**U.S. Department of Labor**

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

BRB No. 16-0200 BLA

| | | |
|---|---|---|
| WILLIE J. NORTH | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| HARLAN CUMBERLAND COAL COMPANY, LLC | ) | |
| | ) | |
| | ) | |
| and | ) | DATE ISSUED: 02/02/2017 |
| | ) | |
| BITUMINOUS CASUALTY CORPORATION | ) | |
| | ) | |
| | ) | |
| 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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Johnnie L. Turner and Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

BOGGS, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2012-BLA-5929) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to

the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 18, 2011.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with over sixteen years of qualifying coal mine employment,[3] and found that the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.204(b)(2)(i), (iv) and 718.204(b) overall. The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially challenges the administrative law judge's denial of employer's request for post-bronchodilator testing. Employer also challenges the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and total respiratory disability at 20 C.F.R. §§718.204(b)(2)(i), (iv) and 718.204(b) overall. Further, employer contends that the administrative law judge erred in finding that employer did not rebut the presumption at

[1] This is claimant's third claim. Director's Exhibit 4. Claimant's prior claim, filed on March 1, 2001, was denied by Administrative Law Judge Daniel F. Solomon on December 17, 2004 because claimant failed to establish total respiratory disability. Director's Exhibit 2. The Board affirmed Judge Solomon's denial of benefits. *North v. Harlan Cumberland Coal* Co., BRB No. 05-0368 BLA (Jan. 19, 2006) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant 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) (2012); *see* 20 C.F.R. §718.305.

[3] The administrative law judge specifically found that all of claimant's coal mine employment took place underground or aboveground at an underground mine and, therefore, constituted qualifying coal mine employment for the purposes of invoking the Section 411(c)(4) presumption. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); Decision and Order at 10.

Section 411(c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.

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

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

## I. PROCEDURAL ISSUE

We first address employer's argument that the administrative law judge abused her discretion in denying employer's request to compel claimant to undergo post-bronchodilator pulmonary function testing. Employer maintains that an administrative law judge must allow valid testing that is not contraindicated and that the testing is required to afford it due process of law. The relevant procedural history is as follows. On September 21, 2011, claimant underwent pulmonary function testing by Dr. Rosenberg. Dr. Rosenberg was able to administer a pre-bronchodilator pulmonary function study, but recorded that "[claimant] declined to take [a] bronchodilator [because his] attorney . . . told him not to take [a] bronchodilator."[5] Director's Exhibit 13-19. Dr. Rosenberg added that "[claimant] stated that he would have taken [a] post[-bronchodilator] test but was only doing what his lawyer told him to do." Id. Thus Dr. Rosenberg was not able to perform post-bronchodilator testing. *Id*. At employer's request, on October 10, 2013, claimant underwent repeat pulmonary function testing by Dr. Dahhan, but again declined to take bronchodilator medication. Dr. Dahhan similarly recorded that "[claimant] stated he was advised by his lawyer not to take a

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[5] Dr. Rosenberg added that he spoke with claimant's counsel and verified that those were his instructions. Director's Exhibit 13-19.

bronchodilator." Dr. Dahhan's October 13, 2013 report. Thus, Dr. Dahhan also administered only a pre-bronchodilator pulmonary function study.

On October 21, 2013, employer filed a motion to deny the claim by reason of abandonment, pursuant to 20 C.F.R. §§725.409, 725.414, asserting that claimant unreasonably refused to submit to the post-bronchodilator pulmonary function testing that employer scheduled for him.[6] In the alternative, employer requested that claimant be compelled to undergo the requested testing, arguing that it was required in order to afford employer due process of law.[7] Claimant objected to employer's motion, arguing that a post-bronchodilator pulmonary function study is not necessary for determining whether claimant is disabled in federal black lung cases. Claimant also argued that he did not abandon his claim because he attended all appointments that employer scheduled for him. Further, claimant contended that it would be unreasonable to require him to take bronchodilator medication, given his advanced age, poor health, and the unknown side effects of the medication.[8]

Following her consideration of the parties' arguments, by order dated November 1, 2013, the administrative law judge denied employer's motion. The administrative law

[6] The regulation at 20 C.F.R. §725.414 provides that "[i]f a miner unreasonably refuses . . . [t]o submit to an evaluation or test requested by the district director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. 20 C.F.R. §725.414(a)(3)(i)(B), *referencing* 20 C.F.R. §725.409. The regulation at 20 C.F.R. §725.409 provides, in pertinent part, that a claim may be denied at any time by the district director by reason of abandonment where the claimant fails "[t]o undergo a required medical examination without good cause . . . ." 20 C.F.R. §725.409(a)(1).

[7] Employer asserted that post-bronchodilator testing was both reasonable and necessary for employer's development of its defense, and noted that Dr. Rosenberg specifically stated that post-bronchodilator testing "would have been quite useful in confirming that [claimant] has asthma." Employer's October 16, 2013 Motion at 5, *quoting* Director's Exhibit 13-8. Employer further asserted that claimant previously submitted to post-bronchodilator testing, and that his refusal to submit to employer's recent request for bronchodilator testing was in "bad faith." Employer's Brief at 4 n.1, 5; Director's Exhibit 2-378.

[8] Claimant stated that he "has severe breathing problems and a fear of taking the post-bronchodilator testing, which he feels at his age could cause his heart to become erratic or cause other problems." Claimant's October 28, 2013 Response to Employer's Motion.

judge stated that employer had "not demonstrated that [c]claimant has unreasonably refused to submit to any testing it has requested" and that "the pertinent regulations do not require [c]laimant to undergo post-bronchodilator pulmonary function testing." November 1, 2013 Order. Thus, the administrative law judge concluded that "denial of this claim on the basis of abandonment would be inappropriate, as would issuance of any order to compel [c]laimant to submit to such testing." *Id.* During the November 12, 2013 hearing, the administrative law judge noted that employer took exception to her November 1, 2013 order, but declined to alter her determination. Hearing Tr. at 6, 7.

In its post-hearing closing brief, employer renewed its objections, asserting that it should be dismissed from liability for this claim because claimant refused to submit to the two post-bronchodilator pulmonary function studies that it scheduled for him. Employer's May 5, 2014 Post-Hearing Brief at 8-9. Employer argued that its due process rights were violated because claimant's refusal to submit to post-bronchodilator pulmonary function testing denied employer evidence that was relevant to its defense of the claim. *Id*. at 12. Employer also argued that, under both the Administrative Procedure Act and the Black Lung Benefits Act, "[i]t is patently unfair to allow [claimant] to unilaterally dictate what evidence the [e]mployer can develop while he himself operates under no such constraints." *Id*. at 13.

In her Decision and Order, the administrative law judge further considered employer's objections, but again denied employer's motion on the grounds that the pertinent regulations do not require claimant to undergo post-bronchodilator testing. Decision and Order at 4, *citing* 20 C.F.R. §§725.409, 725.414(a)(3)(i).

Employer argues on appeal that the administrative law judge abused her discretion in summarily denying employer's request for post-bronchodilator testing on the grounds that such testing is not required by the regulations. Employer asserts that the fact that the Department of Labor's (DOL) regulations do not require the administration of bronchodilators does not mean that they may not be performed when a medical professional believes they would be useful in rendering a differential diagnosis.[9]

The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

[9] Employer noted that Dr. Rosenberg emphasized that "administering bronchodilators is critically important to help determine the etiology of [claimant's] pulmonary impairment, Employer's Brief at 16, *quoting* Employer's Exhibit 1A, and that Dr. Vuskovich similarly opined that post-bronchodilator would have helped establish an accurate diagnosis, given claimant's inability to generate a valid pre-bronchodilator result. Employer's Brief at 16, *citing* Employer's Exhibit 2 at 17 n.13, 20 n.16, 24.

In order to determine whether the administrative law judge properly denied employer's motion to compel, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On the facts presented in this case, we are unable to discern whether the administrative law judge abused her discretion in denying employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing. In her November 1, 2013 order and her December 29, 2015 decision, the administrative law judge's only stated basis for denying employer's motion is that post-bronchodilator testing is not required by the regulations. However, as employer asserts, the administrative law judge failed to address its argument that the fact that post-bronchodilator testing is not required by the regulations does not, itself, mean that they may not be performed, or its contention that its due process rights were violated because claimant's refusal to submit to post-bronchodilator pulmonary function testing denied employer evidence that was relevant to its defense of the claim. As the administrative law judge's ruling does not allow us to conduct a proper appellate review of her holdings, we must vacate her denial of employer's motion to compel post-bronchodilator testing. On remand, the administrative law judge must reconsider employer's motion and fully explain the rationale for her findings. 5 U.S.C. §557(c)(3)(A).

Furthermore, because the administrative law judge may not have based her Decision and Order on all admissible evidence, we must also vacate her findings that claimant invoked the Section 411(c)(4) presumption, and that employer failed to establish rebuttal of the presumption. To promote judicial efficiency, however, we will address employer's additional arguments concerning the administrative law judge's weighing of the evidence relevant to these issues.

## II. INVOCATION OF THE SECTION 411(c)(4) PRESUMPTION

### A. Length of Qualifying Coal Mine Employment

Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment. The administrative law judge began her analysis of the length of claimant's coal mine employment by noting, correctly, that to be credited with a year of coal mine employment, claimant must prove that he was engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32); Decision and Order at 8. Finding that she was unable to

determine the beginning and ending dates of claimant's coal mine employment, and referencing the method set out in 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge calculated the length of claimant's coal mine employment by dividing claimant's earnings for each year from claimant's Social Security Administration (SSA) earnings records by the coal mine industry's average yearly earnings for miners for 125 days of income, as reported by the Bureau of Labor Statistics (BLS).[10] The administrative law judge therefore found that "[c]laimant's total coal mine employment, in the years [from] 1972 to 1987 inclusive, was 15.6 years." *Id.* The administrative law judge then noted that the SSA earnings records reflected "some very limited" additional coal mine employment in 1952, 1954, 1969 and 1988.[11] *Id.* Considering this evidence, together with claimant's credible testimony that he began working in coal mine employment prior to age eighteen and was sometimes paid in cash, the administrative law judge concluded that the evidence supported "at least one additional year of coal mine employment." *Id.* at 8, 10. Thus, the administrative law judge credited claimant with a total of over sixteen years of qualifying coal mine employment. *Id.*

We agree with employer that the administrative law judge's method of calculating claimant's years of qualifying coal mine employment cannot be upheld. To credit claimant with a year of coal mine employment, the administrative law judge must first determine whether claimant was engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, then the administrative law judge must determine whether claimant worked as a miner for at least 125 working days within that one year period. 20 C.F.R. §725.101(a)(32). Proof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish that the miner worked for one calendar year. Here, the administrative law judge did not conduct the threshold inquiry of whether claimant established a calendar year of coal mine employment prior to determining if claimant worked at least 125 days during that year.[12] Further, the regulations provide that, if the

[10] The Bureau of Labor Statistics average coal mine earnings table is located at Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm.

[11] The administrative law judge found that claimant earned $31.50 for Cain and Maggard Coal Company in 1952; $101.12 for New Hyden Coal Company in 1952; $290.00 for Golden Glow Coals in 1954; $18.00 for Golden Glow Coals in 1969; and $160.00 for Harlan Cumberland Coal Company (Harlan Coal) in 1988. Decision and Order at 8 n.10.

[12] The record contains conflicting evidence as to whether claimant worked a full year in 1972. While claimant testified that he worked for Shamrock Coal Company

beginning and ending dates of the miner's employment cannot be ascertained, the administrative law judge may, in her discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average "daily" earnings for that year as reported by the BLS at Exhibit 610. 20 C.F.R. §725.101(a)(32)(iii). In the instant case, the administrative law judge used the incorrect table at Exhibit 610, the table listing the coal mine industry's average yearly earnings for miners for 125 days of income, and not the "daily" earnings table, to calculate claimant's coal mine employment. As a result, the administrative law judge improperly credited claimant with 365 days of employment if his income exceeded the industry average for just 125 days of coal mine work. *See Clark*, 22 BLR at 1-281. As the method employed by the administrative law judge in determining claimant's length of coal mine employment is not reasonable, it cannot be affirmed. *See Clark*, 22 BLR at 1-281; *Tackett v. Director, OWCP*, 12 BLR 1-11, 1-13 (1988); *Dawson v. Old Ben Coal Co.*,11 BLR 1-58, 1-60 (1988); *see also Wojtowicz,* 12 BLR at 1-165; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we vacate the administrative law judge's finding of 15.6 years of qualifying coal mine employment from 1972 to 1987. Further, because the administrative law judge did not adequately explain how she determined that claimant established one year of coal mine employment for partial periods of work in 1952, 1954, 1969 and 1988, we also vacate the administrative law judge's finding that claimant established one year of coal mine employment for these partial periods of work.[13] We therefore remand this case for

---

(Shamrock) for over a year beginning in 1971, claimant's Social Security Administration (SSA) earnings records do not reflect earnings from Shamrock until the last two quarters of 1972. As employer asserts, the record also contains conflicting evidence concerning claimant's employment in 1987, with Harlan Coal. In documents contained in his 1988 claim, claimant noted that he stopped working for Harlan Coal in October 1987. Director's Exhibit 1 at 1-299, 1-308, 1-310 and 1-311. However, in documents contained in his 2001 and 2011 claims, claimant noted that he stopped working for Harlan Coal in November 1987. Director's Exhibits 2-443 and 2-441, 4-1, 5-1, and 6-1. The administrative law judge must resolve these conflicts.

[13] As employer asserts, the administrative law judge did not adequately explain why she credited claimant with a full additional year of qualifying coal mine employment for his partial periods of employment in 1952, 1954, and 1969. For coal mine employment performed prior to 1978, the Board has held that an administrative law judge permissibly may credit a miner for each calendar quarter in which $50.00 was earned. *See Tackett v. Director,* OWCP, 6 BLR 1-839 (1984). However, the SSA earnings records show that claimant earned only $31.00 for Cain and Maggard Coal Company in 1952, and only $18.00 for Golden Glow Coals in 1969. Director's Exhibit 8. Moreover, while the record reflects that claimant received $160.00 in earnings from Harlan Coal in

further findings regarding the length of claimant's qualifying coal mine employment. 30 U.S.C. §921(c)(4).

On remand, however, the administrative law judge is not required to use the "daily" wage table at Exhibit 610, described at Section 725.101(a)(32)(iii). Rather, the use of this table is discretionary, if the administrative law judge finds that the record does not contain sufficient evidence of the beginning and ending dates of claimant's employment. The administrative law judge may use any credible evidence to determine the dates and length of claimant's underground coal mine employment, including claimant's testimony, his employment history forms and his SSA earnings records, and any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

### B. Total Respiratory Disability

Employer also contends that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) based on the qualifying pulmonary function study dated April 30, 2011.[14] The administrative law judge considered the pulmonary function studies dated March 19, 2011, April 30, 2011, September 21, 2011, and November 22, 2013. Decision and Order at 12. The April 30, 2011 study administered by Dr. Baker and the September 21, 2011 study administered by Dr. Rosenberg yielded qualifying values. Decision and Order at 12-13; Director's Exhibits 12, 13. In contrast, the March 19, 2011 and November 22, 2013 studies administered by Dr. Baker yielded non-qualifying values. Decision and Order at 12-13; Director's Exhibit 12; Claimant's Exhibit 1. The administrative law judge gave no weight to the March 19, 2011 and November 22, 2013 non-qualifying studies because she found that their reliability and validity were questioned by the reviewing physicians, and because they did not conform to the requirements of Appendix B to 20 C.F.R. Part 718. The administrative law judge gave significant probative weight to the April 30, 2011

---

1988, the administrative law judge did not explain her determination to credit claimant with any coal mine employment for Harlan Coal in 1988, in light of claimant's statements that he stopped work at Harlan Coal in October or November of 1987. Director's Exhibit 7.

[14] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

qualifying study because she found that it conformed to the requirements of Appendix B, and because Drs. Baker, Rosenberg, Mettu and Vuskovich concluded that it is valid. Decision and Order at 12-13. Finally, the administrative law judge gave diminished weight to the September 21, 2011 qualifying study, finding that while it appeared to conform to the requirements of Appendix B, its validity was nonetheless called into question by Dr. Vuskovich's comment that claimant gave "inconsistent efforts." Decision and Order at 13. Based on the September 21, 2011 and April 30, 2011 pulmonary function studies, the administrative law judge found that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 13.

Employer argues that the administrative law judge erred in failing to explain why she found that the April 30, 2011 pulmonary function study is valid. Employer specifically asserts that the April 30, 2011 pulmonary function study is invalid because claimant's cooperation was only "fair." We disagree.

The regulations at 20 C.F.R. §718.103 and Appendix B, governing pulmonary function studies, do not require "optimal" effort on the part of the miner in order for a pulmonary function study to be deemed valid. The Board has held that "fair" cooperation and comprehension are sufficient. *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). In this case, the administrative law judge considered that the April 30, 2011 test was performed with only fair effort, but permissibly gave significant weight to it because it conformed to the requirements of Appendix B to 20 C.F.R. Part 718, and because Drs. Baker, Rosenberg, Mettu and Vuskovich all concluded that it is a valid study. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 n.4 (1987). Thus, we reject employer's assertion that the administrative law judge erred in finding the April 30, 2011 pulmonary function study to be valid. Further, employer did not challenge the validity of the test when the case was before administrative law judge.[15] *See* Employer's May 5, 2014 Post-Hearing Brief at 17. Consequently, we reject employer's assertion that the administrative law judge erred by relying on Dr. Baker's April 30, 2011 pulmonary function study.

Employer also asserts that the administrative law judge erred in failing to "consider the impact of [claimant's] advanced age on the significance of the test results." Employer's Brief at 17. Contrary to employer's assertion, the administrative law judge considered that claimant was seventy-six and seventy-eight years old at the time the pulmonary function studies were conducted. Further, absent medical evidence to the

[15] In its closing brief, employer stated that "[o]nly the April 30, 2011 test is valid and it produced results that fell below the disability standards." *See* Employer's May 5, 2014 Post-Hearing Brief at 17.

contrary,[16] pulmonary function studies performed on a miner who is over age seventy-one must be treated as qualifying if the values produced by the miner would be qualifying for a seventy-one year old. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). Thus, the administrative law judge properly found claimant's April 30, 2011 pulmonary function study to be qualifying. Decision and Order at 12 n.12. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

Employer next contends that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Baker and Rosenberg that claimant is totally disabled from a pulmonary standpoint, and the opinion of Dr. Vuskovich that claimant has the pulmonary capacity to perform coal mine work. Decision and Order at 15-17; Director's Exhibits 12, 13; Employer's Exhibit 2. Noting that the physicians appeared to be similarly qualified to render opinions regarding total respiratory disability, the administrative law judge found that Dr. Baker's opinion was well-reasoned and consistent with the pulmonary function study evidence. *Id.* at 17-18. Similarly, the administrative law judge found that Dr. Rosenberg's opinion was well-reasoned. *Id.* at 18. By contrast, the administrative law judge discredited Dr. Vuskovich's opinion finding, in part, that Dr. Vuskovich did not demonstrate an understanding of the exertional requirements of claimant's usual coal mine work.[17] *Id.* at 18-19. Based on the opinions of Drs. Baker and Rosenberg, the administrative law judge found that claimant established total respiratory disability.

---

[16] The Board has held that the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age seventy one are actually normal or otherwise do not reflect a totally disabling pulmonary impairment. *K.L.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008).

[17] The administrative law judge also found that Dr. Vuskovich's opinion is equivocal and internally inconsistent because, "although [Dr. Vuskovich] opined that the [April 30, 2011] pulmonary function test was 'valid,' he explained that [c]laimant was suffering an 'acute asthma attack' during the test and therefore 'he did not generate valid spirometry results.'" Decision and Order at 18-19. Contrary to the administrative law judge's finding, Dr. Vuskovich did not inconsistently characterize the validity of the April 30, 2011 pulmonary function study results. Rather, Dr. Vuskovich noted that the April 30, 2011 pulmonary function study generated valid results. Employer's Exhibit 2. However, based on his review of other pulmonary function studies, Dr. Vuskovich noted that "[claimant's] baseline ventilatory capacity could not be assessed because he didn't generate valid spirometry results except on the occasion when he was experiencing and [sic] acute asthma attack (4/30/11)." *Id.*

Employer argues that the administrative law judge erred in discrediting Dr. Vuskovich's opinion on the grounds that he did not demonstrate an understanding of the exertional requirements of claimant's usual coal mine work. Employer's Brief at 18. We agree. A miner is considered to be totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1)(i). The administrative law judge is required to determine the exertional requirements of his usual coal mine work and then consider them in conjunction with the medical reports assessing disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 306, 23 BLR 2-261, 2-285 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000). The miner's usual coal mine work is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). It is claimant's burden to establish the exertional requirements of his usual coal mine employment in order that the administrative law judge may compare the physical demands with each physician's assessment of impairment or disability and reach a conclusion regarding whether claimant is totally disabled. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

In this case, as employer asserts, although the administrative law judge found that claimant's last coal mine job was as a roof bolter, she did not make a specific finding as to the physical demands of that position, e.g., mild, moderate or heavy labor.[18] Employer's Brief at 17-18. Nonetheless, the administrative law judge discredited Dr. Vuskovich's opinion on the issue of total disability, in part, because Dr. Vuskovich did not demonstrate an understanding of the exertional requirements of claimant's usual coal mine work as a roof bolter in his analysis of claimant's pulmonary condition. Decision and Order at 18. Moreover, as employer correctly asserts, in crediting Dr. Baker's opinion that claimant is totally disabled, the administrative law judge did not address whether Dr. Baker had knowledge of the exertional requirements of claimant's usual coal mine work. Decision and Order at 17; Employer's Brief at 18. Because the administrative law judge did not perform the analysis required by 20 C.F.R. §718.204(b)(1), and applied disparate scrutiny to the opinions of Drs. Vuskovich and Baker, we vacate her finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) based on the opinions of Drs. Baker and Rosenberg.[19]

[18] All three physicians noted that claimant's usual coal mine employment was as a roof bolter.

[19] There is some merit to employer's assertion that the administrative law judge mischaracterized Dr. Vuskovich's opinion in finding it inadequately explained. The administrative law judge accurately noted that Dr. Vuskovich opined that claimant's April 30, 2011 qualifying pulmonary function study did not reflect the presence of a

*Wojtowicz*, 12 BLR at 1-165. Before the administrative law judge evaluates the medical opinion evidence on total disability, she must make a determination of the nature and exertional requirements of claimant's usual coal mine employment. *Eagle v. Armco, Inc.*, 943 F.2d 509, 511, 15 BLR 2-201, 2-204 (4th Cir. 1991); *accord Killman v. Director, OWCP*, 415 F.3d 716, 721, 23 BLR 2-250, 2-259 (7th Cir. 2005). After she has determined the exertional requirements of claimant's usual coal mine work, the administrative law judge should evaluate all of the medical opinions of record, and determine whether each doctor had a sufficient understanding of the exertional requirements of a roof bolter for her to credit the doctor's opinion on total disability and, if not, whether the doctor adequately described claimant's physical limitations. *Cornett*, 227 F.3d at 577, 22 BLR at 2-123. If an administrative law judge credits a doctor's statement of a claimant's physical limitations, she can consider the limitations together with the exertional requirements to determine if the opinion would support claimant's burden to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995).

Because we vacate the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), we also vacate the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b) overall. On remand, should the administrative law judge find that the medical opinion evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge must weigh all the relevant evidence

---

totally disabling pulmonary impairment, but instead reflected that claimant was having an acute asthma attack at the time of the testing. Decision and Order at 19. The administrative law judge further accurately noted that Dr. Vuskovich's stated basis for that conclusion was that Dr. Baker did not report wheezing or other abnormalities during his March 19, 2011 examination, but reported that claimant was wheezing and out of breath during his April 30, 2011 examination and testing. Employer's Exhibit 2. Noting that, contrary to employer's argument, in his report dated March 19, 2011, Dr. Baker recorded claimant's symptoms of daily wheezing, Director's Exhibit 12, the administrative law judge concluded that "Dr. Vuskovich's finding that Dr. Baker 'did not report wheezing' is demonstrably false." Decision and Order at 19. However, as employer points out, Dr. Baker's March 19 examination report recorded wheezing as a complaint or symptom "as described by patient." Director's Exhibit 12. Thus, while wheezing was reported by Dr. Baker, it was not reported as an observation made by the physician at the time of the examination. Consequently, the administrative law judge should reconsider this aspect of Dr. Vuskovich's opinion, accurately taking into account the nature of the information provided in the March 19 report.

together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[20] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Because we have vacated the administrative law judge's finding of total respiratory disability at 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that claimant established a change in the applicable condition of entitlement at 20 C.F.R. §725.309.

## III. REBUTTAL OF THE SECTION 411(c)(4) PRESUMPTION

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[21] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption.

In addressing whether employer disproved the existence of legal pneumoconiosis,[22] the administrative law judge considered the opinions of Drs. Rosenberg and Vuskovich. Dr. Rosenberg opined that claimant does not suffer from

[20] If claimant fails to establish total respiratory disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[21] "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). "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." 20 C.F.R. §718.201(a)(1).

[22] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 22.

legal pneumoconiosis, but suffers from chronic obstructive pulmonary disease (COPD) related to cigarette smoking. Director's Exhibit 13; Employer's Exhibits 1, 1A. Similarly, Dr. Vuskovich diagnosed COPD in the form of asthma, and opined that claimant does not have legal pneumoconiosis. Employer's Exhibit 2.

The administrative law judge discredited Dr. Rosenberg's opinion because she found that it is inconsistent with the scientific evidence credited by the DOL in the preamble to the 2001 regulatory revisions and was unsupported by the evidence of record. In addition, the administrative law judge discredited Dr. Vuskovich's opinion because she found that it was not well-reasoned. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting Dr. Rosenberg's opinion as inconsistent with the preamble. Employer's Brief at 20-22. We disagree. The administrative law judge found that, in eliminating coal mine-dust exposure as a cause of claimant's obstructive lung disease, Dr. Rosenberg relied, in part, on his view that claimant's severely reduced FEV1 and reduced FEV1/FVC ratio of 55% are inconsistent with the pattern of obstruction generally observed in relationship to past coal mine dust-exposure. Decision and Order at 27; Director's Exhibit 13; Employer's Exhibits 1, 1A. The administrative law judge rationally found that, even if the *general* pattern of obstruction due to coal mine dust results in a preserved ratio, Dr. Rosenberg did not explain why the pattern of obstruction in claimant's particular case has no relationship to coal mine dust-exposure. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 27. Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Rosenberg's opinion as inconsistent with the preamble.

Employer also asserts that the administrative law judge erred in discrediting Dr. Vuskovich's opinion as not well-reasoned. Contrary to employer's assertion, the administrative law judge permissibly found that, aside from stating that coal mine dust is not asthmagenic, Dr. Vuskovich did not persuasively explain how he eliminated claimant's years of coal mine dust-exposure as a contributing or aggravating cause of claimant's obstruction. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d 1119, 1127, 25 BLR 2-581, 2-598 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (Traxler, C.J., dissenting). The administrative law judge also noted that in excluding coal mine dust as a cause of claimant's obstructive impairment, Dr. Vuskovich stated that a pulmonary impairment caused by coal dust would not be reversible. The administrative law judge permissibly found that the basis for Dr. Vuskovich's opinion is

unclear, as claimant did not undergo any bronchodilator testing. *See Opp*, 746 F.3d at 1127, 25 BLR at 2-598; *see also Kennard*, 790 F.3d at 668; *Cochran*, 718 F.3d at 324, 25 BLR at 2-265. Thus, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Vuskovich's opinion as not well reasoned. We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).[23]

Furthermore, the administrative law judge's determination that the opinions of Drs. Rosenberg and Vuskovich were not well reasoned and therefore failed to disprove the existence of legal pneumoconiosis necessarily rendered their opinions inadequate to disprove disability causation. Under the facts of this case, there was no need for the administrative law judge to analyze their opinions a second time. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *see also Scott*, 289 F.3d at 269, 22 BLR at 2-383-84; *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). Moreover, employer does not challenge the administrative law judge's findings with regard to disability causation. Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Consequently, if the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked, she may reinstate the award of benefits. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. If the administrative law judge does not find the Section 411(c)(4) presumption invoked, she must consider entitlement under 20 C.F.R. Part 718.

[23] Because employer bears the burden to prove that claimant does not have pneumoconiosis, we need not address employer's arguments regarding the weight the administrative law judge accorded to Dr. Baker's opinion that claimant has legal pneumoconiosis, and that claimant's disability is due to legal pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

HALL, Chief Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's denial of employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing. I would hold that, on the facts presented in this case, employer has not met its burden to show that the administrative law judge abused her discretion in denying employer's motion to require claimant to undergo post-bronchodilator pulmonary function testing.

As the administrative law judge correctly noted, while the regulation at 20 C.F.R. §725.414(a)(3)(i)(B) provides that a claim may be denied as abandoned if claimant unreasonably refuses to undergo a requested test, 20 C.F.R. §725.409, referenced therein, specifically states that a claim may be denied by reason of abandonment where a claimant fails to undergo a *required medical examination* without good cause. Decision and Order at 4. The administrative law judge also correctly noted that the pertinent regulation at 20 C.F.R. §718.103 does not require claimant to undergo post-bronchodilator testing. Rather, the Department of Labor (DOL) has recognized that the use of a bronchodilator does not provide an adequate assessment of a miner's disability. *See* 45 Fed. Reg. 13.678, 13,682 (Feb 29, 1980). While the DOL also recognized that post-bronchodilator testing may aid in determining the presence or absence of pneumoconiosis, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case lies, has recognized the limited value of a miner's response to bronchodilators as a method for

excluding coal mine dust exposure as a cause of his impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *accord Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004). In light of these factors, and considering that claimant had attended all scheduled appointments set by employer, the administrative law judge permissibly concluded that denial of the claim on the grounds of abandonment, or the issuance of an order compelling claimant to take bronchodilator medication, was unwarranted in this case. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc); Decision and Order at 3-4; November 1, 2013 Order at 1-2. As the administrative law judge fully considered the parties' arguments, and adequately explained her findings, I would affirm the administrative law judge's denial of employer's October 21, 2013 motion.

I concur in all other respects with the majority's decision.

BETTY JEAN HALL, Chief
Administrative Appeals Judge