U.S. Department of Labor

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

BRB No. 14-0125 BLA

LYNDELL N. CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN COAL COMPANY	)	DATE ISSUED: 01/28/2015
	)	
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 on Second Remand Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), 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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Second Remand[1] Award of Benefits (2009-BLA-05884) of Administrative Law Judge Daniel F. Solomon with respect to a claim filed on June 23, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In its previous decision, the Board affirmed the administrative law judge's findings that claimant established more than fifteen years of coal mine employment at a surface mine in dust conditions similar to those found in an underground mine. *Clark v. Green Coal Co.*, BRB No. 12-0460 BLA, slip op. at 4 (June 17, 2013)(unpub.). However, the Board vacated the administrative law judge's findings that the medical opinion evidence was sufficient to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4); and that employer did not rebut the presumption.[2] *Id*. at 9. Consequently, the Board vacated the award of benefits and remanded the case to the administrative law judge for reconsideration. *Id*. at 12.

On appeal, employer argues that the administrative law judge erred in relying solely on Dr. Houser's opinion to find total disability established at 20 C.F.R. §718.204(b)(2), particularly when none of the objective evidence was qualifying. In addition, employer asserts that, in weighing the evidence to determine whether employer rebutted the presumption at amended Section 411(c)(4), the administrative law judge erred in relying on the preamble to the 2001 revised regulations. Employer further asserts that the administrative law judge did not properly weigh the medical opinion evidence relevant to rebuttal and omitted relevant evidence from consideration. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited brief, asking the Board to reject employer's argument that the administrative law judge's reliance on the preamble was improper.

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,

[1] Although the administrative law judge entitled his decision "Decision and Order on Second Remand," the Board has remanded this case only once. Accordingly, we will refer to the decision on appeal as "Decision and Order on Remand."

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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.

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).

I. Invocation of the Amended Section 411(c)(4) Presumption

The administrative law judge observed that, in his initial Decision and Order, he had determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order on Remand at 2. The administrative law judge discussed claimant's testimony concerning his job duties as a field mechanic and noted that he had previously "found that [c]laimant's job as actually performed was heavy . . . . [and] [t]he Board did not disturb [this] finding." *Id.* at 3. The administrative law judge also indicated that he had previously determined "that the preponderance of the evidence, as well as the most recent evidence, shows that [c]laimant has a moderately severe obstructive disorder . . . . [and] [t]he Board did not disturb this finding either." *Id.* at 4.

In reevaluating the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge acknowledged that, in determining that claimant was not totally disabled, Dr. Repsher addressed the more recent evidence, including the June 2, 2011 pulmonary function study and blood gas study performed by Dr. Chavda.[4] Decision and Order on Remand at 7; Employer's Exhibit 15. However, the administrative law judge determined that Dr. Repsher's opinion was entitled to little weight, as he did not adequately address his diagnosis of moderate obstructive lung disease in the context of claimant's last coal mine employment. Decision and Order on Remand at 7; Employer's Exhibits 2, 15. Similarly, the administrative law judge gave less weight to Dr. Jarboe's opinion, that claimant was not totally disabled, because his report did not reflect an accurate understanding of the duties of claimant's last coal mine employment, despite Dr. Jarboe's claim that he reviewed Dr. Houser's opinion, including his description of claimant's employment history. Decision and Order on Remand at 7-8; Employer's

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[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] The administrative law judge determined correctly that the pulmonary function study obtained by Dr. Chavda, on June 2, 2011, produced values in excess of the qualifying values set forth in Appendix B to 20 C.F.R. Part 718. Decision and Order on Remand at 13; Claimant's Exhibit 7. The administrative law judge also accurately indicated that Dr. Chavda characterized claimant's obstructive defect as moderate. *Id.*

Exhibit 18 at 21, 26. The administrative law judge also gave less weight to Dr. Broudy's opinion, that claimant does not have a significant obstructive impairment, as he found that Dr. Broudy did not consider the more recent pulmonary function study evidence showing a moderate obstructive impairment. Decision and Order on Remand at 6; Employer's Exhibits 1, 7. In contrast, the administrative law judge determined that Dr. Houser's opinion was entitled to greater weight, as he found that Dr. Houser had an accurate understanding of claimant's last coal mine employment and that his opinion was reasoned and documented. Decision and Order on Remand at 8; Claimant's Exhibit 6. Consequently, the administrative law judge found that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the medical opinion evidence. Decision and Order on Remand at 9.

Employer asserts that the administrative law judge erred in discrediting Dr. Repsher's opinion, as Dr. Repsher explicitly considered Dr. Chavda's June 2, 2011 pulmonary function study and provided detailed testimony as to claimant's functional abilities in reports dated July 21, 2011 and July 26, 2011. Employer contends that the administrative law judge also erred in discrediting Dr. Jarboe's opinion because, "[i]f the [administrative law judge] was confused or uncertain whether the doctors' understanding was accurate [concerning claimant's last coal mine duties], he should have asked them." Employer's Brief at 16. Additionally, employer states that the administrative law judge's decision to discredit Dr. Broudy for not considering the most recent pulmonary function study is at odds with his decision to credit Dr. Houser's opinion when he, too, did not consider this study. Employer further contends that the administrative law judge erred in determining that Dr. Baker diagnosed a totally disabling respiratory impairment, as Dr. Baker ultimately concluded that claimant did not have a significant impairment. Employer also asserts that the administrative law judge erred in relying solely on Dr. Houser's opinion to find that claimant established total disability, particularly when there was no objective evidence to support his opinion, and he reviewed less data than the other physicians of record.[5] Finally, employer argues that the administrative law judge did not weigh all of the evidence together in making his finding at 20 C.F.R. §718.204(b)(2), as is required.

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[5] Employer disagrees with both the administrative law judge's previous finding, that Dr. Houser's opinion is reasoned, and the Board's affirmance of this finding, as employer argues that Dr. Houser did not explain his conclusion by referencing objective tests. Because the Board has already addressed this issue, and employer has identified no persuasive reason to disturb our prior holding, we decline to address it again. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000)(en banc)(Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Clark v. Green Coal Co.*, BRB No. 12-0460 BLA, slip op. at 7 (June 17, 2013)(unpub.).

Employer's contentions on appeal are without merit. With respect to the administrative law judge's consideration of the medical opinion evidence, he acted within his discretion as fact-finder in determining that Dr. Repsher's opinion on the issue of total disability is entitled to little weight. Dr. Repsher's July 21, 2011 report was based, in part, on his review of the pulmonary function study that Dr. Chavda obtained on June 2, 2011. Employer's Exhibit 15. Dr. Repsher stated in this report that Dr. Chavda's pulmonary function study, which was the most recent of record, "revealed *moderate* obstructive disease with an FEV1 of 65% of predicted," but since claimant "does not meet the Department of Labor Table of Presumed Disability," he "would be capable of continuing to work at many jobs in the coal mine." *Id*. (emphasis added). In a supplemental report dated July 26, 2011, Dr. Repsher indicated that he had reviewed the portions of the depositions of claimant and Dr. Baker in which they described claimant's job. Employer's Exhibit 16. Dr. Repsher asserted, "[f]rom a pulmonary viewpoint, [claimant] would have no difficulty in performing his usual coal mine duties." *Id*.

The administrative law judge rationally discredited Dr. Repsher's July 21, 2011, report because, in stating that claimant's moderate obstructive disease would not prevent him from performing "many jobs in the coal mine," Dr. Repsher did not "address the impact of Dr. Chavda's pulmonary function study results on his determination that [c]laimant can perform his last coal mine job duties specifically." Decision and Order on Remand at 7, *quoting* Employer's Exhibit 15; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000). The administrative law judge's valid rationale for discrediting Dr. Repsher's July 11, 2011 report also applies to Dr. Repsher's July 26, 2011 report. In the latter report, Dr. Repsher stated that he had reviewed Dr. Baker's deposition and a portion of claimant's deposition, purportedly detailing the nature of claimant's last coal mine job as a field mechanic, but he did not describe or summarize the testimony upon which he relied which, apparently, also included a job description provided by claimant's counsel.[6] Employer's Exhibit 16. In addition, although Dr. Repsher stated unequivocally that, "from a pulmonary viewpoint," claimant "would have no difficulty in performing his usual coal mine duties," he did not set forth an analysis of the effect of claimant's impaired functional capacity on his ability to perform the exertional requirements of his job as a field mechanic. *Id*. Therefore, although the administrative law judge did not specifically address the July 26, 2011 report, his criticism of the July 21, 2011 report applies with equal force to the July 26, 2011 report. In neither report did Dr. Repsher "address the impact of Dr. Chavda's

[6] The administrative law judge found claimant's usual coal mine employment to be heavy labor. Decision and Order on Remand at 3. Dr. Repsher did not characterize it as such in offering his opinion subsequent to his review of Dr. Chavda's June 2, 2011 pulmonary function study. Employer's Exhibits 15, 16.

pulmonary function study results on his determination that [c]laimant can perform his last coal mine job duties specifically." Decision and Order on Remand at 7. We affirm, therefore, the administrative law judge's decision to discredit Dr. Repsher's opinion for failing to discuss with any specificity claimant's ability to perform heavy labor in light of the limitations imposed by the moderate pulmonary impairment which the doctor diagnosed. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124

We also affirm the administrative law judge's decision to discredit the opinions of Drs. Jarboe and Broudy. Contrary to employer's contention, that the administrative law judge should have asked the physicians whether they were aware of the exertional requirements of claimant's last coal mine job, an administrative law judge is not required to seek additional information concerning the basis of a physician's opinion. Rather, in the administrative law judge's role as fact-finder, he has a duty to assess the probative value of the evidence, including the medical opinions of record. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002). In this case, the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Jarboe and Broudy, as he found that neither physician fully understood the nature of claimant's previous coal mine employment.[7] *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Cornett*, 227 F.3d at 578, 22 BLR at 2-124.

As to the administrative law judge's weighing of Dr. Baker's opinion, employer is incorrect in alleging that the administrative law judge was unaware that Dr. Baker testified that the more recent pulmonary function studies support the diagnosis of either a Class 1, or no significant, impairment. *See* Decision and Order on Remand at 6 n.3, 8. More importantly, the administrative law judge did not rely on Dr. Baker's opinion in finding total disability established at 20 C.F.R. §718.204(b)(2)(iv). *Id.* Therefore, remand for reconsideration of his opinion is not required. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[7] Dr. Jarboe testified that claimant "worked as a surface coal miner" and stated that he did not "have information specifically about all the jobs that [claimant] did as a surface worker." Employer's Exhibit 18 at 21. Dr. Broudy noted that claimant "loaded holes, drove trucks and worked as an oil and greaser on the shovel." Employer's Exhibit 1. However, the administrative law judge determined that claimant's last job as a field mechanic required him to perform heavy lifting in servicing equipment and performing his other duties, which Dr. Broudy did not consider. Decision and Order on Remand at 3, 8.

With respect to the administrative law judge's crediting of Dr. Houser's opinion, contrary to employer's allegation, qualifying pulmonary function or blood gas studies are not required for a physician to render a credible diagnosis of a totally disabling respiratory impairment.[8] Test results that exceed the applicable table values may document a diagnosis of a totally disabling respiratory or pulmonary impairment if the physician provides a reasoned explanation of his diagnosis. *See Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *see also Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291, 1-1294 (1984) (The determination of the significance of a test is a medical assessment for the doctor, rather than the administrative law judge).

We also reject employer's contention that the administrative law judge should have discredited Dr. Houser's opinion for the same reason that he discredited Dr. Broudy's opinion, i.e., that he did not review the most recent pulmonary function study. This study, performed by Dr. Chavda on June 22, 2011, revealed a moderate obstructive impairment, according to Dr. Chavda and Dr. Repsher. Claimant's Exhibit 7; Employer's Exhibit 15. Dr. Houser based his diagnosis of a totally disabling respiratory impairment on the pulmonary function study that he obtained on December 29, 2010, which he described as revealing a moderate obstructive impairment. Claimant's Exhibit 6. Thus, the results of the most recent pulmonary function study do not undermine the basis for Dr. Houser's opinion. In light of our rejection of employer's allegations of error, we hold that the administrative law judge permissibly gave "greater weight" to Dr. Houser's opinion at 20 C.F.R. §718.204(b)(2)(iv), because the administrative law judge found that Dr. Houser understood the exertional requirements of claimant's last coal mine job, and his diagnosis of a totally disabling respiratory impairment was reasoned and documented. Decision and Order on Remand at 8; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Additionally, we reject employer's contention that remand is necessary, as the administrative law judge erred in failing to weigh the evidence supportive of a finding of total disability against the contrary probative evidence of record. Although the administrative law judge did not separately weigh Dr. Houser's diagnosis of a totally disabling impairment against the contrary evidence, the administrative law judge's permissible finding that Dr. Houser's opinion is supported by the objective evidence of record encompassed this inquiry. *See* 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island*

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[8] 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, C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Creek Coal Co., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc). Therefore, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2), and invoked the amended Section 411(c)(4) presumption.[9]

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

To rebut the Section 411(c)(4) presumption, employer is required to prove either that claimant does not have pneumoconiosis, or that his disabling respiratory impairment did not "arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge determined, in his previous decision, that employer did not rebut the presumed existence of clinical pneumoconiosis[10] as the x-ray evidence was in equipoise, and noted that the Board "did not disturb [this] finding." Decision and Order on Remand at 10.

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[9] Employer notes that it continues to object to, and wants to preserve for appeal, the Board's previous affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment in conditions substantially similar to underground conditions, as it contends that the administrative law judge did not make the required comparison between claimant's conditions on the surface and conditions underground. As the Board previously addressed these concerns, we will not address them again. *Clark*, slip op. at 3-4.

[10] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "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 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).

Concerning rebuttal of the presumed existence of legal pneumoconiosis,[11] the administrative law judge gave more weight to Dr. Houser's opinion, that claimant's respiratory impairment is due to cigarette smoking and coal dust exposure, as he found that it was well reasoned and documented, and consistent with comments in the preamble to the regulations. Decision and Order on Remand at 13; Claimant's Exhibit 6. The administrative law judge determined that the opinions of Drs. Repsher, Broudy and Jarboe, that claimant does not have legal pneumoconiosis, were not well reasoned because they determined that claimant does not have a respiratory impairment, contrary to the administrative law judge's determination that claimant has a moderately severe obstructive impairment. Decision and Order on Remand at 14; Employer's Exhibits 1, 2, 7, 14-18. The administrative law judge also found that Drs. Broudy and Jarboe erred in relying on premises contrary to statements in the preamble to the 2001 revisions to the regulations. Decision and Order on Remand at 15; Employer's Exhibit 7, 12. The administrative law judge further found that Dr. Jarboe improperly engaged in statistical averaging when he cited studies showing that only a minority of miners have a clinically significant loss of FEV1. Decision and Order on Remand at 16. Relying on his findings concerning legal pneumoconiosis, the administrative law judge also determined that claimant did not rebut the presumed existence of a totally disabling respiratory impairment due to pneumoconiosis. *Id*. at 17-18.

Employer argues that "the [administrative law judge's] resort to the discussion in the preamble as the deciding factor elevates the preamble to the status of a legal rule, published without the benefit of notice and comment." Employer's Brief at 20. Employer also asserts that the administrative law judge did not otherwise provide valid rationales for discrediting the opinions of Drs. Repsher, Broudy and Jarboe.

Employer's arguments lack merit. Contrary to employer's allegation, the administrative law judge did not use the preamble as the sole deciding factor, but rather cited it, along with other factors, in weighing the medical opinion evidence. *See* Decision and Order on Remand at 13-17. Indeed, the administrative law judge provided valid rationales for discrediting the opinions of employer's experts that were unrelated to the preamble. The administrative law judge rationally determined that the opinions of Drs. Repsher and Broudy, that claimant does not have legal pneumoconiosis, were entitled to little weight because they opined, contrary to the administrative law judge's finding, that claimant does not have a pulmonary impairment. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26; Decision and Order on Remand at 14. The administrative law judge also acted within his discretion in giving

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[11] Pursuant to 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. 20 C.F.R. §718.201(a)(2).

less weight to Dr. Jarboe's opinion regarding the cause of claimant's disabling impairment, as he relied on generalities derived from various studies, rather than findings specific to claimant. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); *accord Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008). Because employer does not otherwise challenge the administrative law judge's findings that employer did not rebut the presumed existence of legal pneumoconiosis or that claimant's disabling respiratory impairment "arose out of, or in connection with," his coal mine employment, they are affirmed. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

Accordingly, the administrative law judge's Decision and Order on Second Remand Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that Dr. Repsher's opinion, that claimant is capable of performing his usual coal mine employment, is not adequately reasoned. In my view, employer is correct in maintaining that the administrative law judge mischaracterized the evidence or did not consider all relevant evidence, as is required by the Administrative Procedure

Act[12] (APA). *See Director, OWCP v. Congleton*, 793 F.2d 428, 7 BLR 2-12 (6th Cir. 1984); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). As noted by employer, the administrative law judge did not address Dr. Repsher's report dated July 26, 2011, which appears at Employer's Exhibit 16.[13] Rather, the administrative law judge's restricted his analysis to Dr. Repsher's July 21, 2011 report, which appears at Employer's Exhibit 15. In the July 21, 2011 report, Dr. Repsher observed that "[c]laimant would be capable of continuing to work at many jobs in the coal mine." Employer's Exhibit 15. The administrative law judge stated, "I am not certain Dr. Repsher did address the impact of Dr. Chavda's pulmonary function study results on his determination that [c]laimant can perform his last coal mine job duties specifically. An opinion may be given little weight if it is equivocal or vague."[14]

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[12] The Administrative Procedure Act, 5 U.S.C. §500 et seq., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

[13] In this report, Dr. Repsher opined, following his review of the most recent pulmonary function study, and being provided with deposition testimony on the nature of claimant's last coal mine job, that claimant "would have no difficulty in performing his usual coal mine duties." Employer's Exhibit 16. Dr. Repsher testified at an earlier deposition, before reviewing the most recent pulmonary function study, that claimant "has the respiratory capacity to do continuous medium to moderately heavy work and the respiratory capacity to do intermittent heavy work." Employer's Exhibit 14 at 29.

[14] The administrative law judge's findings with respect to Dr. Repsher's July 21, 2011 report are set forth in his Decision and Order on Remand as follows:

> I note that Dr. Repsher did address the more recent evidence, in particular the June, 2011 pulmonary function study and blood gas study administered by Dr. Chavda, in a supplemental medical report dated July 21, 2011. *See* EX 15. I acknowledge that, consequently, Drs. Houser, Chavda, and Jarboe did not read a more complete record than Dr. Repsher. Nevertheless, I find that Dr. Repsher did not adequately address the June, 2011 pulmonary function study in rendering his opinion as total disability. According to Dr. Repsher, this pulmonary function study "revealed moderate obstructive disease." *Id.* Previously, based on earlier pulmonary function studies, he found that Claimant has "very mild and probably clinically insignificant COPD." EX 2. In the July 21, 2011 report he concluded that because Dr. Chavda's studies do not meet the DOL Table of Presumed Disability,

Decision and Order on Remand at 7, *quoting* Employer's Exhibit 15 (citation omitted). The administrative law judge further explained that, "Dr. Repsher accurately described claimant's last job and he noted that a mechanic may have to lift some heavy tools or equipment or pieces of machinery periodically . . . . However, I discounted Dr. Repsher's opinion on the basis that he did not adequately address the June 2011 pulmonary function study, in that his conclusion after reviewing the study as to whether claimant can perform his last coal mine job duties is equivocal and vague." *Id.* at 8.

In rendering these findings, the administrative law judge did not recognize that Dr. Repsher supplemented the July 21, 2011 report five days later to specifically address whether claimant could engage in his usual coal mine employment. Indeed, nowhere in his Decision and Order on Remand did the administrative law judge indicate awareness of the July 26, 2011 report, although it bears directly on the rationale that the administrative law judge relied on to discredit Dr. Repsher's opinion on the issue of total disability. This report appears at Employer's Exhibit 16 and, in it, Dr. Repsher indicated that he was furnished deposition testimony in which claimant and Dr. Baker described claimant's job as a field mechanic. Employer's Exhibit 16. In this July 26, 2011 report, Dr. Repsher stated: "You have asked whether or not [claimant] could return to his usual coal mine work. From a pulmonary viewpoint, [claimant] would have no difficulty in performing his usual coal mine duties." *Id.* This declaration differs from Dr. Repsher's statement in his July 21, 2011 report in that, after having received the most recent pulmonary function study, he rendered a conclusion that appears to be specific to the duties of claimant's last usual coal mine employment.

Determining whether Dr. Repsher's July 26, 2011 report cured the defect which the administrative law judge found in the physician's July 21, 2011 report is a task that falls within the sole discretion of the administrative law judge in his role as fact-finder. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Contrary to the majority's view, therefore, I would hold that the administrative law judge's omission of

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> "Clearly, [Claimant] would be capable of continuing to work *at many jobs in a coal mine*." EX 15 (emphasis added). It is unclear if "many jobs in a coal mine" includes Claimant's last coal mine job. Thus, I am not certain Dr. Repsher did address the impact of Dr. Chavda's pulmonary function study results on his determination that Claimant can perform his last coal mine job duties, specifically. An opinion may be given little weight if it is equivocal or vague . . . . I discounted Dr. Repsher's opinion on the basis that he did not adequately address the June 2011 pulmonary function study, in that his conclusion after reviewing the study as to whether Claimant can perform his last coal mine employment is equivocal and vague.

Decision and Order on Remand at 7, 8 (citation omitted).

Dr. Repsher's July 26, 2011 report from consideration does not constitute harmless error, but rather requires that the administrative law judge's decision to discredit Dr. Repsher's opinion on the issue of total disability be vacated, and the case remanded for consideration of the omitted evidence, in conjunction with the other relevant medical opinions. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). I would instruct the administrative law judge that, in so doing, he must apply the same level of scrutiny, and the same standards, to each medical opinion. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(en banc); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984).

Because the administrative law judge's discrediting of Dr. Repsher's conclusion that claimant is not totally disabled must be vacated, I also would vacate the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b) and invocation of the Section 411(c)(4) presumption. These dispositions further require that the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis, and the absence of a causal connection between pneumoconiosis and claimant's total disability, be vacated, as the administrative law judge relied on his weighing of Dr. Repsher's opinion on the issue of total disability.

Accordingly, I would further vacate the award of benefits and remand the case to the administrative law judge for reconsideration.

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JUDITH S. BOGGS
Administrative Appeals Judge