BRB No. 13-0151 BLA

CALVIN BLANKENSHIP, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/31/2014
	)	
NEW ELK COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Ann Marie Scarpino (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (10-BLA-5622) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim for benefits on January 10, 2006.[1] Director's Exhibit 3.

In a Decision and Order issued on February 23, 2009, the administrative law judge found that the medical evidence developed since the denial of the prior claim did not establish that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and he denied benefits. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 on January 12, 2010. Director's Exhibits 30, 31. The district director denied modification and claimant requested a hearing, which was held on November 16, 2011.

In a Decision and Order dated November 28, 2012, which is the subject of the current appeal, the administrative law judge credited claimant with thirty-two years of coal mine employment.[2] The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), thereby demonstrating a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge therefore determined that claimant invoked the presumption of amended Section 411(c)(4),[3] 30 U.S.C. §921(c)(4), that he is

[1] Claimant filed a prior claim on May 3, 1973, which was ultimately denied on August 26, 1982, because claimant did not establish total disability. Director's Exhibit 1.

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

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor

totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Finding that claimant established a mistake of fact in the administrative law judge's prior decision denying benefits, the administrative law judge granted modification and awarded benefits. The administrative law judge determined that since the medical evidence did not establish the onset date of claimant's total disability due to pneumoconiosis, claimant is entitled to benefits commencing as of January 2006, the month in which he filed his claim. *Id*.

On appeal, employer argues that the administrative law judge erred in his analysis of the medical evidence, and therefore, erred in determining that claimant invoked, and that employer did not rebut, the Section 411(c)(4) presumption. In addition, employer asserts that the administrative law judge erred in his determination of the benefits commencement date. Finally, employer contends that the administrative law judge erred by failing to consider whether granting modification would render justice under the Act.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in applying the rebuttal provisions of Section 411(c)(4) to this claim.

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. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner

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revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

[4] Employer does not challenge the administrative law judge's finding that claimant had thirty-two years of coal mine employment. That finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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)[5]; *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(c). Additionally, because claimant sought modification of the denial of his subsequent claim for failing to satisfy the requirements of 20 C.F.R. §725.309, the administrative law judge was required to determine whether the new evidence submitted on modification, considered along with the evidence originally submitted in the subsequent claim, established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(c); *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998).

Total Disability and Invocation of the Section 411(c)(4) Presumption

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered five pulmonary function studies, three of which were originally submitted in the subsequent claim, and two of which were submitted on modification. The administrative law judge noted that the originally submitted studies, dated March 30, 2006, June 28, 2006, and April 16, 2007, were non-qualifying.[6] Director's Exhibits 13, 28. The administrative law judge then turned to the newly submitted pulmonary function studies, dated July 15, 2009 and October 12, 2011, which were contained in the treatment records of Dr. Porterfield. Claimant's Exhibits 3, 9. The administrative law judge found that the July 15, 2009 pulmonary function study was non-qualifying, but noted that its FEV1 and

[5] After the administrative law judge issued his decision, the Department of Labor revised 20 C.F.R. §725.309. The provisions that were applied by the administrative law judge at 20 C.F.R. §725.309(d) are now set forth, in identical form, at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013)(to be codified at 20 C.F.R. §725.309(c)).

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

FVC values were lower than those of the earlier studies.[7] The administrative law judge further found that the October 12, 2011 pulmonary function study was qualifying. Finding that the 2009 and 2011 studies "best reflect [c]laimant's present pulmonary condition as they are consistent with the persistent lowering of his results over time," the administrative law judge concluded that "the weight of the pulmonary function test evidence under 20 C.F.R. §718.204(b)(2)(i) is considered to support a totally disabling pulmonary impairment." Decision and Order at 12.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered five blood gas studies. He found that because only one blood gas study, the earliest one submitted, was qualifying, the preponderance of the blood gas studies did not establish total disability.[8]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen, Crisalli, Fino, and Zaldivar. Dr. Rasmussen, who examined claimant on behalf of the Department of Labor in 2006, diagnosed claimant with a "moderate ventilatory impairment," and opined that claimant could not return to his usual coal mine employment, based on a reduced diffusion capacity and an impairment in oxygen transfer. Director's Exhibit 13.

Dr. Crisalli, in reports dated May 21, 2007 and October 11, 2010, and in depositions dated July 30, 2007 and March 10, 2008, opined that claimant has minimal, if any, impairment, with no obstruction or restriction, and that he retains the respiratory capacity to return to his usual coal mine employment as a foreman. Director's Exhibit 28; Employer's Exhibit 3. Dr. Fino, in his report dated October 26, 2011, opined that claimant has no respiratory impairment, and is not totally disabled from a respiratory or pulmonary standpoint. Employer's Exhibit 4. Dr. Zaldivar, in reports dated July 26,

[7] Review of the record reflects that Dr. Fino opined that the July 15, 2009 pulmonary function study was invalid because "the patient did not give a good effort." Employer's Exhibit 4 at 4. The administrative law judge did not address this statement by Dr. Fino at the total disability stage of his Decision and Order. Later, when considering rebuttal of the Section 411(c)(4) presumption, he found that Dr. Fino's invalidation of the July 15, 2009 pulmonary function study was unexplained. Decision and Order at 17.

[8] The blood gas studies were performed on March 30, 2006, June 28, 2006, April 30, 2007, February 20, 2008, and December 8, 2010. Director's Exhibits 13, 28; Claimant's Exhibits 1, 3; Employer's Exhibit 6. The exercise portion of the blood gas study performed by Dr. Rasmussen on March 30, 2006, was qualifying. Director's Exhibit 13.

2006, June 21, 2010, and depositions dated July 24, 2007, March 10, 2008, and November 8, 2011, opined that claimant has a "very slight" impairment due to a weakened left hemidiaphragm, has restriction but no obstruction on the July 15, 2009 pulmonary function study, and is not totally disabled from a pulmonary standpoint. Director's Exhibit 28; Employer's Exhibit 5. Drs. Crisalli, Fino, and Zaldivar agreed that claimant likely is disabled from a cardiac standpoint.

The administrative law judge discredited the opinions of Drs. Crisalli, Fino, and Zaldivar because the physicians did not address the October 12, 2011 pulmonary function study, which the administrative law judge found to be qualifying. Decision and Order at 25. Additionally, the administrative law judge discounted Dr. Zaldivar's opinion, that claimant does not have an obstructive impairment, because he found that Dr. Zaldivar "misread" the results of the July 15, 2009 pulmonary function study, Decision and Order at 13, when he stated that its "FEV1 %" value was 80% of predicted.[9] Employer's Exhibit 5 at 11-12. The administrative law judge further found that Dr. Zaldivar's opinion was undercut by the miner's medical treatment records, which listed diagnoses of chronic obstructive pulmonary disease, and contained a statement from claimant's cardiologist that he suspected claimant's shortness of breath was pulmonary in origin. The administrative law judge concluded that, "the physician reports do not prevail over the results of the pulmonary function tests evidencing a total pulmonary disability. Thus, a weighing of the pulmonary function tests, arterial blood gas tests, physicians' reports and treatment records show[s] that [c]laimant suffers from a total pulmonary disability." Decision and Order at 14.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), employer argues that the administrative law judge erred in finding total disability established based on the sole qualifying pulmonary function study, without considering its reliability. Employer's Brief at 24-26. We agree.

The quality standards apply only to evidence developed in connection with a claim for benefits. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). The October 12, 2011 pulmonary function study was contained in claimant's medical treatment records, and thus is not subject to the quality standards set forth at 20 C.F.R. §718.103. *Stowers*, 24 BLR at 1-92. However, the administrative law judge was required to address whether the 2011 pulmonary function study was

[9] The administrative law judge stated that the July 15, 2009 pulmonary function study "actually resulted in FEV1 values that are 61% of predicted before bronchodilator and 64% after bronchodilator." Decision and Order at 13.

sufficiently reliable, despite the inapplicability of the quality standards.[10] Therefore, the administrative law judge erred in crediting the qualifying 2011 pulmonary function study without considering its reliability to form the basis of a finding of total disability.[11] Thus, we vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), and we remand this case for him to consider whether the October 12, 2011 pulmonary function study is sufficiently reliable to establish total disability. In the interest of judicial economy, we also instruct the administrative law judge to address, at 20 C.F.R. §718.204(b)(2)(i), whether the July 15, 2009 medical treatment pulmonary function study, on which he also relied, was sufficiently reliable to constitute evidence of total disability. Employer's Exhibit 4 at 4; n.7, *supra*.

Employer next argues, pursuant to 20 C.F.R. §718.204(b)(2)(iv), that the administrative law judge erred in rejecting the medical opinions of Drs. Crisalli, Fino, and Zaldivar that claimant is not totally disabled. Employer's Brief at 12-24, 26-27. The administrative law judge discounted the opinions of Drs. Crisalli, Fino, and Zaldivar because the physicians did not address the October 12, 2011 pulmonary function study. Because we have vacated the administrative law judge's finding that the pulmonary function study evidence established total disability and have instructed him to reconsider that issue, we also vacate his finding regarding the medical opinion evidence, and instruct

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[10] The comments to the 2000 regulatory revisions explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[11] Employer argues that only a single pre-bronchodilator and post-bronchodilator study was performed, and thus it cannot be determined whether each study was valid, by comparing tracings to determine whether they are within five percent of each other, or alternatively, 100 millileters of each other. Employer's Brief at 25. Employer further asserts that neither study met the seven second exhalation rule, and that there were problems with claimant's effort, as the testing notes document claimant's inability to perform the diffusing and functional residual capacity tests. *Id*. Employer did not submit evidence addressing the reliability issue, such as a physician's review of the 2011 testing.

him to reconsider it, on remand, after he has reconsidered the pulmonary function study evidence.

Further, we agree with employer that substantial evidence does not support the administrative law judge's additional reasons for discounting Dr. Zaldivar's opinion, and that the administrative law judge should therefore reconsider those reasons, on remand, and explain his determinations. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Specifically, substantial evidence does not support the administrative law judge's determination that Dr. Zaldivar misread the results of the July 15, 2009 pulmonary function study. As employer notes, Dr. Zaldivar accurately stated that the FEV1/FVC ratio of the study, which he referred to as its "FEV1 %" value, was 80% of predicted. Employer's Exhibit 5 at 11-12; Claimant's Exhibit 3. Further, in finding that Dr. Zaldivar's opinion was not supported by claimant's medical treatment records, the administrative law judge did not address Dr. Zaldivar's specific explanations for why he disagreed with the diagnoses of COPD in claimant's medical treatment records, and with the cardiologist's suspicion that claimant's shortness of breath is due to his lungs, or indicate why he credited those aspects of the record over Dr. Zaldivar's opinion. The administrative law judge should specifically address those issues, on remand. *See Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Additionally, on remand, the administrative law judge must consider the medical opinions in light of the exertional requirements of claimant's usual coal mine employment as a foreman. *See McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988).

In light of the foregoing, we vacate the administrative law judge's determination that the weight of the pulmonary function study, blood gas study, and medical opinion evidence and treatment records establishes total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 11-15. Therefore, we also vacate the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and established a change in the applicable condition of entitlement under 20 C.F.R. §725.309(c), and a mistake in fact under 20 C.F.R. §725.310. On remand, the administrative law judge must reconsider whether claimant has established total disability and is entitled to invocation of the Section 411(c)(4) presumption.[12] Before finding total disability established, the administrative law judge must weigh the contrary probative evidence together with the

[12] Review of the administrative law judge's decision, and of the parties' briefs, discloses no discussion of whether claimant's coal mine employment constituted qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. The administrative law judge should resolve that issue, if reached, on remand.

evidence supportive of total disability. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Employer's Brief at 28-29.

Rebuttal of the Section 411(c)(4) Presumption

Although the administrative law judge may not reach the issue of rebuttal on remand, in the interest of judicial economy, we also address employer's assertion that the administrative law judge erred in finding that it did not rebut the amended Section 411(c)(4) presumption.

Initially, employer objects to the application of the rebuttal provisions of amended Section 411(c)(4) to this claim brought against a responsible operator, as the language of this section addresses only claims filed against the Secretary of Labor. Employer's Brief at 8. Employer's arguments are substantially similar to those rejected by the Board in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550, BLR (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject them here for the reasons set forth in that decision.[13] *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge noted that the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge found that employer failed to establish rebuttal by disproving the existence of clinical or legal pneumoconiosis.[14] Decision and Order at 15-18. The

[13] Moreover, as discussed *supra* n.3, the Department of Labor subsequently promulgated regulations implementing amended Section 411(c)(4). Those regulations make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)).

[14] "Clinical pneumoconiosis" consists of "those 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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

administrative law judge concluded that claimant is totally disabled due to legal pneumoconiosis. *Id*. at 18.

In considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered eight readings of two x-rays dated March 30 and June 28, 2006,[15] and considered the physicians' radiological qualifications. Decision and Order at 16. The administrative law judge found the conflicting x-ray evidence to be in equipoise, as he found that there was no reason to credit one physician's reading over another. Decision and Order at 16.

The administrative law judge also considered three CT scan interpretations contained in claimant's treatment records.[16] Claimant's Exhibits 1, 3, 9. After summarizing the CT scan interpretations, the administrative law judge found that the CT scan evidence did not disprove the existence of clinical pneumoconiosis, as none of the CT scans was read to determine the existence of pneumoconiosis. Decision and Order at 16.

The administrative law judge then turned to the medical opinions of Drs. Rasmussen, Crisalli, Fino, and Zaldivar. Dr. Rasmussen diagnosed claimant with clinical pneumoconiosis, while Drs. Crisalli, Fino, and Zaldivar opined that claimant does not suffer from clinical pneumoconiosis. Director's Exhibits 13, 28; Employer's Exhibits 2-5. The administrative law judge found that the medical opinion evidence did not disprove the existence of clinical pneumoconiosis because the physicians based their opinions on their reviews of the x-ray and CT scan evidence, which the administrative

[15] Dr. Rasmussen, a B reader, and Dr. Alexander, a Board-certified radiologist and B reader, interpreted the March 30, 2006 x-ray as positive for pneumoconiosis. Drs. Wiot and Meyer, both of whom are Board-certified radiologists and B readers, and who, employer notes, possess additional radiological credentials, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibits, 13, 14; Claimant's Exhibit 1; Employer's Exhibit 1. Drs. Alexander and Navani, both Board-certified radiologists and B readers, interpreted the June 28, 2006 x-ray as positive for pneumoconiosis. Dr. Meyer, a Board-certified radiologist and B reader, and Dr. Zaldivar, a B reader, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 28; Claimant's Exhibits 6, 7.

[16] The CT scans were performed on April 30, 2007, January 14, 2008, and July 29, 2009. Claimant's Exhibits 1, 3, 9. The record reflects that an additional treatment record exhibit dated October 4, 2011, which the administrative law judge characterized as a CT scan reading was, in fact, a reading of a chest x-ray. Employer's Exhibit 6.

law judge found neither supported nor negated the existence of clinical pneumoconiosis. Decision and Order at 16.

Employer argues that the administrative law judge erred in finding that employer did not disprove the existence of clinical pneumoconiosis. Employer's Brief at 31-33. Initially, employer contends that, when the administrative law judge stated that there was no reason to credit one x-ray reading over another, he considered only whether a physician was qualified as a B reader or Board-certified radiologist, and did not address evidence of the additional radiological qualifications of Drs. Wiot and Meyer.[17] *Id*. at 31-32. We agree.

A physician's additional qualifications in radiology are relevant, "as they may bear on the quality of the various x-ray interpretations of record." *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003). Therefore, we vacate the administrative law judge's determination that the x-ray readings were in equipoise, and instruct him, on remand, to take into account all of the physicians' radiological qualifications that are of record, and to reconsider whether the x-ray evidence disproves the existence of clinical pneumoconiosis.

Employer also contends that the administrative law judge did not evaluate the x-ray and CT scan evidence in light of the medical opinion evidence of record, in which the physicians explained why they concluded that the x-ray and CT scan evidence indicated that claimant does not suffer from clinical pneumoconiosis.[18] *Id*. at 32-33. We agree with employer. We thus vacate the administrative law judge's finding that employer did not disprove the existence of clinical pneumoconiosis based on the CT scan and medical opinion evidence, and instruct him to consider the x-ray and CT scan evidence in light of the medical opinion evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).

With regard to whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Crisalli,

[17] Employer notes that Dr. Wiot was recognized as a "C" reader under the ILO x-ray classification scheme, and was a professor of radiology at the University of Cincinnati. Employer further notes that Dr. Meyer is a professor of radiology at the University of Wisconsin. Director's Exhibit 14; Employer's Exhibit 1.

[18] Employer notes that Drs. Crisalli and Zaldivar explained why they concluded that the positive x-ray interpretations were not plausible, and that Drs. Crisalli, Fino, and Zaldivar explained why they concluded that the findings on claimant's CT scans were not indicative of coal workers' pneumoconiosis. *See* Employer's Brief at 32-33; Director's Exhibit 28; Employer's Exhibits 2-5.

Fino, and Zaldivar, all of whom opined that claimant does not have legal pneumoconiosis, because he has little or no respiratory impairment, but suffers from heart disease. Director's Exhibit 28; Employer's Exhibits 3-5. The administrative law judge rejected their opinions because the physicians did not diagnose claimant with an obstructive impairment, when the administrative law judge found that the pulmonary function studies performed in 2009 and 2011 showed that claimant suffers from such an impairment. Decision and Order at 17. Because we have vacated the administrative law judge's finding on that issue and instructed him to reconsider the pulmonary function study evidence, we vacate the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis, and instruct the administrative law judge, on remand, to reconsider the medical opinions on that issue, if reached.

Employer contends that the administrative law judge failed to address whether employer rebutted the Section 411(c)(4) presumption by proving that claimant's impairment did not arise out of, or in connection with, coal mine employment. Employer's Brief at 10-11. In a footnote after his determination that employer failed to disprove the existence of legal pneumoconiosis, the administrative law judge stated that, "Because I have found legal pneumoconiosis in this case, I will not make a separate determination of the etiology of [c]laimant's pneumoconiosis, as the legal pneumoconiosis inquiry necessarily subsumes that inquiry." Decision and Order at 18 n.6 (citation omitted). Since we have vacated the administrative law judge's finding that employer failed to disprove the existence of pneumoconiosis, we instruct the administrative law judge, on remand, that if the issue is reached, he should specifically address whether employer has proved that claimant's impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's contention, the proper rebuttal standard, as enunciated by the United States Court of Appeals for the Fourth Circuit, is that employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by coal mine dust exposure.[19] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Director's Brief at 2 n.2; Employer's Brief at 11.

Basis for Granting Modification, and the Commencement Date of Benefits

Employer contends that the administrative law judge erred in awarding benefits as of January 2006, the month in which the claim was filed, given that he based his finding

[19] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision was issued requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)).

of total disability on the most recent pulmonary function study of October 12, 2011. Employer's Brief at 33-34. Because we have vacated the award of benefits, we also vacate the benefits commencement date finding, and instruct the administrative law judge, on remand, to reconsider that issue if he again awards benefits. In the interest of judicial economy, and to avoid any repetition of error on remand, we further instruct the administrative law judge to explain fully his specific basis for granting modification, and his determination of the benefits commencement date.

The basis for granting modification, whether mistake in fact or change in conditions, affects the date from which benefits commence.[20] The administrative law judge found that claimant established a mistake in a determination of fact, and awarded benefits as of the month in which the claim was filed. As employer argues, however, the administrative law judge determined that the most recent medical evidence submitted on modification "best reflect[ed] [c]laimant's present pulmonary condition," Decision and Order at 12, and established total disability and invocation of the Section 411(c)(4) presumption. The administrative law judge, therefore, arguably granted modification based on a change in conditions. If, as the administrative law judge also found, the medical evidence did not establish when claimant became totally disabled due to pneumoconiosis, claimant would have been entitled to benefits as of the month in which he requested modification, January 2010. 20 C.F.R. §725.503(d)(2). Because the administrative law judge's decision is unclear as to his basis for granting modification, if the issue is reached on remand, the administrative law judge must specifically explain his basis for granting modification, and then determine the commencement date for benefits in accordance with 20 C.F.R. §725.503(d).

Justice Under the Act

Finally, employer contends that the administrative law judge erred in failing to address whether granting claimant's request for modification would render justice under the Act. Employer's Brief at 35. We agree. The modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination,

[20] If modification is based on a change in conditions, claimant is entitled to benefits as of the month of onset of total disability due to pneumoconiosis, or if that date is not ascertainable, as of the date he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in fact, claimant is entitled to benefits from the date he became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the date he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler v. Peabody Coal Co.*, 926 F.3d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

and should be made only where doing so will render justice under the Act. *Westmoreland Coal Co. v. Sharpe*, 692 F. 3d 317, 327-28, 25 BLR 2-157, 2-173-74 (4th Cir. 2012), *cert. denied*, 570 U.S. (2013); *Sharpe v. Director, OWCP*, 495 F.3d 125, 131-32, 24 BLR 2-56, 2-67-68 (4th Cir. 2007). In this case, the administrative law judge failed to render specific findings as to whether reopening the miner's claim would render justice under the Act. Consequently, we instruct the administrative law judge to determine whether reopening this claim will render justice under the Act. *See Sharpe*, 692 F.3d at 327-28, 25 BLR at 2-173-74; *Sharpe*, 495 F.3d at 131-32, 24 BLR at 2-67-68.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge