BRB No. 11-0324 BLA

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| NORMAN C. BARNES | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| COWIN & COMPANY, INCORPORATED | ) | DATE ISSUED: 02/29/2012 |
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| Employer-Petitioner | ) | |
| | ) | |
| 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 Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Cowin & Company (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-05923) of Administrative Law Judge Janice K. Bullard rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge found that claimant was a miner within the meaning of the Act, and credited him with 21.26 years of coal mine employment. The administrative law judge further found that employer, although not a mine operator, was the properly named responsible operator, as it was an independent contractor performing services or construction work at a mine site pursuant to 20 C.F.R. §725.491(a)(1). The administrative law judge next addressed the applicability of amended Section 411(c)(4) of the Act, which provides, in pertinent part, a rebuttable presumption of totally disabling pneumoconiosis if claimant establishes that the miner had at least fifteen years of "qualifying" coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment.[1] 30 U.S.C. §921(c)(4). "Qualifying" coal mine employment has been defined as work in an underground coal mine or in coal mining employment in conditions that are substantially similar to those in an underground mine. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). The administrative law judge found that, because claimant's work as a mechanic was primarily underground and exposed him to the same conditions as those of a coal miner whose duties were to extract coal, claimant had established at least fifteen years of "qualifying" coal mining pursuant to amended Section 411(c)(4). Additionally, the administrative law judge found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption because she found that the medical opinion evidence established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of Section 411(c)(4) to this claim, arguing that the record does not support a finding of fifteen years of "qualifying" coal mine employment. Employer further contends that the administrative law judge erred in finding that the medical evidence is sufficient to establish a totally disabling respiratory impairment at Section 718.204(b). Additionally, employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

[1] On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) was enacted. Pub. L. No. 111-148 (2010). Section 1556 of the PPACA revived Section 411(c)(4) of the Act for claimants who filed their claims after January 1, 2005, and whose claims remained pending on the enactment date of the PPACA.

Employer also challenges the constitutionality of amended Section 411(c)(4), as applied to employer, arguing that it is impermissibly retroactive and violates employer's due process rights. In response, claimant urges affirmance of the administrative law judge's award of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges the Board to reject employer's contention that amended Section 411(c)(4) is unconstitutional, as violative of employer's due process rights. Additionally, the Director urges the Board to reject employer's contention that amended Section 411(c)(4) does not apply in this case because employer is not a mine operator. The Director does not address employer's arguments on the merits of entitlement.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Constitutionality of Section 411(c)(4)**

We first address employer's challenges to the administrative law judge's application of amended Section 411(c)(4). Employer contends that amended Section 411(c)(4) is unconstitutional because it is impermissibly retroactive. Employer further contends that the Patient Protection and Affordable Care Act (PPACA) is unconstitutional and has been struck down by a federal district court in the State of Florida. Employer also contends that amended Section 411(c)(4) cannot apply in cases involving coal mine construction workers. Specifically, employer contends that, because non-coal mining companies are not required to carry the same insurance endorsement as coal mine companies, the Board's decision in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-199 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), is not controlling in this case. In *Mathews*, the Board held that Section 1556 of the PPACA did not constitute an unlawful taking of employer's property, because an employer through

[2] The parties do not challenge the administrative law judge's finding that claimant established 21.26 years of overall coal mine employment; therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Because claimant was employed in the coal mining industry in Alabama, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

its insurer, since 1974, is on notice that it may be liable for any obligations arising from amendments to the Act, as the federal black lung benefits program has required each policy issued to cover liabilities under the Act to include an insurance endorsement,[4] pursuant to 20 C.F.R. §726.203(a). These contentions lack merit.

Initially, we reject employer's contention that the entire PPACA, which contains amended Section 411(c)(4), has been declared unconstitutional. The lower court decision cited by employer, *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), declaring the individual mandate of the PPACA unconstitutional, has no effect in this case, because an order was issued by the district court staying that decision, pending appeal. *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011). Additionally, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, severed the individual mandate of the PPACA from the remainder of the statute. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011).

Further, we agree with the Director that employer misreads *Mathews*, regarding the importance of the mandatory insurance endorsement to the Board's overall holding on the issue of the constitutionality of the amendments.[5] The Director contends that the Board, in *Mathews*, in concluding that retroactive application of amended Section 411(c)(4) did not violate the Takings Clause of the Fifth Amendment, relied, in part, on the fact that an insurance endorsement is required to be contained in insurance policies pursuant to 20 C.F.R. §726.203(a). Director's Letter Brief at 2. However, as the Director further states, this mandatory endorsement "played no role in the Board's holding that retroactive application of the amendment did not violate the Due Process [C]lause." *Id*. Therefore, the Director contends that, because employer only addresses the retroactive application of amended Section 411(c)(4) based on the Due Process Clause, and not on the Takings Clause, as addressed in *Mathews*, employer's argument regarding the

[4] This endorsement provides, in pertinent part, that insurers are liable for their principals' obligations under the Act, "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force...." 20 C.F.R. §726.203(a); *see Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-199 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

[5] The Director, Office of Workers' Compensation Programs (the Director), however, concurs with employer that construction companies are exempt from the requirement to purchase insurance that applies to traditional coal mining companies. 20 C.F.R. §726.201; Director's Letter Brief at 2.

insurance endorsement is inapposite. Moreover, we reject the remainder of employer's general contentions that amended Section 411(c)(4) is impermissively retroactive for the same reason the Board rejected substantially similar arguments in *Mathews*. *See also Keene v. Consolidation Coal Co*., 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).

**Application of Amended Section 411(c)(4)**
**Length of Coal Mine Employment**

In determining whether claimant established fifteen years of "qualifying" coal mine employment under amended Section 411(c)(4), the administrative law judge found that the record established that most of claimant's coal mine employment involved his work as a mechanic, underground, in coal mine construction. Decision and Order at 13. The administrative law judge further found that, in the context of that employment, claimant spent a majority of his work day underground, only leaving occasionally to retrieve parts or supplies. *Id*. Consequently, the administrative law judge concluded that "[c]laimant has established that his work as a mechanic was performed primarily underground, and exposed him to the same conditions as a coal miner whose duties were to extract coal." *Id*. The administrative law judge, therefore, found that claimant "worked for more than fifteen (15) years in underground mining," thereby establishing at least fifteen years of "qualifying" coal mine employment pursuant to amended Section 411(c)(4). *Id*. at 14.

Employer argues that the record, as a whole, is insufficient to establish that claimant had at least fifteen years of "qualifying" coal mine employment. Employer's Brief at 17. Specifically, employer contends that the administrative law judge found that claimant established less than fifteen years of underground coal mine employment with employer and Oak Grove, the companies for which claimant testified that he was employed in underground coal mining.[6] However, employer contends that the record is insufficient to establish that any of the additional coal mine employment credited by the administrative law judge was underground coal mine employment.[7] *Id.* Employer contends, therefore, that, "[b]ecause claimant did not address the extent or nature of his

[6] Employer does not challenge the administrative law judge's finding that claimant has established 14.45 years of underground coal mine employment during his time with employer; therefore, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

[7] In addition to the 14.45 years of coal mine employment credited by the administrative law judge for claimant's time with employer, the administrative law judge credited claimant with 6.81 years of total coal mine employment with nine additional employers between 1975 and 1986. Decision and Order at 9-10. However, the administrative law judge did not discuss the specific type of work performed by claimant for these companies.

dust exposure during employment [for] companies other than [employer's], he did not establish conditions that were substantially similar to those found in underground mining." *Id*.

This contention has merit. The administrative law judge, in discussing claimant's coal mine employment, found that most of claimant's coal mine employment encompassed work as a mechanic, in underground coal mine construction. Specifically, the administrative law judge discussed claimant's hearing testimony, in which claimant provided a detailed account of the work he performed during his employment with employer in coal mine construction. Decision and Order at 13, Hearing Transcript at 12-21. Based on this testimony, the administrative law judge found that claimant's work as a mechanic was performed primarily underground, exposing him to the same type of conditions as an underground coal miner whose duties were to extract coal. Thus, the administrative law judge found that claimant established fifteen years of "qualifying" coal mine employment. Decision and Order at 13-14.

However, as employer contends, a review of the record and claimant's hearing testimony indicates that claimant appeared to be referring only to his employment with employer, and not all of his construction work, or other employment, with the various companies for which he was employed from 1975-1986.[8] *See* Hearing Transcript at 12-21. Therefore, in light of claimant's testimony, the administrative law judge's findings, and employer's specific contentions, we vacate the administrative law judge's finding that claimant established at least fifteen years of "qualifying" coal mine employment, as the administrative law judge has not fully discussed all of the relevant evidence regarding the entirety of claimant's coal mine employment. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see Leachman*, 855 F.2d at 512; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). On remand, the administrative law judge must determine whether, in addition to the "qualifying" coal mine employment for employer, as credited by the administrative law judge, any of the additional coal mine employment credited by the administrative law judge is "work in an underground mine or coal mine work in conditions substantially similar to conditions in an underground mine" and, thus, sufficient to establish the "**at least** fifteen years of qualifying coal mine employment" required under Section 411(c)(4). 30 U.S.C. §921(c)(4) [emphasis added]; *Leachman*, 855 F.2d at 512; *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

[8] Claimant specifically referenced employer in his discussion of the work he performed in his coal mine construction employment. Hearing Transcript at 12-21. No other employers were specifically named in claimant's hearing testimony. *Id.*

**Application of Amended Section 411(c)(4)**
**Total Respiratory Disability – 20 C.F.R. §718.204(b)**

In finding that claimant established invocation of the Section 411(c)(4) presumption, the administrative law judge initially found that the objective evidence of record, namely the pulmonary function studies and blood gas studies, was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i) and (ii). Decision and Order at 14-15. Specifically, the administrative law judge found that the record contains two pulmonary function studies, one dated September 29, 2008, which yielded non-qualifying values, and the other, dated February 25, 2010, which yielded qualifying values pre-bronchodilator, but non-qualifying values post-bronchodilator. *Id*. at 14-15; Director's Exhibit 10; Employer's Exhibit 1. The administrative law judge concluded that, while this evidence shows that claimant's "lung function has worsened somewhat between the two studies, [it did] not establish total disability pursuant to [Section] 718.204(b)(2)(i)." Decision and Order at 15. The administrative law judge further found that because the "blood gas studies did not yield qualifying results," total disability was not established pursuant to Section 718.204(b)(2)(ii).[9] *Id*.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that the opinions of Drs. Barney and Hawkins, that claimant is totally disabled from performing his usual coal mine employment, outweighed the opinion of Dr. Goldstein, which did not address the issue of total respiratory disability.[10] Decision and Order at 15. The

[9] The administrative law judge also found that total disability could not be established at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence in the record of cor pulmonale with right-sided congestive heart failure. Decision and Order at 15.

[10] Dr. Barney, in a report dated November 7, 2008, diagnosed chronic obstructive pulmonary disease (COPD) and pneumoconiosis, opining that these conditions were related to tobacco use and coal dust exposure. In addition, Dr. Barney opined that, even though claimant is retired, he would not be capable of performing his prior job due to severe dyspnea with moderate exertion. Director's Exhibit 10; Claimant's Exhibit 1.

Dr. Hawkins, in a Clinical Note dated June 19, 2009, diagnosed coal workers' pneumoconiosis, and noted the presence of an obstructive lung disease related to claimant's cigarette smoking. Dr. Hawkins further stated that claimant had substantial coal dust exposure and opined that there is a significant respiratory impairment from his "exposures" but that it is not possible to precisely delineate the amount of impairment resulting from claimant's coal dust exposure and the amount from his smoking history. Claimant's Exhibit 2.

administrative law judge found the opinions of Drs. Barney and Hawkins to be credible, as they were "based on their clinical examinations, test results, and medical records reviews." *Id*.; Director's Exhibit 10; Claimant's Exhibits 1, 2. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to Section 718.204(b)(2)(iv). Further, on considering all of the evidence, the administrative law judge found that the "preponderance of the evidence establishes . . . [that] [c]laimant has established the presence of a total respiratory disability" pursuant to Section 718.204(b). *See* Decision and Order at 15.

Employer, however, contends that the administrative law judge erred in finding the medical evidence sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b). Specifically, employer contends that the administrative law judge erred in finding the opinions of Drs. Barney and Hawkins to be credible, arguing that the physicians failed to provide a sufficient rationale for their conclusions. Additionally, employer contends that Dr. Hawkins's opinion is based on objective evidence that is not contained in the record. These contentions have merit.

As employer contends, the administrative law judge did not adequately discuss the medical opinion evidence in finding that it established a totally disabling respiratory impairment. Specifically, the administrative law judge did not adequately discuss the evidence relied upon by Dr. Hawkins in rendering his conclusions. A review of the record indicates that the pulmonary function study referenced in Dr. Hawkins's opinion, and relied on by the physician, is not in the record.[11] The administrative law judge did not address the absence of this evidence. Rather, the administrative law judge only stated that the opinion of Dr. Hawkins was supported by its underlying objective testing, without discussing how that evidence supported the doctor's opinion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 15; Claimant's Exhibit 2. Because the opinion of Dr. Hawkins is based on evidence that is not contained in the record, *see* 20 C.F.R. §725.414, we vacate the administrative law judge's finding that the medical opinion evidence established total respiratory disability pursuant to

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Dr. Goldstein, in a report dated February 25, 2010, opined that claimant does not have occupational pneumoconiosis, but that claimant's pulmonary functions "show an obstructive defect with marked improvement following bronchodilators consistent with asthma." Employer's Exhibits 1, 8. Dr. Goldstein did not render a specific finding regarding the extent, if any, of a respiratory impairment.

[11] Dr. Hawkins's June 19, 2009 opinion contains the partial results of an undated pulmonary function study, which Dr. Hawkins interpreted as "[c]urrent $FEV_1$ is within the current disability standards[.]" Claimant's Exhibit 2. It also contains the results of an undated blood gas study.

Section 718.204(b)(2)(iv), and we remand the case to the administrative law judge for further consideration of the opinion of Dr. Hawkins. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In reconsidering the credibility of the opinion of Dr. Hawkins, the administrative law judge must ascertain the degree to which his opinion is influenced by his review and reliance on the evidence not contained in the record. *See Harris*, 23 BLR at 1-108. If she finds that Dr. Hawkins's conclusion is inextricably tied to his reliance on evidence that is not in the record, the administrative law judge must determine whether to exclude Dr. Hawkins's report, redact that portion of Dr. Hawkins's report or factor in the physician's reliance upon the inadmissible evidence when deciding what weight, if any, to accord the opinion. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris*, 23 BLR at 1-108. Moreover, on remand, the administrative law judge must provide a more detailed discussion of her consideration of Dr. Barney's opinion, as the administrative law judge did not fully discuss it in light of the non-qualifying objective studies upon which it is based.[12] *See Wojtowicz*, 12 BLR at 1-164; *Clark*, 12 BLR at 1-155.

In light of the foregoing, we vacate the administrative law judge's finding of entitlement pursuant to amended Section 411(c)(4) and remand the case for further consideration. Specifically, on remand, the administrative law judge must first determine whether claimant has established at least fifteen years of "qualifying" coal mine employment. If she finds at least fifteen years of "qualifying" coal mine employment, the administrative law judge must then determine whether claimant has established a totally disabling respiratory impairment and, thus, established invocation of the Section

[12] Additionally, because the administrative law judge relied on the opinions of Drs. Hawkins and Barney in finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4), we also vacate these findings. If, on remand, the administrative law judge reaches the issue of rebuttal, the proper inquiry is the sufficiency of employer's evidence because pneumoconiosis and disability causation are presumed once invocation of amended Section 411(c)(4) is established. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011)(rebuttal requires an affirmative showing that the miner does not suffer from pneumoconiosis, or that the disease is not related to coal mine work).

411(c)(4) presumption.[13] *See* 30 U.S.C. §921(c)(4). If invocation is established, the administrative law judge must then determine whether employer has rebutted this presumption.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision insofar as it rejects employer's constitutional arguments regarding the applicability of the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). I also agree with the majority that the administrative law judge did not adequately explain her finding that claimant has established fifteen years of "qualifying" coal mine employment under amended Section 411(c)(4). Nevertheless, I respectfully dissent from the majority's determination to vacate the administrative law judge's award of benefits and to remand the case to the administrative law judge for further consideration of the issue of total disability at 20 C.F.R. §718.204(b), and, if reached, for further consideration of the

[13] If, however, the administrative law judge determines that claimant has not established at least fifteen years of "qualifying" coal mine employment, then the administrative law judge must consider entitlement, without benefit of the presumption, under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

issue of the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). My review of the record reveals that remand of the case for consideration of the medical evidence on the merits of entitlement is unnecessary because the administrative law judge rationally found that claimant established a totally disabling respiratory impairment pursuant to Section 718.204(b), and that legal pneumoconiosis was a substantially contributing cause of his disability pursuant to Section 718.202(a)(4) and Section 718.204(c). Since claimant has established entitlement without the benefit of the rebuttable presumption at amended Section 411(c)(4), it is unnecessary to remand the case. The administrative law judge's award of benefits should be affirmed.

The majority vacates the administrative law judge's award of benefits and remands the case for reconsideration of the medical opinion evidence on the issue of total disability at Section 718.204(b), even though employer offered no medical opinion evidence to contradict the opinions of Drs. Barney and Hawkins that claimant has a totally disabling respiratory impairment. The best argument that employer could fashion from Dr. Goldstein's opinion is:

> Claimant's complaint of shortness of breath is not in itself evidence of a permanent respiratory impairment. Dr. Goldstein believed that claimant's shortness of breath might be related to asthma, cardiac disease, exogenous obesity, sleep apnea, and/or deconditioning.

Employer's Brief at 16; Employer's Exhibit 1. In his three-page report, Dr. Goldstein was unable to include even one short sentence stating that the miner was not totally disabled.

The administrative law judge found that the medical opinion evidence established that claimant was totally disabled. The administrative law judge made clear that she credited the opinions of Drs. Barney and Hawkins, above all, because they are "familiar with the exertional requirements of [c]laimant's coal mine employment." Decision and Order at 15. Yet employer has persuaded the majority to remand the case for reconsideration of Dr. Hawkins's opinion on total disability because the doctor relied, in part, on a pulmonary function study which is not in the record. The majority has not required employer to demonstrate that it was unduly prejudiced by this error. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009)(The party challenging the decision must explain how "the error to which he points could have made any difference."). Employer alleges only that the administrative law judge erred in crediting Dr. Hawkins's opinion. Dr. Hawkins reported both a qualifying and non-qualifying result. Since Dr. Goldstein also reported both a qualifying and a non-qualifying result, Dr. Hawkins's report is not inherently suspicious. Dr. Hawkins opined:

> He has now developed significant dyspnea which has been progressive and limiting. He certainly cannot perform any prior coal mine work. He cannot perform any significant manual labor at this time because of severe respiratory impairment.

Claimant's Exhibit 2 at Clinical Note June 19, 2009, p.1. Dr. Hawkins's opinion was obviously based on his personal observation of claimant, as well as his knowledge of claimant's usual coal mine employment. The doctor did not need a qualifying study to support his opinion that claimant was totally disabled. 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *see also Arnold v. Peabody Coal Co.*, 41 F.3d 1203, 19 BLR 2-22 (7th Cir. 1994). Since the record demonstrates that the administrative law judge credited Dr. Hawkins's disability opinion because he knew both claimant and his coal mine employment, the absence of Dr. Hawkins's pulmonary function study from the record has not unduly prejudiced employer. *Shinseki*, 556 U.S. at 413. Hence, remand of the case to reconsider Dr. Hawkins's disability opinion is unnecessary.

The majority also directs that the case be remanded for reconsideration of Dr. Barney's disability opinion[14] in light of the non-qualifying objective studies upon which it is based. This direction is particularly puzzling for three reasons. The first is that the regulations expressly provide for a claimant to establish total disability with medical opinion evidence "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). The obvious intent of the section is to enable a claimant to establish total disability despite non-qualifying studies. The majority's direction is also puzzling because the law is clear that a doctor can offer a total disability opinion if he knows both the miner and the miner's usual coal mine employment, even though the objective studies are non-qualifying. *See Cornett*, 227 F.3d at 587, 22 BLR at 2-124; *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-722, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 507, 15 BLR 2-116, 2-120 (7th Cir. 1991); *see generally Director, OWCP v. Mangifest*, 826 F.2d 1318, 1332, 10 BLR 2-220, 2-244 (3d Cir. 1987). That is the principal reason that the administrative law judge gave for crediting Dr. Barney's disability opinion. Decision and Order at 15. Finally, the majority's direction is puzzling because Dr. Barney's disability opinion is uncontradicted. There is no serious doubt that Dr. Barney is absolutely correct in finding claimant totally disabled.

[14] Dr. Barney opined: "[p]atient is retired but cannot perform prior job due to severe dyspnea with moderate exertion." Director's Exhibit 10 at 4.

I believe that the majority is too quick to accept employer's declaration of error, that the administrative law judge failed to take into account that Dr. Hawkins cited evidence not in the record, as the basis for remanding the case for additional consideration, without first determining whether absence of this study constituted harmless error. *Shinseki*, 556 U.S. at 413. The majority is too quick again in accepting employer's contention that the administrative law judge's crediting of Dr. Barney's opinion requires further explanation. As I have demonstrated, both contentions are baseless. Consequently, I would affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability at Section 718.204(b).

The majority also holds that, if, on remand, the administrative law judge credits claimant with less than fifteen years of qualifying coal mine employment, the administrative law judge must consider this case under 20 C.F.R. Part 718, without benefit of the amended Section 411(c)(4) presumption. However, a careful reading of the administrative law judge's decision reveals that this case need not be remanded for additional consideration because in finding the evidence insufficient to establish rebuttal at amended Section 411(c)(4), the administrative law judge considered all of the relevant evidence and found that it affirmatively established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, she has provided an alternative ground for the award of benefits, without benefit of the presumption. *See* Decision and Order at 19-21. Hence, as I have demonstrated that the administrative law judge reasonably weighed the medical opinion evidence in finding a totally disabling respiratory impairment, I shall address employer's allegations of error regarding the administrative law judge's finding that the existence of legal pneumoconiosis was established at Section 718.202(a)(4).

Employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge erred in finding the opinions of Drs. Barney and Hawkins, that claimant suffers from legal pneumoconiosis, were well-reasoned and documented. Employer also argues that the administrative law judge erred in failing to adequately consider the fact that neither Dr. Barney nor Dr. Hawkins provided any objective support for their conclusions that claimant's respiratory impairment was due, at least in part, to claimant's coal dust exposure. Additionally, employer contends that the administrative law judge erred in according less weight to the contrary opinion of Dr. Goldstein, that claimant does not have legal pneumoconiosis, arguing that the administrative law judge erred in finding Dr. Goldstein's opinion to be conclusory and lacking in adequate support for his conclusions.

Contrary to employer's contention, the administrative law judge specifically addressed each of the causative factors relied on by Drs. Barney, Hawkins and Goldstein.

The administrative law judge discussed the varying smoking histories that claimant provided at different stages in this case, noting the discrepancies throughout the record, and found that the history provided to Dr. Hawkins, claimant's treating physician, was the most credible and, therefore, the administrative law judge reasonably found a forty-eight pack year history. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 18. Further, contrary to employer's contention, because the administrative law judge credited claimant with 21.26 years of coal mine employment, a finding not challenged by employer, claimant did not overstate the length of his coal mine employment and, therefore, the administrative law judge rationally found that Drs. Hawkins and Goldstein relied on an accurate employment history in rendering their decisions. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Decision and Order at 11, 18-19; Claimant's Exhibit 2; Employer's Exhibit 1.

The administrative law judge considered the medical opinion evidence in light of claimant's occupational history and smoking history, in addition to the underlying objective medical evidence relied on by the physicians. Decision and Order at 18-19. While noting that she accorded less weight to Dr. Barney's diagnosis of clinical pneumoconiosis because he relied on an x-ray reading contrary to her finding at Section 718.202(a)(1), the administrative law judge, nonetheless, found Dr. Barney's opinion regarding legal pneumoconiosis to be well-documented and entitled to probative weight. *Id*. at 18. Specifically, the administrative law judge found: that Dr. Barney based his opinion on claimant's medical, smoking and employment histories, as well as the results of claimant's physical examination and objective testing; that he diagnosed chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure; and that he believed that claimant's dyspnea was related to coal workers' pneumoconiosis. *Id*. at 19; Director's Exhibit 10; Claimant's Exhibit 1.

The administrative law judge further found that Dr. Hawkins, claimant's treating physician since June 2009, diagnosed legal pneumoconiosis, based on "progressive, significant exertional dyspnea stemming from obstructive lung disease" and opined that cigarette smoking and coal dust exposure equally contributed to this condition. Decision and Order at 19; Claimant's Exhibit 2. Noting that Dr. Hawkins's opinion was based on accurate smoking and employment histories, as well as complete physical and pulmonary examinations in the course of his treatment of claimant, the administrative law judge found that Dr. Hawkins's opinion is well-documented and well-reasoned. However, because the record does not adequately document the frequency and extent of Dr. Hawkins's treatment of claimant, the administrative law judge found that this opinion was not entitled to controlling weight, as the opinion of claimant's treating physician, pursuant to 20 C.F.R. §718.104(d). Decision and Order at 19.

Having reviewed the record and the administrative law judge's findings, I would hold that the administrative law judge accurately evaluated the opinions of Drs. Barney

and Hawkins, their underlying documentation, and the physicians' explanations for their conclusions, and acted within her discretion as trier-of-fact in finding that the opinions were well-documented and reasoned. *See United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); Decision and Order at 18-19. Employer's arguments to the contrary essentially request a reweighing of the evidence, an exercise beyond the Board's review. *See Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989). Therefore, because both Dr. Barney and Dr. Hawkins attributed claimant's COPD, in part, to claimant's coal dust exposure, the administrative law judge reasonably found that these opinions support the conclusion that claimant's COPD constitutes legal pneumoconiosis under the Act. 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); *see also Jordan*, 876 F.2d at 1460, 12 BLR at 2-375; *McClendon v. Drummond Coal Co.*, 861 F.2d 1512, 1514, 12 BLR 2-108, 2-109 (11th Cir. 1988); *Stomps v. Director, OWCP*, 816 F.2d 1533, 1535, 10 BLR 2-107, 1-108 (11th Cir. 1987).

With regard to the contrary opinion of Dr. Goldstein, that legal pneumoconiosis is not present, but that claimant has COPD with an asthmatic component and that it is secondary to his smoking, the administrative law judge stated that Dr. Goldstein based his opinion on a clinical examination, an accurate employment history, and a somewhat shorter smoking history than that credited by the administrative law judge, but the administrative law judge found that Dr. Goldstein's opinion "lacks adequate support for some of his assertions." Decision and Order at 18; Employer's Exhibits 1, 8. The administrative law judge found Dr. Goldstein's opinion was conclusory: the doctor did not explain his finding regarding the importance of the reversibility on pulmonary function study; he did not explain how he could rule out claimant's twenty-one years of coal dust exposure as a causative or aggravating factor in claimant's condition; and he did not address whether smoking and coal dust inhalation could have a combined effect. Decision and Order at 18-19. The administrative law judge, therefore, accorded less weight to Dr. Goldstein's opinion, finding that it was conclusory and insufficiently reasoned. *Id*.

The administrative law judge had provided abundant support for her determination that Dr. Goldstein's opinion was entitled to little weight because the physician did not adequately explain his conclusions. *Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Fagg*, 12 BLR at 1-79; *Clark*, 12 BLR at 1-155; Decision and Order at 18-19. Specifically, the administrative law judge permissibly questioned Dr. Goldstein's opinion because the doctor did not explain how he eliminated claimant's long coal dust exposure as a source of his COPD, or discuss whether both smoking and coal dust exposure could have had a combined effect on claimant's respiratory impairment. *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); Decision and Order at 19.

Because the administrative law judge reasonably analyzed the medical opinions of record and explained her reasons for crediting or discrediting the conflicting opinions, she acted within her discretion in weighing the evidence and drawing appropriate inferences therefrom, and substantial evidence supports those findings.[15] The case at bar arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has emphatically declared that the "question of whether the medical report is sufficiently documented and reasoned is one of credibility for the fact finder." *Jones*, 386 F.3d at 992, 23 BLR at 2-238, quoting *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375. The Board needs to follow the Eleventh Circuit's example of self-restraint, expressed in *Taylor*, 862 F.2d at 1531 n.1, 12 BLR at 2-112 n.1 ("[w]e do not question the weight accorded to the evidence by the [administrative law judge], for such is not within our scope of review."). Consistent with the Board's narrow scope of review, I would affirm the administrative law judge's credibility determinations that the medical opinion evidence establishes the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's legal pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment pursuant to Section 718.204(c). Since the administrative law judge also properly credited the uncontradicted medical opinions that establish that claimant suffers from a totally disabling respiratory impairment, I would affirm the administrative law judge's award of benefits.

[15] Employer also contends that the administrative law judge erred in stating that the treatment notes of Dr. Ballard, Employer's Exhibit 5, were supportive of legal pneumoconiosis, arguing that because these notes mention only claimant's smoking history; "[s]he did not mention his work history," they are more supportive of a finding that cigarettes played a role in claimant's condition and that his work history was not a significant factor to consider. Employer's Brief at 15. Employer's statement is flatly wrong. Review of the Woodstock Health Care Form that Dr. Ballard completed indicates that she noted that the patient had been diagnosed with silicosis and asbestosis in 2000 and that he was a retired miner. Employer's Exhibit 5 at 3, unpaginated. In any event, the administrative law judge did not accord these treatment notes any weight in her ultimate findings, but relied on the opinion of Dr. Hawkins, as supported by Dr. Barney's opinion.

Accordingly, I respectfully dissent from the majority's determination to vacate the administrative law judge's award of benefits and to remand the case for reconsideration of claimant's entitlement to the rebuttable presumption at Section 411(c)(4) of the Act. Remand is unnecessary because the administrative law judge wisely provided an alternate ground to support the award, by finding that claimant established entitlement pursuant to 20 C.F.R. Part 718. Because the administrative law judge's credibility determinations are supported by substantial evidence, her decision awarding benefits should be affirmed.

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REGINA C. McGRANERY
Administrative Appeals Judge