U.S. Department of Labor

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

BRB No. 17-0489 BLA

THOMAS G. ARNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SCRUBET, INCORPORATED	)	DATE ISSUED: 08/09/2018
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	
	)	
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 Monica Markley, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and Denise Hall Scarberry (Ones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-06241), rendered by Administrative Law Judge Monica Markley on a miner's claim filed on June 21, 2010, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-eight years of surface coal mine employment in conditions substantially similar to those in an underground coal mine. She also found that claimant has a totally disabling respiratory or pulmonary impairment and, therefore, invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer limits its allegations of error to the administrative law judge's finding that claimant established total disability based solely on the medical opinion evidence. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal.[2]

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

[1] Under Section 411(c)(4) of the Act, claimant's total disability is presumed to be due to pneumoconiosis if he had 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(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had twenty-eight years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 20-21.

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

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

The regulations provide that claimant will be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.[4] 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, claimant can establish his disability by: (i) pulmonary function studies; (ii) arterial blood-gas studies; (iii) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or (iv) the opinion of a physician who, exercising reasoned medical judgment, concludes that claimant's respiratory or pulmonary condition is totally disabling, based on medically acceptable techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv). If an administrative law judge finds that total disability has been established under one or more subsections, he or she must weigh the evidence supportive of total disability against the contrary probative evidence of record. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Relevant to 20 C.F.R. §718.204(b)(2)(i), the record contains five pulmonary function studies. The pre-bronchodilator study dated January 3, 2012, is qualifying,[5] while the post-bronchodilator study done on that date and all of the other studies of record are non-qualifying.[6] Director's Exhibit 11; Claimant's Exhibits 3, 4; Employer's Exhibits 2,

[4] Claimant reported that he last worked as a foreman at a surface mine, and that he was required to walk between six hundred and fifteen hundred feet daily and climb ten feet into the cab of a bulldozer. Hearing Transcript at 21-23; Claimant's Exhibit 4. The administrative law judge did not make a finding as to the exertional requirements of claimant's usual coal mine work.

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

[6] The pulmonary function studies dated October 28, 2010, October 20, 2011, February 17, 2012, and January 19, 2015 produced non-qualifying results both before and after the administration of bronchodilators. Director's Exhibit 11; Claimant's Exhibit 4; Employer's Exhibits 2, 7. The pulmonary function study conducted on January 3, 2012 produced qualifying prebronchodilator values and non-qualifying values after the administration of bronchodilators. Claimant's Exhibit 3.

7. The administrative law judge determined, "[b]ased on the more persuasive recent non-qualifying test results as well as the non-qualifying test results of 2010 and 2011, I find that claimant has not established total disability" by the pulmonary function study evidence. Decision and Order at 22.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered qualifying at-rest blood gas studies dated October 28, 2010 and February 17, 2012, and non-qualifying at-rest studies dated October 20, 2011, January 3, 2012, and January 19, 2015. Decision and Order at 22; Director's Exhibit 11; Claimant's Exhibits 3, 4; Employer's Exhibits 2, 7. She noted that the non-qualifying blood gas study performed on January 3, 2012, was performed at rest and after exercise. *Id*. The administrative law judge found that "[e]xercise testing is a better predictor of [c]laimant's ability to work in coal mine employment, and the more recent testing is more indicative of [c]laimant's current condition." *Id*. Accordingly, she gave more weight to the January 3, 2012 non-qualifying exercise blood gas study and the January 19, 2015 non-qualifying at-rest blood gas study, which is the most recent of record. *Id*. The administrative law judge therefore concluded that the blood gas studies of record are insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii).[7] *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the diagnoses of a totally disabling respiratory or pulmonary impairment made by Drs. Al-Khasawneh, Splan and Gallai. Decision and Order at 23-25; Director's Exhibit 11; Claimant's Exhibits 3, 4. Dr. Al-Khasawneh examined claimant on October 28, 2010, and stated that the non-qualifying pulmonary function study performed on that date showed "moderate obstruction without a reversible component," while the qualifying resting blood gas study was "severely abnormal." Director's Exhibit 11. Specifically citing the blood gas study results, Dr. Al-Khasawneh concluded that claimant "has a severe pulmonary impairment" and "does not retain [the] pulmonary capacity to work as a coal miner." *Id*.

Dr. Splan examined claimant on January 3, 2012 and administered a pulmonary function study and a blood gas study. Claimant's Exhibit 3. He determined that claimant's qualifying pre-bronchodilator pulmonary function study showed "moderately severe obstructive airways disease," and the non-qualifying, at-rest blood gas study results were consistent with mild hypoxia. *Id*. Dr. Splan stated, "[t]he impairment based upon [claimant's] pulmonary function test is thought to be moderately severe and based upon

[7] The administrative law judge found that claimant could not establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 22.

his degree of impairment of his lung function standing alone, he should not return to the mines." *Id*.

Dr. Gallai examined claimant on February 17, 2012 and determined that claimant's non-qualifying pulmonary function study and a qualifying blood gas study done at rest revealed a severe obstructive defect and severe hypoxia, respectively. Claimant's Exhibit 4. Dr. Gallai stated that claimant's obstructive impairment prevented him from performing his usual coal mine job as a surface mine foreman, explaining:

> At first glance, it does not appear that a for[e]man would have that physical of a position, but in the patient's description[,] masking out a road could be as short as 600 feet or as long as 1,500 feet. Climbing up into a Caterpillar D10 bulldozer 10 feet and because of the climbing[,] a great deal of physical exertion as well as walking up to 500 and 600 feet every other day. I would expect somebody even with moderate obstructive lung disease would have significant difficulty in any of these descriptions performing these duties.
>
> The [patient] does not have the pulmonary endurance to return to his former employment in the coal mining industry.

Id.

The administrative law judge found that the opinions of Drs. Al-Khasawneh, Splan and Gallai are reasoned and entitled to "significant weight" because the physicians "adequately explained why their diagnoses preclude [c]laimant from returning to work in the coal mining industry[.]" Decision and Order at 25. She gave "less probative weight" to the contrary opinions of Drs. Vuskovich, Jarboe and Rosenberg,[8] as Dr. Vuskovich focused solely on the objective data from Dr. Al-Khasawneh's examination of claimant, while Drs. Jarboe and Rosenberg failed to adequately explain why claimant is able to perform his usual coal mine job. *Id*. at 26. The administrative law judge therefore concluded that the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 26-27. Weighing the evidence as a whole, the administrative law judge stated:

[8] Dr. Vuskovich reviewed the pulmonary function study and the blood gas study obtained by Dr. Al-Khasawneh during his October 28, 2010 examination of claimant, while Drs. Jarboe and Rosenberg examined claimant and reviewed additional medical evidence. Director's Exhibit 14; Employer's Exhibits 4, 5, 7, 11, 14, 15. Each physician determined that claimant does not have a totally disabling respiratory or pulmonary impairment. *Id*.

> The objective testing in the form of pulmonary function tests and arterial blood gas studies produced both qualifying and non-qualifying results, and these tests are not sufficient to establish total disability. However, the medical opinion evidence is sufficient to establish total disability. The well-documented and well-reasoned medical opinion evidence establishes that [c]laimant lacks the respiratory or pulmonary capacity to return to his previous coal mine employment, and the contrary medical evidence does not rebut a finding of total disability under § 718.204(b).

Id. at 27.

Employer argues that the administrative law judge erred in finding that the diagnoses of a totally disabling impairment made by Drs. Al-Khasawneh, Splan and Gallai are documented and reasoned. Employer maintains that because claimant's experts relied on objective studies that the administrative law judge found do not accurately represent claimant's ability to perform his usual coal mine employment, the administrative law judge could not credit their opinions. In addition, employer asserts that remand is unnecessary, as even if the medical opinion evidence is sufficient to establish total disability, it is outweighed by the contrary probative evidence.

The employer's allegation of error regarding the administrative law judge's weighing of the medical opinions of Drs. Al-Khasawneh, Splan and Gallai has merit. Dr. Al-Khasawneh explicitly based his opinion on the October 28, 2010 blood gas study that produced qualifying values at rest. Director's Exhibit 11. Dr. Gallai observed that the qualifying at-rest blood gas study he obtained on February 17, 2012 revealed severe hypoxia. Claimant's Exhibit 4. As previously indicated, however, the administrative law judge found that the January 3, 2012 non-qualifying exercise blood gas study is entitled to greater weight than the qualifying, at-rest studies because "[e]xercise testing is a better predictor of [c]laimant's ability to work." Decision and Order at 22; Claimant's Exhibit 3. She also determined that the most recent blood gas study, which was performed on January 19, 2015 and produced non-qualifying values, is entitled to greater weight than any prior studies, as "the most recent testing is more indicative of [c]laimant's current condition." Decision and Order at 22; Employer's Exhibit 7. Based on the rationales that the administrative law judge provided for preferring the non-qualifying studies, she should have considered whether the credibility of the diagnoses of total disability made by Drs. Al-Khasawneh and Gallai is diminished by their reliance on earlier, at-rest blood gas studies.[9]

[9] Our dissenting colleague accurately notes that Dr. Gallai's diagnosis of a totally disabling obstructive impairment appears to be based on the pulmonary function study that he obtained on February 17, 2012. Slip op. at 14 n.18; Claimant's Exhibit 4. On remand,

The administrative law judge's crediting of the opinions of Drs. Splan and Gallai, reflects a similar omission. Dr. Splan relied on the qualifying pre-bronchodilator pulmonary function study dated January 3, 2012, while Dr. Gallai cited the non-qualifying February 17, 2012 pulmonary function study. When finding that these opinions are reasoned, the administrative law judge did not revisit her determination that the most recent non-qualifying pulmonary function study, dated January 19, 2015, was "more persuasive" than the earlier studies. Decision and Order at 25, 26-27. Thus, she did not address whether the physicians' reliance on earlier pulmonary function studies detracted from the probative value of their opinions, when the relevant inquiry is whether a claimant is disabled on the date of the hearing.[10] *See Freeman United Coal Mining Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 171 (7th Cir. 1990), *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622 (6th Cir. 1988).

By omitting consideration of her weighing of the pulmonary function studies and blood gas studies, the administrative law judge did not fully explain her determination that the opinions of Drs. Al-Khasawneh, Splan and Gallai are sufficient to establish total disability. Accordingly, her decision does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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however, if the administrative law judge discredits Dr. Gallai's diagnosis, she should address whether his determination that claimant's resting blood gas study revealed severe hypoxia is sufficient to establish total disability when considered with the rest of his report and the exertional requirements of claimant's usual coal mine employment. *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996).

[10] Contrary to our dissenting colleague's characterization, we do not hold that the administrative law judge gave "determinative weight" to the January 19, 2015 pulmonary function study. Slip op. at 14. Rather, we accurately state that she found the "recent non-qualifying test results," i.e., the January 19, 2015 pulmonary function study, "as well as the non-qualifying test results of 2010 and 2011" to be "more persuasive" than the sole qualifying pulmonary function study, dated January 3, 2012. Slip op. at 4, *quoting* Decision and Order at 22. The administrative law judge's use of the phrase "more persuasive" rather than "determinative weight" does not provide a basis for altering our holding that she failed to comply with the Administrative Procedure Act (APA), 5 U.S.C. §§500-591, as incorporated into the Act by 30 U.S.C. §932(a), when finding that claimant established total disability at 20 C.F.R. §718.204(b)(2).

[11] The APA provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material

We must therefore vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv). We must also vacate her findings that claimant established total disability under 20 C.F.R. §718.204(b)(2), based on a weighing of the evidence of record as a whole, and invoked the Section 411(c)(4) presumption.[12]

However, we reject employer's contention that remand is not required because the administrative law judge's determination that the pulmonary function and blood gas studies do not establish total disability precludes a finding that the medical opinion evidence establishes total disability. Under 20 C.F.R. §718.204(b)(iv),[13] non-qualifying test results alone do not prove the absence of a totally disabling impairment, and the fact that claimant did not demonstrate total disability by the pulmonary function study or blood gas study evidence does not preclude a finding of total disability based on the medical opinion

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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).

[12] Employer generally asserts that "the [administrative law judge] erred in concluding that the opinions of Dr[s]. Jarboe, Vuskovich and Rosenberg are [not] well-reasoned." Employer's Brief at 11. Because employer does not raise any specific allegations concerning the administrative law judge's weighing of their opinions, we affirm her finding that they are not well-reasoned and are entitled to less weight under 20 C.F.R. §718.204(b)(2)(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); Decision and Order at 26-27. To the extent that employer intended its assertion to also challenge the administrative law judge's finding that it failed to rebut the Section 411(c)(4) presumption, we affirm this finding in light of employer's failure to identify a specific error in the administrative law judge's consideration of the medical opinion evidence on rebuttal. *See Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); Decision and Order at 32-41.

[13] The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

evidence.[14] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997). We therefore remand this case to the administrative law judge to reconsider whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2).

On remand, the administrative law judge must first reconsider the medical opinions of Drs. Al-Khasawneh, Splan and Gallai under 20 C.F.R. §718.204(b)(2)(iv). She must begin by making a finding as to the exertional requirements of claimant's usual coal mine work for comparison to the physicians' assessments of claimant's physical limitations. *See Cornett*, 227 F.3d at 578; *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 218-19 (6th Cir. 1996). When weighing the physicians' opinions, the administrative law judge must address the explanations for the physicians' diagnoses, the documentation underlying their medical judgments, and the sophistication of, and bases for, their conclusions.[15] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). This analysis further requires

[14] We agree with our dissenting colleague that the administrative law judge can properly credit medical opinions diagnosing total disability that are based on non-qualifying objective studies and find that they outweigh the contrary probative evidence of record. The administrative law judge also has a duty to resolve conflicts in the evidence and set forth her findings, however, including the underlying rationale, in compliance with the APA. If she has fallen short, the proper action is to remand the case to her so that she can correct the deficiency, rather than attempt to provide what she has omitted. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). In this case, the administrative law judge failed to resolve a conflict that arose when she credited medical opinions diagnosing total disability that were based on older non-qualifying objective studies, after giving greater weight to the more recent non-qualifying objective studies, and to the non-qualifying exercise blood gas study dated January 3, 2012. Decision and Order at 22-25. While our dissenting colleague goes to great lengths explaining how he would reconcile this conflict by assigning various weight to each physician's reliance on these tests, a plain reading of the administrative law judge's decision reveals that she did not even generally interrelate the conflicting evidence from the different subsections in this case. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc) (If an administrative law judge finds that total disability has been established under one or more subsections, she must weigh the evidence supportive of total disability against the contrary probative evidence of record.).

[15] Regarding the respective qualifications of these physicians, the administrative law judge found that they are "all highly qualified pulmonary specialists with Board-certification in Internal Medicine and Pulmonary Disease." Decision and Order at 24.

that the administrative law judge specifically address her weighing of the objective tests on which the physicians relied and determine whether they provide credible documentation for diagnoses of total respiratory or pulmonary disability. If the administrative law judge finds that claimant has established total disability under 20 C.F.R. §718.204(b)(2)(iv), she must weigh all of the evidence together, and reach a conclusion as to whether claimant has a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock*, 9 BLR at 1-195. The administrative law judge is instructed to set forth her findings on remand in detail, including the underlying rationale, as required by the APA.[16] *See Wojtowicz*, 12 BLR at 1-165.

[16] Because we have affirmed, as unchallenged on appeal, the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption, if the administrative law judge determines on remand that claimant has established total disability at 20 C.F.R. §718.204(b)(2) and invoked the Section 411(c)(4) presumption, she can reinstate the award of benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. Because the administrative law judge's analysis of the medical opinions is consistent with the law and supported by substantial evidence, I would affirm her finding that claimant established total disability and thus invoked the Section 411(c)(4) presumption. Because employer has not identified any error in her finding that it did not rebut the presumption, claimant is entitled to benefits.

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. 20 C.F.R. §718.204(b)(1). A miner's total disability can be established by pulmonary function studies, 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). If an administrative law judge finds that total disability has been

established under one or more subsections, she must weigh the evidence supportive of total disability against the contrary probative evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc).

It is undisputed that the pulmonary function studies and blood gas studies, on balance, are not qualifying for total disability. Employer also identifies no error in the administrative law judge's rejection of the opinions of Drs. Jarboe, Vuskovich and Rosenberg that claimant is not totally disabled. *See* slip op. at 8 n.12. Therefore, the only remaining questions relevant to this appeal are: (1) whether the administrative law judge permissibly found that claimant's physicians credibly diagnosed a totally disabling respiratory impairment; and if so, (2) whether those medical opinions are undermined by the non-qualifying pulmonary function studies and blood gas studies.

A medical opinion can assist claimant in establishing total disability if the physician exercises "reasoned medical judgment," bases his conclusions on "medically acceptable clinical and laboratory diagnostic techniques," and ultimately concludes that the miner's respiratory condition prevents him from engaging in his usual coal mine work. 20 C.F.R. §718.204(b)(2)(iv). "The determination as to whether [a physician's] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the factfinder to decide." *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). "To make this determination, the [administrative law judge] must 'examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based.'" *Greene v. King James Coal Min., Inc.*, 575 F.3d 628, 635 (6th Cir. 2009), *quoting Rowe*, 710 F.2d at 255.

There can be little dispute that the medical opinions of Drs. Splan and Gallai are sufficiently documented and reasoned, such that the administrative law judge did not err in crediting them.[17] Each physician based his opinion on medically acceptable diagnostic techniques and specifically explained why the results of claimant's examination and testing render him unable, from a respiratory standpoint, to perform his usual coal mine work.

Dr. Splan examined claimant on January 3, 2012 and administered a pulmonary function study and a blood gas study. Claimant's Exhibit 3. He determined that claimant's pre-bronchodilator pulmonary function study was qualifying for total disability and

[17] As part of the Department of Labor-sponsored complete pulmonary evaluation, Dr. Al-Khasawneh also diagnosed claimant as totally disabled based on a qualifying blood gas study performed at-rest that revealed a "severe pulmonary impairment." Director's Exhibit 11. For the reasons outlined below, *see* slip op. at 15 n.19, it is unnecessary for the Board to consider whether the administrative law judge erred in crediting his opinion.

showed "moderately severe obstructive airways disease," while the non-qualifying, at-rest blood gas study was consistent with mild hypoxia. *Id*. Dr. Splan stated, "[t]he impairment based upon [claimant's] pulmonary function test is thought to be moderately severe and based upon his degree of impairment of his lung function standing alone, he should not return to the mines." *Id*.

Dr. Gallai examined claimant on February 17, 2012 and determined that claimant's non-qualifying pulmonary function study revealed a severe obstructive defect that prevented him from performing his usual coal mine job as a surface mine foreman, explaining:

> At first glance, it does not appear that a for[e]man would have that physical of a position, but in the patient's description[,] masking out a road could be as short as 600 feet or as long as 1,500 feet. Climbing up into a Caterpillar D10 bulldozer 10 feet and because of the climbing[,] a great deal of physical exertion as well as walking up to 500 and 600 feet every other day. I would expect somebody even with moderate obstructive lung disease would have significant difficulty in any of these descriptions performing these duties. The [patient] does not have the pulmonary endurance to return to his former employment in the coal mining industry.

Claimant's Exhibit 4.

The administrative law judge found that the opinions of Drs. Splan and Gallai are reasoned and entitled to "significant weight" because the physicians "adequately explained why their diagnoses preclude [c]laimant from returning to work in the coal mining industry[.]" Decision and Order at 25. Because this finding is supported by substantial evidence, and the remaining medical opinions diagnosing claimant as not totally disabled are not credible, I would affirm the finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The final question, then, is whether the administrative law judge's finding that the pulmonary function studies are non-qualifying for total disability necessarily undermines the credibility of Drs. Splan and Gallai. I would hold that it does not.

It is well-established that a medical opinion can support a finding of total disability even when the administrative law judge has determined that the objective testing of record, as a whole, does not. 20 C.F.R. §718.204(b)(2)(iv) ("Where total disability cannot be shown" based on pulmonary function studies and blood gas studies, "total disability may nevertheless be found" based on a physician's "reasoned medical judgment."). Thus, the

mere fact that Dr. Splan relied on a qualifying pulmonary function study that was contrary to the weight of such evidence at 20 C.F.R. §718.204(b)(2)(i) does not render his opinion inherently less credible. Moreover, Dr. Gallai relied on objective testing that was *consistent with* the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), as he diagnosed a totally disabling impairment based on a pulmonary function study that was similarly non-qualifying.[18] Claimant's Exhibit 4; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578 (6th Cir. 2000) ("[E]ven a 'mild' respiratory impairment may preclude the performance of the miner's usual duties[.]").

The majority construes the administrative law judge's Decision and Order as including a finding that the non-qualifying January 19, 2015 pulmonary function study is the most accurate reflection of claimant's respiratory condition, thus undermining Dr. Splan's and Dr. Gallai's reliance on earlier studies. *See* slip op. at 7-8. I discern no such finding. The administrative law judge noted that only the January 3, 2012 pre-bronchodilator study was qualifying for total disability, while the "post-bronchodilator results on that same day are non-qualifying and the results of the tests performed one month later and four years later are non-qualifying." Decision and Order at 22. She therefore determined that the preponderance of the pulmonary function studies does not establish total disability, "[b]ased on the more persuasive recent non-qualifying test results as well as the non-qualifying test results of 2010 and 2011." *Id*. Because the administrative law judge did not give determinative weight to the January 19, 2015 study or render a finding that it was the most accurate reflection of claimant's condition, I disagree that remand is required for consideration of whether that study undermines the opinions of Drs. Splan and Gallai.[19] *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Because the administrative law judge permissibly credited the opinions of Drs. Splan and Gallai that claimant is totally disabled, and rejected the contrary opinions of Drs.

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[18] As noted above, Dr. Gallai opined that claimant's February 17, 2012 pulmonary function study revealed a severe obstructive defect, and "even [someone] with moderate obstructive lung disease would have significant difficulty" performing claimant's usual coal mine work. Claimant's Exhibit 4.

[19] In contrast, when weighing the blood gas studies, the administrative law judge specifically found that "the most recent [blood gas study performed on January 19, 2015] is more indicative of [c]laimant's current condition." Decision and Order at 22. This statement regarding the blood gas studies does not undermine the opinions of Drs. Splan and Gallai, however, because they based their conclusions on pulmonary function studies, which measure a different type of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR

Jarboe, Vuskovich, and Rosenberg, I would affirm her finding that claimant is totally disabled at 20 C.F.R. §718.204(b)(2), and thus invoked the Section 411(c)(4) presumption. Because employer has not identified any error in the administrative law judge's finding that it did not rebut the presumption, *see* slip op. at 8 n.12, I would affirm the award of benefits.

GREG J. BUZZARD
Administrative Appeals Judge

1-797, 1-798 (1984). Although Dr. Al-Khasawneh relied on an earlier blood gas study to diagnose total disability, it is not necessary for the Board to consider whether the existence of a more recent, "more indicative" blood gas study undermines his conclusions. Regardless of whether Dr. Al-Khasawneh's opinion is credible, the opinions of Drs. Splan and Gallai constitute substantial evidence in support of the administrative law judge's finding that claimant established total disability. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Because all contrary opinions of record diagnosing claimant as not totally disabled were permissibly discredited by the administrative law judge, employer has not explained how a reevaluation of Dr. Al-Khasawneh's opinion on total disability would make any difference in the administrative law judge's ultimate finding. *Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").