U.S. Department of Labor

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

BRB Nos. 15-0081 BLA
and 15-0081 BLA-A

STANLEY D. STEWART	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
PERFORMANCE COAL COMPANY	)	DATE ISSUED: 12/23/2015
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Mary Jane Brown (Bucci Bailey & Javins LC), Summersville, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits (2013-BLA-5426) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed on April 5, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with at least fifteen years of underground coal mine employment,[1] and found that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Because the administrative law judge determined that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] Additionally, the administrative law judge determined that while claimant has a respiratory impairment due to clinical and legal pneumoconiosis, because his impairment is not totally disabling, claimant failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge's Decision and Order does not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), as he failed to address Dr. Cohen's disability opinion and resolve the conflict in the evidence as to whether claimant is totally disabled from his usual coal mine employment, based on the results of his arterial blood gas studies. Claimant also specifically challenges the administrative law judge's finding as to the exertional requirements of his usual coal mine work. Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, challenging the administrative law judge's finding that claimant established the existence of legal pneumoconiosis and alleging error with the weight accorded the medical opinions regarding the cause of claimant's respiratory impairment. The Director,

[1] Claimant testified that he worked thirty-four and one-half years in underground coal mine employment. Hearing Transcript at 10.

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

Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. TOTAL DISABILITY

The regulations provide that a miner shall 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. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability can be established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R. Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) when the miner has pneumoconiosis, evidence showing that the miner suffers from cor pulmonale with right-sided congestive heart failure; or 4) when total disability is not established under the preceding subsections, the opinion of a physician who, exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. 20 C.F.R. §718.204(b)(2)(i)-(iv).

A. The Arterial Blood Gas Studies

Pursuant to 20 C.F.R. §718.204(b)(2)(ii),[5] the administrative law judge determined that the three arterial blood gas studies of record, obtained by Dr. Rasmussen on May 22,

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment and that he has clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[5] The administrative law judge determined that the pulmonary function studies were non-qualifying for total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and that claimant is unable to establish total disability under 20 C.F.R. §718.204(b)(2)(iii),

2012 and July 8, 2013, and by Dr. Zaldivar on February 6, 2013, were non-qualifying for total disability. Decision and Order at 8-9; Director's Exhibit 13; Claimant's Exhibit 3; Employer's Exhibit 1. Claimant argues that the administrative law judge erred in merely reciting the results of the arterial blood gas study evidence and that he did not properly weigh that evidence. Claimant states that the arterial blood gas study evidence "consisted of more than mere numerical test results," and the qualifying nature of this evidence was more fully addressed by the medical opinion evidence. Claimant's Brief at 21.

Contrary to claimant's argument, the administrative law judge considered Dr. Rasmussen's opinion that "the results of [the May 22, 2012] exercise [arterial blood gas study] came within the margin of error for [arterial blood gas studies] . . . and thus may indicate a 'qualifying' value'" for total disability. Decision and Order at 24. The administrative law judge, however, properly found that "the margin of error plays no role" under 20 C.F.R. §718.204(b)(2)(ii), because the arterial blood gas study "tables and the regulations make no such allowance, and rounding up to a qualifying value is impermissible." *Id*. at 26 n. 41; *see Tucker v. Director, OWCP*, 10 BLR 1-35, 1-39-41 (1987) (interpreting Appendix C of 20 C.F.R. Part 718 as precluding both "rounding up" and "rounding down"). Therefore, we affirm the administrative law judge's finding that, because the arterial blood gas study evidence is non-qualifying under the regulatory criteria, claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

B. The Medical Opinion Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant last worked as a continuous miner operator and summarized claimant's testimony as to the nature and frequency of the tasks he was required to perform in that job. Decision and Order at 5-6. The administrative law judge took judicial notice of the 4th edition of the Department of Labor's (DOL) *Dictionary of Occupational Titles* (DOT) and its descriptions of the various degrees of labor in Appendix C, IV.[6] *Id*. Comparing

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because there is no evidence that he suffers from cor pulmonale with right-sided congestive heart failure.

[6] Claimant asserts that the administrative law judge erred in taking judicial notice of the *Dictionary of Occupational Titles* (DOT) 4th ed. without giving prior notice to the parties. We disagree. Pursuant to 29 C.F.R. §18.45, an administrative law judge is granted discretion to take judicial notice "of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing *or by reference in the administrative law judge's decision*, of the matters so noticed, and shall be given

claimant's testimony to the DOT's definitions of "heavy work" and "very heavy work," the administrative law judge found that claimant's usual coal mine work met the definition of "heavy work." *Id*.

The administrative law judge next considered whether the medical opinions of Drs. Rasmussen, Cohen, Zaldivar and Castle were sufficient to establish that claimant was unable to perform the exertional requirements of his coal mine job. Decision and Order at 24-26. Drs. Rasmussen and Cohen opined that claimant is totally disabled based on the results of Dr. Rasmussen's exercise arterial blood gas studies. Director's Exhibit 13; Claimant's Exhibits 3, 4, 6. In contrast, Drs. Zaldivar and Castle opined that claimant is not totally disabled and asserted that Dr. Rasmussen's testing was invalid because he exercised claimant beyond what was necessary to conduct the test. Employer's Exhibits 1-4.

The administrative law judge found that "claimant's symptoms, as corroborated by Drs. Rasmussen and Cohen, render him unable to exert himself without shortness of breath" and he concluded that claimant established a "prima facie case that he is incapable of performing his prior coal mine employment."[7] Decision and Order at 24-25.

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adequate opportunity to show the contrary." 29 C.F.R. §18.45 (emphasis added); *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9 (1978). In this case, the administrative law judge acted within his discretion when he took judicial notice of the DOT in his Decision and Order. *See Maddaleni*, 14 BLR at 1-139; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); Decision and Order at 5-6. As required by 29 C.F.R. §18.45, the administrative law judge specifically advised the parties that they had "25 days from the date of the issuance of this Decision to contest taking notice" of the DOT. Decision and Order at 5 n. 12. Because the parties were given adequate opportunity to contest the administrative law judge's reliance on the DOT, we reject claimant's assertion of error.

[7] In summarizing the applicable law on the issue of total disability, the administrative law judge stated:

> Once it is demonstrated that the miner is unable to perform his usual coal mine work[,] a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. §718.204(b)(2).

The administrative law judge found that while "it may be asserted that Dr. Zaldivar's exercise [arterial blood gas study] was sub-maximal it is not proven to be invalid." Decision and Order at 25 (internal quotations omitted). The administrative law judge concluded:

> [Employer] has rebutted the prima facie showing of a total respiratory disability. It is clear that [claimant] was very fit prior to 2012 and that some impairment developed. However, both sets of objective testing are non-qualifying . . . . As Dr. Castle credibly opined, the margin of error plays no role here, contrary to what I see as Dr. Rasmussen's stretch to support his disability opinion. As [employer's] physicians both pointed out, Dr. Rasmussen exercised him to an extraordinary degree, i.e., 90 [percent] of his heart rate, exceeding the 85 [percent] target heart rate. In fact, both were astounded. [Dr. Zaldivar] further noted that the [American Medical Association (AMA)] says if one can perform 25 ml per kg per minute oxygen consumption they can do heavy labor; here the miner did 31 ml per kg per minute. Moreover, Dr. Rasmussen found the miner unable to perform "very heavy" labor and I have found his work only required "heavy" labor.

Id. at 26. Thus, the administrative law judge found that claimant's evidence was insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*.

1. Exertional Requirements

Claimant argues that the administrative law judge erred in finding that the exertional requirements of his usual coal mine work as a continuous miner operator

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Decision and Order at 24, *citing Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988). The administrative law judge's statement is not accurate, as claimant bears the burden of proof of establishing, *based on the evidence as a whole*, that he is totally disabled from performing his usual coal mine work. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994) (emphasis added); 20 C.F.R. §§718.204(b)(1)(i), (ii); 718.305(b)(1)(iii); 725.103. As explained *infra*, the administrative law judge determined that claimant did not meet his burden in this case.

constituted "heavy work," and not "very heavy work," under the DOT definitions.[8] Claimant's Brief at 22-28. We agree.

The DOT defines "heavy work" as "[e]xerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects" with physical demand requirements "in excess of those for [m]edium [w]ork." Employment and Training Administration, U.S. Dept. of Labor, *Dictionary of Occupational Titles*, Vol. II, Appendix C (4th ed. 1991). It defines "very heavy work" as "[e]xerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects" with physical demand requirements that "are in excess of those for [h]eavy [w]ork." *Id*. Considering these definitions in conjunction with claimant's hearing testimony,[9] the administrative law judge stated:

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[8] Claimant points to, as relevant evidence, his hearing testimony wherein he stated that he was required to (1) hang curtain dozens of times during each shift, and that when wet with water or mud, the curtain could weigh between 40 and 100 pounds; (2) set between 5 and 100 timbers during each shift, which were 6x6 inch blocks of wood measuring twelve feet long and weighing between 50 and 100 pounds each; (3) lift and drag the miner cable dozens of times during each shift, which itself measured three inches in diameter and contained water line, and might weigh between 50 and 100 pounds; (4) build stoppings once or twice during each shift, which was a process that required lifting and stacking 25 to 30-pound solid cinder blocks, and which could require lifting and stacking as many as 200 to 400 blocks for each stopping, depending on the length and height of the opening being sealed; (5) occasionally build cribs, lifting and stacking as many as 30 to 50 crib blocks weighing 25 to 30 pounds each; (6) use sledgehammers to break up fallen rocks weighing from 50 to 500 pounds; (7) drag water pumps which weighed from 100 to 300 pounds; (8) load and unload boxes of roof bolts, plates and glue, and lift and carry bags of rock dust weighing 50 pounds each; and (9) perform all of these requirements, while wearing and carrying on his person, in each shift, tools and equipment weighing approximately 40 pounds. *See* Claimant's Brief at 3-4.

[9] The administrative law judge also noted that claimant partially completed a "[f]orm CM-913 dealing with the rigors of his work" and that he provided answers to employer's interrogatories indicating that "he pulled heavy cable, lifted and carried 50 pound bags of rock dust, hung curtain, set bits and 50-lb timbers, built cribs, set 50 lb. pumps, among other duties" and "would lift and carry 50-100 lbs. up to 50-100 feet as needed, sit two hours and stand eight hours per day." Decision and Order at 5 n. 12 (internal citations omitted).

> The claimant, as part of his duties, was required to operate the miner remotely between four and eight hours a day during his ten hour shift but also *intermittently* hang curtain weighing 40-100 pounds, "dozens of times" during each shift. [Hearing Transcript at 16, 25]. He was also *occasionally* required to build cribs, lift and stack as many as 30-50 crib blocks weighing 25-30 pounds each, build stoppings, lift and drag 50-100 pound cable, break rock with a sledge hammer, load and unload roof bolts, drag water pumps, lift and carry 50-pound bags of rock dust, carry 40 pounds of personal equipment, and set 50-100 pound timbers up to between fifty and 100 times per shift. [Hearing Transcript at 17-25]. Some of those tasks were perform[ed] as part of a crew. Hanging curtain took about 5-20 minutes and he would handle the cable at the same time. [Hearing Transcript at 23, 32]. . . . Moreover, he "*regularly*" performed many of those duties as opposed to "*occasionally*."

Decision and Order at 5-6 (emphasis added); *see* Hearing Transcript at 13-25.

Claimant correctly asserts that the administrative law judge's findings are "internally inconsistent." Claimant's Brief at 23-24. The administrative law judge made contradictory findings with regard to the frequency with which claimant was required to exert 50 to 100 pounds of force in performing his job. The administrative law judge initially indicated that claimant "occasionally" performed tasks that required in excess of 50 pounds of force, which meets the DOT's definition of "heavy work," but not "very heavy work." Decision and Order at 5-6. However, the administrative law judge then stated that claimant "'regularly' performed many of those duties as opposed to 'occasionally.'" *Id*. Moreover, in a separate portion of his Decision and Order, the administrative law judge stated that claimant "regularly mov[ed] 50-100 pound 3 [inch] cable." *Id*. at 15. Because exerting "in excess of 50 pounds of force frequently" would meet the DOT definition of "very heavy work," the administrative law judge's findings are not sufficiently explained. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employment and Training Administration, U.S. Dept. of Labor, *Dictionary of Occupational Titles*, Vol. II, Appendix C (4th ed. 1991).

Furthermore, we agree with claimant that in finding that claimant performed no tasks that involved "more than 100 pounds" of exertion, the administrative law judge did not address claimant's testimony that that he was occasionally required to drag a water pump that weighed one hundred to three hundred pounds. Decision and Order at 6; *see* Hearing Transcript at 23-24. Based on the above-stated errors, we vacate the administrative law judge's determination that claimant's usual coal mine employment required "only heavy work," and not "very heavy work." Decision and Order at 6. On remand, the administrative law judge must reconsider the evidence relevant to the

exertional requirements of claimant's usual coal mine employment and fully explain his findings of fact and conclusions of law. We specifically instruct the administrative law judge to review the evidence, including claimant's hearing testimony, in detail, and address claimant's argument that he performed tasks that qualify as "very heavy work" under the DOT's definition of "very heavy work," taking into account employer's arguments to the contrary,[10] i.e. when applying the DOT definition, evaluate whether the evidence establishes that claimant performed tasks that required "[e]xerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects" with physical demand requirements that "are in excess of those for [h]eavy [w]ork." *See* Employment and Training Administration, U.S. Dept. of Labor, *Dictionary of Occupational Titles*, Vol. II, Appendix C (4th ed. 1991).

2. Credibility Findings

Claimant also asserts on appeal that the administrative law judge failed to adequately explain his weighing of the exercise blood gas study obtained by Dr. Rasmussen, as required by the APA,[11] and erred by failing to address the weight accorded Dr. Cohen's opinion. *See Wojtowicz*, 12 BLR at 1-165. We agree. In finding that claimant is not totally disabled, the administrative law judge noted that Drs. Zaldivar and Castle were "astounded" by Dr. Rasmussen's exercise arterial blood gas studies. Decision and Order at 26. But the administrative law judge did not address why he credited the opinions of Drs. Zaldivar and Castle over the contrary opinions of Drs. Rasmussen and Cohen, who testified that the tests were valid and "maximal."[12]

[10] The administrative law judge should consider employer's contention that claimant performed this activity as part of a crew, and that the evidence is also relevant to determining whether this task required more than one-hundred pounds of exertion by claimant himself.

[11] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[12] In his reports, Dr. Rasmussen described how he conducted the exercise portion of the May 22, 2012 and July 8, 2013 arterial blood gas studies, setting forth the manner in which claimant performed the treadmill exercise, and identifying the oxygen consumption that claimant achieved. Director's Exhibit 13; Claimant's Exhibit 3. Dr. Cohen reviewed the results of all the arterial blood gas studies conducted in this case, and made statements as to what factors are "important" for an exercise arterial blood gas

Director's Exhibit 13; Claimant's Exhibits 3, 4, 6. On remand, the administrative law judge should reconsider the explanations provided by the physicians as to the interpretations of the exercise portion of Dr. Rasmussen's arterial blood gas studies, and adequately explain how he resolved the conflict in the evidence on this issue.[13] *See Wojtowicz*, 12 BLR at 1-165.

Furthermore, the administrative law judge acknowledged that Dr. Cohen opined that claimant is totally disabled from heavy labor, summarizing his opinion as follows:

> Dr. Cohen reported that [claimant] "could not sustain heavy workloads," such as lifting and hanging continuous miner cable and shoveling coal spills, "for up to eight hours a day," given the gas exchange abnormalities. Dr. Cohen admitted that he based his disability findings, in part, on his belief that one can only sustain 40%

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study to be "valid." Claimant's Exhibit 4; Claimant's Exhibit 6 at 13-14. Dr. Cohen also described a number of factors he considers to determine if a blood gas study is "maximal," including breathing reserve, heart rate, bicarbonate levels and lactate levels. Claimant's Exhibit 6 at 59. Based on his review of the test results, Dr. Cohen opined that the two tests performed by Dr. Rasmussen on May 22, 2012 and July 8, 2013 were "near maximal and maximal [respectively], as compared to the quite submaximal test performed by Dr. Zaldivar" on February 6, 2013. Claimant's Exhibit 4. Dr. Zaldivar testified, in an April 7, 2014 deposition, that he reviewed the results of Dr. Rasmussen's 2012 and 2013 exercise arterial blood gas studies, and stated that Dr. Rasmussen exercised claimant to the level of "walking a skyscraper." Employer's Exhibit 4 at 44-50, 63, 65. In his deposition, taken on April 2, 2014, Dr. Castle testified that Dr. Rasmussen's exercise arterial blood gas study was done with "an awful lot of exertion" and that he has "never had anybody that could go that long or that high in [his] own personal experience." Employer's Exhibit 3 at 27. He conceded that claimant "does, with extremely vigorous exercise," have a significant drop in pO2 on the arterial blood gas study. *Id*. at 29.

[13] The physicians who rendered total disability opinions in this case also disagreed as to what conclusions can be drawn from Dr. Zaldivar's February 6, 2013 arterial blood gas study. The administrative law judge, however, did not credit or discredit any medical opinion based on the results of this test. However if, on remand, the administrative law judge renders any credibility finding at 20 C.F.R. §718.204(b)(2)(iv) based on the results of Dr. Zaldivar's arterial blood gas study, he must resolve the conflict in the evidence as to the interpretation of said study.

> of [one's] VO2 for eight hours,[14] which would equate to very, very heavy manual labor without a break[,] "so basically doing a marathon every day for eight hours." However, ultimately, Dr. Cohen opined that [claimant] could not perform heavy labor except a few minutes per day and would be able to hang the cable once or set one timber.

Decision and Order at 25, *quoting* Claimant's Exhibit 4. The administrative law judge, however, did not explain in his Decision and Order his weighing of Dr. Cohen's opinion with respect to the degree of exertion the administrative law judge found was required by claimant's last coal mine job. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). On remand, we instruct the administrative law judge to explain his weighing of Dr. Cohen's opinion in determining whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

II. ARGUMENTS ON CROSS-APPEAL

In the interest of judicial economy, we will address employer's arguments relating to the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[15] as the administrative law judge's

[14] During his deposition, Dr. Cohen explained that the American Thoracic Society (ATS) statement about VO2 capacity is relevant only to "[support] the concept that people cannot do very, very high percentages of their maximum work capacity for long periods of time." Claimant's Exhibit 6 at 65. Dr. Cohen also indicated, however, that he based his opinion that claimant is totally disabled on his "understanding of what [claimant's] jobs entailed and what [Dr. Cohen] think[s] his exercise capacity is . . . ." *Id*.

[15] The administrative law judge did not begin his analysis of the evidence by considering whether claimant established total respiratory or pulmonary disability and thereby qualified for invocation of the 411(c)(4) presumption. The administrative law judge's consideration of whether claimant proved he had pneumoconiosis, prior to considering whether claimant invoked the presumption, was unnecessary, since claimant would be presumed to have pneumoconiosis if the presumption were invoked, and would not qualify for benefits if he were not totally disabled by a respiratory or pulmonary impairment.

credibility determinations may affect his consideration on remand of whether employer is able to rebut the Section 411(c)(4) presumption, if that presumption is invoked.[16]

In its cross-appeal, employer concedes that claimant suffers from clinical pneumoconiosis,[17] but argues that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Castle with regard to whether claimant has legal pneumoconiosis.[18] Drs. Zaldivar and Castle diagnosed claimant with "radiographic" clinical pneumoconiosis and asthma, unrelated to coal dust exposure. Employer's Exhibits 1, 2, 3, 4. The administrative law judge assigned "little, if any credit," to the opinions of Drs. Zaldivar and Castle because he was not persuaded by their reasoning for excluding coal dust exposure as a causative factor for claimant's asthma. Decision and Order at 21. We agree with employer that the administrative law judge's rationale for

[16] If the administrative law judge determines on remand that claimant has established that he has a totally disabling respiratory impairment sufficient to support invocation of the Section 411(c)(4) presumption, the burden of proof shifts to employer to affirmatively establish that claimant does not have legal and clinical pneumoconiosis or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(ii).

[17] Pursuant to 20 C.F.R. §718.201(a)(1), clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[18] Under 20 C.F.R. §718.201(a)(2), legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*. The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated *by*, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

rejecting the opinions of Drs. Zaldivar and Castle is not adequately explained. *See Wojtowicz*, 12 BLR at 1-165.

First, the administrative law judge concluded that Drs. Zaldivar and Castle relied on the view that coal dust exposure does not cause asthma, which he determined was "not in accord with the scientific views accepted by the [DOL]." Decision and Order at 21. The administrative law judge is correct that the DOL, in the preamble to the 2001 revised regulations, recognized that the "term 'chronic obstructive pulmonary disease' (COPD) includes three disease processes characterized by airways dysfunction: chronic bronchitis, emphysema, and *asthma*." 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000) (emphasis added). Moreover, the DOL further found that "the overwhelming scientific and medical evidence demonstrates that coal mine dust exposure can cause obstructive lung disease." 65 Fed. Reg. at 79,994. However, both Drs. Zaldivar and Castle made clear that they were not diagnosing a *chronic* obstructive impairment, in the form of asthma, but were diagnosing intermittent asthma. Specifically, Dr. Zaldivar testified that claimant suffers from a "variable impairment [] due to asthma bronchospasm" and that claimant does not suffer from a "fixed respiratory impairment." Employer's Exhibit 4 at 57. In addition, Dr. Zaldivar stated:

> [Claimant] cannot be said to have COPD. Asthma is a form of COPD, but not all asthma is COPD. Only some asthma is COPD. . . . Now, he has an obstructive disease, but it's not chronic. Some breathing tests have been entirely normal before bronchodilators and after bronchodilators. So he doesn't have a [COPD]. He does have an obstructive disease, but it's *sporadic*.

Id. at 60 (emphasis added). On cross-examination, Dr. Zaldivar reiterated that claimant has "intermittent obstruction produced by asthma." *Id*. at 86-87. Dr. Castle also opined that claimant does not suffer from fixed airway obstruction. Employer's Exhibit 3 at 25. He testified that claimant "does not have COPD," but rather has "reversible airway obstruction, meaning that sometimes [he] has it and sometimes he's totally normal." *Id*. at 57-58. Therefore, the administrative law judge erred in finding that Drs. Zaldivar and Castle provided an explanation that is "not in accord with the scientific views accepted by the [DOL]."[19] Decision and Order at 21; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 315-16, 25 BLR 2-115, 2-130 (4th Cir. 2012).

[19] Moreover, the administrative law judge recognized, but failed to consider, in his weighing of the evidence, the fact that Drs. Rasmussen and Cohen agreed with Drs. Castle and Zaldivar that claimant's asthma was unrelated to his coal dust exposure. Decision and Order at 20 n. 33.

Second, the administrative law judge found that Drs. Zaldivar and Castle relied on "post-bronchodilator reversibility" on pulmonary function testing to diagnose asthma. Decision and Order at 21. The administrative law judge found their opinions unpersuasive, explaining that such reversibility does not "preclude concomitant disabling [coal workers' pneumoconiosis]." Decision and Order at 21, *citing Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). However, as employer argues, Drs. Zaldivar and Castle relied on complete, not partial, bronchoreversibility to diagnose intermittent asthma. Employer's Exhibits 1, 2, 3, 4. Furthermore, the administrative law judge failed to address the fact that Dr. Rasmussen indicated that his May 22, 2012 pulmonary function study showed "complete reversible airflow obstruction . . . consistent with asthma," and that his July 8, 2013 pulmonary function study was "normal" pre-bronchodilator, and "without significant change following bronchodilator therapy." Director's Exhibit 13; Claimant's Exhibit 3.

Third, the administrative law judge noted that both Drs. Zaldivar and Castle admitted that "coal dust exposure and *other respiratory afflictions* have an additive effect, yet neither . . . convincingly explain why it was not so in this case." Decision and Order at 33 (emphasis added). The administrative law judge's analysis is flawed to the extent that Drs. Zaldivar and Castle each acknowledged that cigarette smoking and coal dust exposure may have an additive effect, but they explained that claimant has no significant cigarette smoking history. Specifically, Dr. Zaldivar was asked if claimant's coal dust exposure would "have an additive effect on any other factors that might be involved in [claimant's] pulmonary status," to which he responded that it is additive "only in smoking coal miners," but that claimant "cannot be considered to be a smoking coal miner because . . . he quit smoking back in his thirties[,] [a]nd he only smoked for a very few years, according to his history." Employer's Exhibit 4 at 97-101. He further testified that if claimant "had airway obstruction from smoking and . . . coal mining, the two would add together," but that "we don't have airway obstruction from either source." *Id*. at 101. Moreover, Dr. Castle testified that claimant does "not have any definite evidence of tobacco smoke-induced airways disease." Employer's Exhibit 1 at 19-20. Thus, because the administrative law judge did not adequately explain his credibility determinations with regard to the opinions of Drs. Zaldivar and Castle on the issue of the existence of legal pneumoconiosis, we vacate his findings pursuant to 20 C.F.R. §718.202(a)(4).

III. Remand Instructions

On remand, the administrative law judge should first consider whether the evidence is sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment for invocation of the Section 411(c)(4) presumption. If claimant is found to be *not* totally disabled, the administrative law judge may reinstate the denial

of benefits. However, if the administrative law judge determines on remand that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge must find that claimant has invoked the Section 411(c)(4) presumption. Thereafter, in this case, the burden of proof shifts to employer to affirmatively establish that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201."[20] 20 C.F.R. §718.305(d)(1)(ii); *Minich v. Keystone Coal Mining Corp*., BLR , BRB No. 13-0544 BLA, slip op. at 10-11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the "no part" standard is valid, and that it requires the party opposing entitlement to "rule out" any connection between pneumoconiosis and the miner's total disability. *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143 BLR (4th Cir. 2015); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-446 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473-74 (6th Cir. 2013); *Minich*, slip op. at 11 (to rebut the presumed causal relationship between pneumoconiosis and total disability, employer must establish that "no part, not even an insignificant part, of claimant's respiratory or pulmonary disability was caused by pneumoconiosis.").

Because we have affirmed the administrative law judge's finding that claimant has clinical pneumoconiosis, employer must establish that no part of claimant's respiratory disability is due to clinical pneumoconiosis, in order to establish rebuttal of the 411(c)(4) presumption, even if employer is able to successfully disprove the existence of legal pneumoconiosis. *See Bender*, 782 F.3d at 143; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). When weighing the medical opinions on remand, the administrative law judge should consider factors relevant to the probative value of the opinions, including the doctors' explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In reaching his credibility determinations on remand, the administrative law

[20] Employer has conceded that claimant has clinical pneumoconiosis. Thus employer would be unable to rebut the presumption on the basis that the miner does not have legal or clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). However, a finding as to legal pneumoconiosis may also be relevant as to whether employer has established rebuttal by proving that the miner's respiratory disability was not caused by pneumoconiosis as defined in 20 C.F.R. §718.201.

judge is instructed to set forth his rationale, findings of fact and conclusions of law, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge