Thus, there

is no evidence in the record establishing that claimant was not totally disabled due to pneumoconiosis between the filing date of his subsequent claim and Dr. Forehand's report. We therefore hold that the administrative law judge properly determined that claimant is entitled to benefits from November 2010. *See Green*, 790 F.2d at 1119 n.4, 9 BLR at 2-36 n.4.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge