**U.S. Department of Labor**

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

BRB No. 17-0524 BLA

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| MARK S. HILTON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| C & N MINING, LLC | ) | |
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| and | ) | |
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| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | DATE ISSUED: 08/15/2018 |
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| Employer/Carrier-Petitioners | ) | |
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| 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

Before: BOGGS, BUZZARD, and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05125) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on December 20, 2012.[1]

The administrative law judge credited claimant with twenty-eight years of underground coal mine employment and found that the new evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[2] She also found total disability established based on the old and new evidence together, and invoked the rebuttable presumption that claimant's total disability is due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

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[1] This is claimant's second claim for benefits. His prior claim, filed on June 18, 2009, was denied on February 5, 2010 by the district director because he did not establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Claimant took no further action on that claim.

[2] Where 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).

[3] Under Section 411(c)(4) of the Act, a claimant is entitled to a presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in underground mines, 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.

On appeal, employer challenges the administrative law judge's finding that claimant is totally disabled. Alternatively, employer contends that the administrative law judge erred in her determination of the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Total Disability**

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. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's total disability is established by: qualifying[6] pulmonary function studies or arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

The administrative law judge found that the new blood gas studies establish total disability at 20 C.F.R. §718.204(b)(2)(ii),[7] and the new medical opinions establish total

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has twenty-eight years of underground coal mine employment. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). We further affirm, as unchallenged, her finding that employer did not rebut the Section 411(c)(4) presumption. *See Skrack*, 6 BLR at 1-711.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 4.

[6] A "qualifying" pulmonary function study or arterial 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).

[7] The administrative law judge considered five new blood gas studies conducted on January 31, 2013, April 18, 2013, December 18, 2014, May 16, 2016, and June 14, 2016. Decision and Order at 12, 22. The January 31, 2013 blood gas study conducted by Dr.

disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 22, 24. She further found total disability established based on the weight of the old and new evidence, overall, at 20 C.F.R. §718.204(b)(2).[8] Decision and Order at 24.

Employer challenges only the administrative law judge's determination that the medical opinions support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Raj, Shamma-Othman, Forehand, Rosenberg, and Jarboe. Decision and Order at 15-21, 23-24. While Drs. Raj, Shamma-Othman, and Forehand opined that claimant suffers from a totally disabling pulmonary impairment,[9] Drs. Rosenberg and Jarboe opined that

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Forehand produced non-qualifying values at rest and qualifying values with exercise. Director's Exhibit 19A. The April 18, 2013 study conducted by Dr. Rosenberg, the December 18, 2014 study conducted by Dr. Jarboe, and the May 16, 2016 study conducted by Dr. Raj produced non-qualifying results both at rest and with exercise. Director's Exhibit 22; Claimant's Exhibit 2; Employer's Exhibit 1. The most recent blood gas study conducted by Dr. Shamma-Othman on June 14, 2016 produced non-qualifying values at rest but qualifying values with exercise. Claimant's Exhibit 3. The administrative law judge accorded the greatest weight to the exercise study results as a better predictor of claimant's ability to work in the mines and noted that, in addition to the 2013 qualifying exercise study, the most recent studies conducted in June 2016 and May 2016 produced qualifying and near-qualifying exercise results, respectively. Decision and Order at 22. The administrative law judge therefore found that the weight of the blood gas study evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 22. Because employer does not challenge this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[8] The administrative law judge found that the new pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that 20 C.F.R. §718.204(b)(2)(iii) is inapplicable, as the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 9-10, 22.

[9] Dr. Raj opined that claimant does not retain the pulmonary capacity to perform his usual coal mine work due to his reduced diffusing capacity and his hypoxemia with exercise. Claimant's Exhibit 2; Employer's Exhibit 7. Dr. Shamma-Othman opined that claimant is totally disabled from a pulmonary standpoint due to his exercise-induced hypoxemia, which would prevent him from returning to his previous coal mine employment. Claimant's Exhibit 3. Dr. Forehand diagnosed claimant with exercise-induced arterial hypoxemia, and determined that claimant has insufficient residual gas

claimant is not disabled from a pulmonary standpoint.[10] The administrative law judge also considered claimant's testimony regarding the exertional requirements of his usual coal mine work. Decision and Order at 4. Claimant stated that during his mining career he ran shuttle cars, worked coal drills, and ran a pinner, but during his last year in the mines he was a continuous miner operator. Decision and Order at 4; Hearing Transcript at 14-15, 19. He was required to move cables weighing more than fifty pounds every time he moved the miner, which was frequently during his twelve-hour shift.[11] Decision and Order at 4; Hearing Transcript at 15.

Considering the conflicting medical opinion evidence, the administrative law judge credited the opinions of Drs. Raj, Shamma-Othman, and Forehand that claimant is totally disabled because their opinions are reasoned and supported by the blood gas studies and because they accounted for the exertional requirements of claimant's usual coal mine work. Decision and Order at 24. She discounted the contrary opinions of Drs. Rosenberg and Jarboe, finding their opinions to be inadequately explained. *Id*. at 23-24. She therefore found that the weight of the medical opinion evidence supports a finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that Dr. Raj's opinion is not well-reasoned because he testified that he did not know how much work was involved in some of the duties claimant performed, such as shoveling belts, rock dusting and setting timbers.[12] Employer's Brief

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exchange capacity to perform his usual coal mine work. Director's Exhibit 19A; Employer's Exhibits 2, 3.

[10] Dr. Rosenberg opined that claimant is not disabled from a pulmonary perspective based on normal gas exchange and diffusing capacity measurements. Director's Exhibit 22; Employer's Exhibits 4, 6. Dr. Jarboe also opined that claimant retains the ventilatory and gas exchange capacity to perform his usual coal mine work or work of similar physical demand in a dust-free environment. Employer's Exhibits 1, 5.

[11] Claimant testified that the continuous miner was operated by a remote control that hung around his neck and weighed thirty pounds. Hearing Transcript at 19. He moved the cables by hand and without assistance, and had to do so when the miner was backing up. *Id.* at 15, 19-20.

[12] Dr. Raj testified that claimant's last job was a continuous miner operator and he shoveled belts, rock-dusted by hand and machine, set timbers, hung curtains for ventilation, and built brattices. Employer's Exhibit 7 at 7. He noted that "in this job [claimant] also has to lift like 50 to 75 pounds at any time during the work day." *Id.*

at 7-8. Employer has taken Dr. Raj's testimony out of context. While Dr. Raj stated that he did not know what was required for some of claimant's duties and, therefore, could not say whether claimant could perform them, he specifically stated that he understands "how much work" is required to lift fifty to seventy-five pounds. Employer's Exhibit 7 at 20-21. As the administrative law judge accurately noted, Dr. Raj further testified that claimant's hypoxemia made it "impossible" for him to lift fifty to seventy-five pounds even one time in the course of a shift, and that if operating a continuous miner required him to drag a cable, "he cannot do that job." Employer's Exhibit 7 at 28-29; *see* Decision and Order at 20-21, 24. Finally, Dr. Raj emphasized that "any kind of physical activity that he has to move or he has to drag something, he has to lift something, he cannot do that" and, therefore, Dr. Raj opined that claimant could not meet the exertional rigors of his last coal mine job as a continuous miner operator. Employer's Exhibit 7 at 29, 32-33. We therefore reject employer's argument that the administrative law judge erred in finding that Dr. Raj's opinion is based on an accurate understanding of the exertional requirements of claimant's usual coal mine work.[13]

Nor did the administrative law judge err in her consideration of Dr. Shamma-Othman's opinion. While Dr. Shamma-Othman did not demonstrate an understanding of the exertional requirements of some of claimant's duties, such as setting timbers or hanging curtains, he correctly understood that claimant's job required "50-75 pounds lifting at any given time during the work day." Claimant's Exhibit 3 at 1. Thus, contrary to employer's argument, the administrative law judge rationally concluded that Dr. Shamma-Othman's opinion that claimant's hypoxemia "would prevent him from performing the exertional

[13] There is also no merit to employer's argument that Dr. Raj mischaracterized his May 16, 2016 blood gas study results as meeting federal disability criteria. Employer's Brief at 7. Employer mistakenly cites to Claimant's Exhibit 3, the opinion of Dr. Shamma-Othman, who accurately stated that the values from his own blood gas testing "meet federal black lung disability standards for total disability." Claimant's Exhibit 3 at 3. In contrast, Dr. Raj stated in his report that claimant's resting blood gas values are "abnormal" and that his exercise study showed hypoxemia. Claimant's Exhibit 2 at 3. At his deposition, Dr. Raj testified that claimant's blood gas study does not meet "the federal black lung criteria" for total disability, but nevertheless "definitely" shows hypoxemia. Employer's Exhibit 7 at 15-17. Further, to the extent employer argues that Dr. Raj's opinion is insufficient to support a finding of total disability because it is based on a non-qualifying blood gas study, it is rejected. The Sixth Circuit has held that a doctor can offer a reasoned medical opinion diagnosing total disability even though the objective testing is non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Estep v. Director, OWCP*, 7 BLR 1-904, 1-905 (1985).

requirements of his last coal mine employment" was based on an adequate understanding of those requirements. Claimant's Exhibit 3 at 3; *see* Decision and Order at 24.

Finding that Drs. Raj and Shamma-Othman convincingly explained how claimant's objective testing showed that he is unable to perform his usual coal mine employment, the administrative law judge permissibly concluded that their opinions are well-reasoned. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 24. As employer raises no further arguments regarding the credibility of their opinions, we affirm the administrative law judge's determination that the opinions of Drs. Raj and Shamma-Othman support a finding of total disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Cornett v. Benham Coal Co.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129.

Employer next contends that the administrative law judge erred in crediting Dr. Forehand's opinion because the administrative law judge "[did] not even mention" Dr. Forehand's deposition wherein, employer contends, Dr. Forehand testified that claimant is not totally disabled based on the results of the blood gas studies conducted by Drs. Rosenberg and Jarboe.[14] Employer's Brief at 6-7. Contrary to employer's contention, the administrative law judge reviewed Dr. Forehand's deposition testimony as well as his medical reports in crediting his opinion as well-reasoned and documented.[15] Decision and

[14] Employer also argues that it was error for the administrative law judge to consider Employer's Exhibit 2, Dr. Forehand's May 6, 2016 supplemental report, which employer asserts was "excluded" from evidence. Employer's Brief at 6-7. Contrary to employer's argument, the administrative law judge admitted Employer's Exhibit 2 into evidence. Decision and Order at 2; Order dated November 23, 2016. Moreover, because the contents of Employer's Exhibit 2, i.e., Dr. Forehand's discussion of his blood gas study results and the results of the studies conducted by Drs. Rosenberg and Jarboe, were discussed at length in Dr. Forehand's deposition, employer has not explained how the administrative law judge's summarizing of the medical evidence contained in Employer's Exhibit 2 adversely affected her evaluation of Dr. Forehand's opinion. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Exhibit 3 at 14-29.

[15] Dr. Forehand examined claimant on January 31, 2013, and opined that claimant has insufficient residual gas exchange capacity to perform his usual coal mining work based the results of his exercise blood gas study. Director's Exhibit 19A. On May 6, 2016, Dr. Forehand provided a supplemental report in which he reviewed the blood gas studies

Order at 16-18; Director's Exhibit 19A; Employer's Exhibits 2, 3. The administrative law judge specifically noted that although Dr. Forehand acknowledged that the blood gas studies conducted by Drs. Rosenberg and Jarboe at rest and with exercise did not yield qualifying results, he stated that he could not determine claimant's capacity for work based on those studies because he did not know the exercise protocol they used. Decision and Order at 18; Employer's Exhibit 3 at 19. He further testified, however, that had those studies been conducted as his was, he believed they would have yielded the same results as his testing. Decision and Order at 18; Employer's Exhibit 3 at 22. Thus, contrary to employer's characterization, Dr. Forehand stated that he had no doubts that his own test was valid and clearly showed a level of oxygen desaturation during exercise consistent with total disability.[16] Employer's Exhibit 3 at 18.

Moreover, the administrative law judge permissibly found that Dr. Forehand's opinion is reasoned and documented because it is "consistent with the evidence available to him" including claimant's relevant histories, coal mine employment duties, physical examination findings, and the qualifying blood gas study results he obtained. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 16, 24; Director's Exhibit 19A. As it is supported by substantial evidence, we affirm the administrative law judge's determination to credit Dr. Forehand's opinion that claimant is

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conducted by Drs. Rosenberg and Jarboe and stated that they did not cause him to question his own results. Employer's Exhibit 2. On June 13, 2016, Dr. Forehand testified regarding his blood gas study results and those obtained by Drs. Rosenberg and Jarboe. He stated that he did not have a valid basis for making a comparison, as he believed that the doctors' exercise testing was not comparable to his and was not conducted in accordance with Department of Labor requirements. Employer's Exhibit 3 at 18-27.

[16] We reject employer's assertion that "Dr. Forehand acknowledged that his blood gas study was not drawn during exercise as the [c]laimant was exercising on an interior fire escape and the arterial draw must be completed after the [c]laimant reaches the bottom." Employer's Brief at 6, *citing* Employer's Exhibit 3 at 25-26. Dr. Forehand explained that he used an indwelling arterial catheter "so that the exercise blood gas can be drawn during exercise" because within twenty seconds after stopping exercise the PO2 can return to normal. Employer's Exhibit 3 at 17, 24; *see* Employer's Exhibit 2. While Dr. Forehand stated that his exercise blood gas sample was drawn "as soon as [claimant] came down the steps," he clarified that it was drawn while claimant was "taking that last step" within "one second, two seconds at most" of his reaching the bottom and that he was "still in a state of exercise when that exercise sample was drawn." Employer's Exhibit 3 at 25-27. In his May 6, 2016 report, Dr. Forehand similarly stated that claimant's exercise blood gas sample was drawn "[d]uring his exercise" by means of an arterial catheter. Employer's Exhibit 2.

totally disabled. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 24.

Because employer raises no other arguments with respect to the medical opinion evidence, we affirm the administrative law judge's finding that claimant established total disability based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv).[17] Similarly, we further affirm the administrative law judge's conclusion that the new evidence, when weighed together, establishes total disability pursuant to 20 C.F.R. §718.204(b)(2) and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc); Decision and Order at 25. Moreover, we consequently affirm the administrative law judge's finding that claimant established total disability based on the old and new evidence together. Decision and Order at 27.

Because it is unchallenged that claimant established twenty-eight years of underground coal mine employment, and we have affirmed the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 25. Since claimant invoked the presumption, and employer does not contest the administrative law judge's finding that it did not rebut the presumption, claimant has established his entitlement to benefits.

**Commencement Date for Benefits**

Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If that date is not ascertainable from all the relevant evidence of record, benefits will commence with the month in which the claim was filed, unless credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32,2-36 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, no benefits may be paid for any time period prior to the

[17] We affirm, as unchallenged on appeal, the administrative law judge's finding that the opinions of Drs. Rosenberg and Jarboe are entitled to little weight regarding the issue of total respiratory disability. *See Skrack*, 6 BLR at 1-711; Decision and Order at 23.

date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge observed that by the time Dr. Forehand examined claimant on January 31, 2013, "he was already totally disabled." Decision and Order at 27. She further found that the evidence does not establish the month in which claimant first became totally disabled due to pneumoconiosis and therefore concluded that claimant is entitled to benefits commencing in December 2012, the month in which he filed his subsequent claim. *See* 20 C.F.R. §725.503(b).

Employer asserts that the administrative law judge erred in awarding benefits as of December 2012 because "it is clear that the administrative law judge has based her determination that [c]laimant has a totally disabling pulmonary or respiratory impairment on . . . the exercise study performed by Dr. [Shamma-]Othman in June of 2016" given that Dr. Raj's blood gas study, conducted one month prior, yielded non-qualifying values. Employer's Brief at 9. Contrary to employer's argument, the administrative law judge determined that total disability was established by the January 31, 2013 and June 14, 2016 qualifying exercise blood gas studies and the medical opinions of Drs. Forehand, Raj, and Shamma-Othman. Decision and Order at 22, 24.

In addition, the fact that claimant had non-qualifying blood gas results before June 2016, does not, in and of itself, establish that he was not totally disabled at that time. *See* 20 C.F.R. §718.204(b)(2)(iv) ("total disability may nevertheless be found if a physician exercising reasoned medical judgement . . . concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in [coal mine] employment"). Here, contrary to employer's argument, the administrative law judge permissibly credited Dr. Raj's opinion that claimant is totally disabled based on the May 16, 2016 blood gas study. Decision and Order at 24. As employer does not raise any other contentions of error with respect to the administrative law judge's determination of the date for commencement of benefits, we affirm the administrative law judge's determination that claimant is entitled to benefits commencing December 2012, the month in which he filed this subsequent claim. 20 C.F.R. §§725.309(c)(6), 725.503(b); *see Lykins*, 12 BLR at 1-182.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge