BRB No. 07-0811 BLA

C.F.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 07/30/2008
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits (2003-BLA-00256) of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Modification Denying Benefits (2003-BLA-00256) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case involves

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claimant's second request for modification of the denial of his duplicate claim filed on November 3, 1995.[2]

The administrative law judge credited claimant with twenty-nine years of coal mine employment, by stipulation, and found that the newly submitted x-ray and medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Thus, the administrative law judge found that claimant established a material change in conditions, pursuant to 20 C.F.R. §725.309(d) (2000), since the denial of claimant's original claim. Considering all of the record evidence, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total respiratory disability. Consequently, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310 (2000).

Claimant appeals the administrative law judge's finding that the evidence failed to establish total disability, and requests reversal or remand. Specifically, claimant challenges Dr. Castle's interpretation of the March 17, 2004 blood gas study, and contends that the opinion of his treating physician, Dr. Cardona, established total disability.[3] Employer responds, urging affirmance of the administrative law judge's denial of benefits, but challenges the administrative law judge's finding of pneumoconiosis arising out of coal mine employment. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

We initially address claimant's arguments regarding the administrative law judge's consideration of the blood gas study evidence at 20 C.F.R. §718.204(b)(2)(ii). Of the two blood gas studies conducted since the previous denial of modification, only Dr. Rasmussen's test of March 17, 2004 yielded qualifying "exercise" values, (pCO_2 at 38

[2] Claimant's original claim for benefits was filed in 1983, and denied by Administrative Law Judge Robert L. Cox on August 11, 1988 for failure to establish the existence of pneumoconiosis. Director's Exhibit 27. The duplicate claim was denied by Administrative Law Judge Stuart A. Levin on March 1, 1999 for failure to establish any element of entitlement; the first request for modification of the denial of the duplicate claim was denied by Administrative Law Judge John C. Holmes on April 10, 2001, for failure to establish the existence of pneumoconiosis, and the Board affirmed this finding on February 13, 2002. The instant request for modification of the denial of the duplicate claim was filed on January 20, 2003. Decision and Order at 2; Director's Exhibits 1, 37, 58, 65.

[3] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendix C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

and pO_2 at 61); the administrative law judge characterized the result as "barely qualifying for presumptive total disability under Appendix C." Decision and Order at 6.[4] Dr. Castle reviewed the newly-submitted medical evidence and opined:

> When (claimant) was examined by Dr. Rasmussen, an exercise blood gas study did show a qualifying pO_2. It is my opinion that this was a result of ventilation/perfusion mismatching due to his bronchial asthma. Furthermore, the pO2 noted was above the predicted lower limit of normal for his age and the barometric pressure at which it was done. . . . it is my opinion that he did not demonstrate a disabling abnormality of blood gas transfer mechanisms due to a coal dust induced disease. Employer's Exhibit 1 at 6.

The administrative law judge credited Dr. Castle's opinion that "a normal pO_2 value for a man the claimant's age at the elevation at which Dr. Rasmussen's test was taken would be 60.59," and accepted his "representation that the results obtained in Dr. Rasmussen's blood gas test are normal despite meeting the standard for presumptive total disability."[5] Decision and Order at 6-7; Employer's Exhibit 1 at 6. Observing that four of the five earlier blood gas studies of record were non-qualifying, and the fifth was performed during hospitalization for an acute illness, the administrative law judge concluded that the blood gas study evidence of record failed to establish total disability.[6] Decision and Order at 7.

Claimant first contends that Dr. Castle's interpretation of the March 2004 blood gas study is flawed and hostile to the Act. Employer responds that Dr. Castle properly accounted for the effect of claimant's age and the testing site altitude; and, moreover, that his determination that the qualifying blood gas value resulted from ventilation/perfusion mismatching additionally supports his opinion.[7]

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[4] The qualifying blood gas study exercise values obtained were a pCO_2 of 38 and a pO_2 of 61; with a pCO_2 of 38, a pO_2 of more than 62 would be non-qualifying. Decision and Order at 6, n.8; Claimant's Exhibit 1 at 5.

[5] Claimant is eighty years of age. Decision and Order at 2.

[6] The administrative law judge cited Dr. Rasmussen's conclusion that claimant's exercise blood gases showed a "moderate impairment in oxygen transfer." Decision and Order at 8; Claimant's Exhibit 1 at 3.

[7] Blood gas studies shall report the altitude and barometric pressure at which the test was conducted. 20 C.F.R. §718.105.

The regulation at 20 C.F.R. §718.204(b)(2) provides that in the absence of contrary probative evidence, evidence which meets the standards of the arterial blood gas test values listed in Appendix C to Part 718 shall establish total disability. Contrary to claimant's assertion, however, total disability need not be found based on a single qualifying blood gas study. *Beatty v. Danri Corp*., 16 BLR 1-11, 1-13 (1991); *Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986). Rather, the administrative law judge must weigh contrary evidence, including the opinion of an interpreting physician regarding the significance and validity of qualifying after-exercise blood gas values. *See Milburn Colliery Co. v. Director, OWCP* [*Hicks*], 138 F.3d 524, 534, 21 BLR 2-323, 2-336 (4th Cir.1998); *Lane v. Union Carbide*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).[8] Further, the administrative law judge is not bound to accept the reasoning or theory of any particular medical expert, *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997), but must weigh the evidence and "draw his own conclusions." *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). In this context, therefore, he may properly consider a medical opinion detailing factors that render a blood gas study unreliable; these may include a condition suffered by the miner, or circumstances surrounding the testing. *See Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co*., 6 BLR 1-788 (1984). In particular, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has required consideration of evidence of factors such as obesity, heart disease, and intervening heart surgery that could affect blood gas study results, causing them to be more likely to produce qualifying results. *See Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *see also Ramey v. Kentland Elkhorn Coal Corp*., 755 F.2d 485, 7 BLR 2-124 (4th Cir. 1985). Additionally, the United States Court of Appeals for the Tenth Circuit has noted that while factors such as age and weight may affect blood gas study results, the regulations give "no guidance in how to determine the extent to which the results should be discounted," approving reliance on the relative credibility of the medical witnesses. *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 n.4, 13 BLR 2-372, 2-378-80 n.4 (10th Cir. 1990); *see also Twin Pines Coal Co. v. White*, 854 F.2d 1212, 11 BLR 2-198 (10th Cir.1988).

Accordingly, with respect to the consideration of claimant's age, we conclude that Dr. Castle's statements do not dismiss the applicability of the table found at Appendix C, or rule out total disability *per se* at any particular numerical value of Appendix C, but are specific to the individual factor of claimant's age. The administrative law judge's

[8] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1998)(*en banc*).

determination to credit Dr. Castle's interpretation of the March 2004 blood gas test result in this respect is therefore permissible.

Turning to the administrative law judge's acceptance of Dr. Castle's opinion, that the March 2004 blood test value was actually normal for a man of claimant's age at the test site elevation, we note that because "altitude may skew results to some extent," altitude is a proper consideration in evaluating blood gas studies. *Alley*, 897 F.2d 1052, 1055, 13 BLR at 2-378-79. Moreover, as noted in *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1168 (10th Cir. 1986):

> If a blood gas study produces abnormal results which can be attributed to altitude rather than pathogenic dysfunction, then this evidence is relevant to either the existence or extent of disability due to a respiratory or pulmonary impairment. Consequently, the effect of altitude on arterial oxygen pressure is relevant medical evidence which the fact-finder must consider if introduced…. The effect of altitude on arterial oxygen pressure is a medical determination which must be made by a physician… Without a physician's opinion, the fact-finder would be unable to make a rational evaluation of the relationship between altitude and the blood gas test results or draw any inferences from this information concerning the claimant's impairment.[9]

In a case where "a preponderance of the blood gas [study] evidence established a prima facie case of disability" under the [Part 718] regulations, yet "conflicting pulmonary function [study] evidence, and particularly, the medical opinion evidence, overcame the blood gas [study] evidence such that the evidence overall failed to establish total disability," *Casey v. Island Creek Coal Co*., 165 F.3d 910 (Table)(4th Cir. 1998) (unpub.), the court observed:

> [M]edical opinions which dispute the inference of total disability that may in appropriate circumstances be drawn from qualifying blood gas evidence are not hostile to the Act or the regulations. The Act requires consideration of all relevant evidence, *see* 30 U.S.C. §923(b) (1994), and the drafters of the regulations not only specifically provided that blood gas [study] evidence be weighed against contrary probative evidence but also recognized that blood gas studies are an imperfect tool for establishing disability. Hence, Appendix C states that the values contained in the tables provided do not establish "standards for determining normal alveolar gas exchange values for any particular individual." 20 C.F.R. Part 718,

[9] *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 1168 (10th Cir. 1986); *accord Maddeleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992).

> Appendix C. This language reflects that qualifying or non-qualifying values can mean different things for different people.[10]

Accordingly, while not binding, the Appendix C tables represent the Department of Labor's best estimate of the extent to which altitude may affect blood gas tests in the black lung context, and, as such, provide guidance in decision making. *Alley*, 897 F.2d at 1055-56, 13 BLR at 2-378-79. The Board has both approved inclusion of altitude as an interpretive factor where accepted by an administrative law judge, and also deferred to an administrative law judge's determination to discount such evidence where the physician's opinion was found inadequate.[11] As this case arises within the Fourth Circuit, we note *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed. Appx. 551 (4th Cir.)(Apr. 5, 2004)(unpub.), affirming an administrative law judge's determination to reject a physician's opinion that a (qualifying) blood gas study was "not disabling anyway" and "although a pO_2 in the 60's is not normal at sea level…(the tests were conducted at 2000 feet above sea level)…and at that point the pO_2 is normal." *Frye*, slip op. at 7-8. The physician's statements were deemed to improperly presume that the miner was not totally disabled, contrary to the language of the regulation that "an elevation of 2000 feet does not affect the results of a blood gas study," since the table at Appendix C for establishing total disability applies to studies performed at test sites up to 2,999 feet above sea level. *Id*. However, in *West v. Eastern Associated Coal Co.*, 873 F.2d 1442 (4th Cir. 1989)(unpub.), a medical opinion of total disability based on studies indicating "normal or near-normal" pulmonary capabilities, was held properly rejected based on medical testimony that "Dr. Cardona incorrectly read his own blood gas [study] results as if they were performed at sea level [and] [i]n doing so he ignored the fact that blood gas studies are sensitive to the altitude of the test site." *West*, slip op. at 3.

Based on the foregoing, we distinguish Dr. Castle's opinion from the statements disfavored in *Frye*. Dr. Castle does not rule out or demean application of the regulatory scheme, but provides medically discernable reasons for his conclusion that the values of this particular blood gas test were nonetheless normal for claimant. Accordingly, Dr. Castle's contention does not appear to either fall into a traditionally hostile category, or to so contravene the statutory and regulatory provisions of the Act as to be clearly hostile and non-probative. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321, 19 BLR 2-192, 2-

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[10] *Casey v. Island Creek Coal Co.*, 165 F.3d 910 (Table)(4th Cir. 1998)(unpub.).

[11] *See Martino v. Director, OWCP*, 6 BLR 1-33 (1983); *Casias v. Director, OWCP*, 6 BLR 1-438 (1983); *see also Temple v. Big Horn Coal Co.*, BRB No. 96-0885 BLA (May 27, 1997)(unpub.); *J.O. v. Energy West Mining, Inc.*, BRB No.07-0123 BLA (October 29, 2007)(unpub.); *but cf. Arnoldi v. Wyoming Fuel Co.*, BRB No. 98-1315 BLA (June 22, 1999)(unpub.); *Gomez v. Director, OWCP*, BRB No. 98-0994 BLA (Apr. 20, 1999)(unpub.).

206 (7th Cir. 1995). Moreover, even a physician's expression of a view that is at odds with the Act is not enough by itself to exclude that opinion from consideration; rather, the issue must be resolved by consideration of the facts and medical opinions in each specific case. *Blakley*, 54 F.3d at 1321-1322, 19 BLR at 2-206-207. While the administrative law judge in *Frye* characterized the physician's opinion as contrived to "alter the meaning of test results," *Frye*, slip op. at 8, in the instant case, Dr. Castle's opinion was found to be the best reasoned, and based on the most evidence of record, respecting claimant's current condition. Decision and Order at 9. In his disposition of the blood gas study evidence, the administrative law judge did not ignore or dismiss the applicability of the Appendix C values. Rather, he specifically credited Dr. Castle's interpretation of the test as normal "despite" meeting the standard for presumptive total disability. Decision and Order at 7. Moreover, it appears the administrative law judge accepted Dr. Castle's entire opinion on this issue, crediting Dr. Castle's opinion that claimant is not disabled from any respiratory or pulmonary cause. Decision and Order at 11. Therefore, Dr. Castle's additional reason for finding the March 2004 blood gas test normal, *i.e.*, the ventilation/perfusion mismatching, provides a third basis of support for the administrative law judge's determination to accept his opinion that the test was normal despite meeting the values of Appendix C. Accordingly, as the administrative law judge's determination respecting the evaluation and weighing of the evidence should not be overturned unless it constitutes clear error as a matter of law, *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-606 (4th Cir. 1999), we reject claimant's contention that Dr. Castle's opinion is hostile to the Act.

Claimant next challenges Dr. Castle's interpretation of the March 2004 blood gas study as "vague, arbitrary and without support," urging that the administrative law judge should have considered "whether the pO_2 value is expected to decrease at a much greater rate as elevation increases than that specified in Appendix C to the regulations as suggested by Dr. Castle." Claimant's Brief at 4, 8-10. Specifically, claimant argues that the administrative law judge should have independently ascertained the precise elevations of the various testing sites, and extrapolated that the pO_2 value obtained by Dr. Rasmussen in Beckley, West Virginia, a lower elevation than Bluefield, West Virginia, should have been higher than 70, based on Dr. Cardona's testimony that 70 would be a normal reading for Bluefield.

In this connection, we first note that the administrative law judge found Dr. Cardona's testimony respecting the blood gas study "muddled" and "at best confused," concluding that "his discussion of the results of the PFT and the arterial blood gas tests border on the incoherent, and I have no confidence in his conclusions." Decision and Order at 7-8 n.9. It is the province of the administrative law judge to make credibility determinations and resolve conflicts in the evidence; here, the administrative law judge rationally chose not to accept the specific testimony by Dr. Cardona, which claimant submits as support for his argument. *See generally Underwood*, 105 F.3d at 946, 21 BLR

at 2-23. Moreover, while the claimant argues that the administrative law judge should have adopted a different conclusion than that of Dr. Castle, the interpretation of medical tests is for physicians; an administrative law judge is not qualified to substitute his own opinion for that of medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Nor must an administrative law judge require such particularized findings on the part of medical experts in evaluating and weighing the medical evidence of record, as claimant suggests. *See generally Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-346 (4th Cir. 2006). Rather, the credibility of medical experts is a matter of discretion within the purview of the trier-of-fact. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Finally, because an administrative law judge's findings must be based solely on the evidence of record, s*ee* 20 C.F.R. §725.477(b); *White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004), claimant's challenge based on statistical evidence outside of the record essentially urges an improper exercise in medical determination by the administrative law judge, and a *de novo* review of Dr. Cardona's testimony; both are beyond the scope of review. *See Blakley*, 54 F.3d at 1321 n.7, 19 BLR at 2-206 n.7; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1984).

We next reject claimant's contentions that the administrative law judge "failed to provide any reason whatsoever for his rejection of Dr. Cardona's opinion on the issue of disability," and that the administrative law judge was obliged to give greater weight to Dr. Cardona's opinion as treating physician, in accord with *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Claimant's Brief at 8-9. In *Consolidation Coal Co. v. Director, OWCP* [*Held*], 314 F.2d 184, 22 BLR 2-564 (4th Cir. 2002), the court stressed that no such presumption or requirement was intended in *Grizzle*, and that while the treating status of a physician is an appropriate consideration, extra weight should not be mechanically accorded a medical opinion on that basis. *See* 20 C.F.R. §718.104(d)(5); *accord Nat'l Mining Ass'n v. U.S. Dept. of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). Here, the administrative law judge characterized Dr. Cardona's evidence as "shockingly confused," incoherent, biased, based on erroneous data and misstated testing results, and indicative of a lack of precision; he assigned "no weight to Dr. Cardona's medical opinions." Decision and Order at 7-8. Accordingly, while properly acknowledging Dr. Cardona's status as claimant's treating physician, the administrative law judge nevertheless identified deficiencies in his opinion and testimony, and rationally discredited his evidence.

Finally, we reject, as unfounded, claimant's assertion that the administrative law judge improperly credited Dr. Castle's opinion on the issue of total disability. The administrative law judge properly examined the reasoning employed in Dr. Castle's medical opinion in light of its objective supporting material, accounting for contrary test

results and diagnoses. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, the administrative law judge validly credited Dr. Castle's conclusion that claimant has no totally disabling respiratory or pulmonary impairment as "very well explained and consistent with the evidence," and permissibly concluded that only Dr. Castle's opinion was entitled to full weight at Section 718.204(b)(2)(iv). Decision and Order at 9-11; *see Hicks*, 138 F.3d at 533, 21 BLR at 334; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).[12] As the administrative law judge's findings and conclusions are rational and supported by substantial evidence, his finding that the evidence failed to establish total disability under Section 718.204(b)(2) is affirmed. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Accordingly, we affirm the administrative law judge's finding that the evidence failed to establish total disability pursuant to Section 718.204(b), and the concomitant denial of the request for modification of the denial of the duplicate claim.[13]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

[12] As claimant advances no arguments relating to the administrative law judge's analysis of the other medical opinions of record, the administrative law judge's findings in that respect are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[13] In view of our disposition herein, we need not address employer's challenge to the administrative law judge's finding of the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b).

McGRANERY, J., dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's decision denying benefits. Although the administrative law judge correctly determined that the weight of the x-ray evidence, including two readings by employer's doctors, established the existence of pneumoconiosis, and that the medical opinion evidence did not contradict this finding, I believe that he erred in finding that claimant had failed to establish total disability and, therefore, erred in finding claimant had failed to establish total disability due to pneumoconiosis. Review of the record supports claimant's contention that the administrative law judge's analysis was flawed in his consideration of the blood gas study evidence and that this error tainted his consideration of the medical opinion evidence. I would reverse the decision denying benefits.

The administrative law judge made several errors in weighing the blood gas study evidence. The regulations provide that "[a]rterial blood gas tests [which] show the values listed in Appendix C to this part…" "shall establish a miner's total disability…" "[i]n the absence of contrary probative evidence…." 20 C.F.R. §718.204(b)(2)(ii). Thus, Appendix C has been incorporated as a matter of law into Part 718. The majority denied this fact and the administrative law judge paid only lip service to it.[14]

The record contains two reports of blood gas tests performed since the prior denial of modification. Dr. Rasmussen's test conducted on March 17, 2004, yielded non-qualifying at rest values but qualifying exercise values. On September 1, 2004, Dr. Hippensteel conducted only an at rest study, which yielded non-qualifying values. Although the administrative law judge recognized that the exercise study was qualifying under Appendix C of the regulations, the administrative law judge chose to credit Dr. Castle's opinion that the test results were actually normal. Dr. Castle opined:

> When [claimant] was examined by Dr. Rasmussen, an exercise blood gas study did show a qualifying pO_2. It is my opinion that this was as a result of ventilation/perfusion mismatching due to his bronchial asthma. Furthermore, the pO_2 noted was above the predicted lower limit of normal for his age and the barometric pressure at which it was done. Therefore, for these reasons, it is my opinion that [claimant] did not demonstrate a disabling abnormality of blood gas transfer mechanisms due to a coal mine dust induced lung disease.

[14] The majority cites as supporting authority *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 13 BLR 2-372 (10th Cir. 1990). Because the Part 718 regulations were not applicable to the claim in *Alley*, the court recognized it was not bound by the tables of Appendix C. Nevertheless, the court relied upon the Appendix C tables for comparative purposes.

Employer's Exhibit 1 at 8. Dr. Castle nowhere indicated the scientific source, theory or data he relied upon to reach the conclusion that the results were normal.[15] Even though the three different tables in Appendix C specifically provide for differences in elevation, the administrative law judge accepted Dr. Castle's opinion which contradicts the Appendix. The administrative law judge observed: "Claimant has not rebutted Dr. Castle's representation that the results obtained in Dr. Rasmussen's blood gas test are normal despite meeting the standard for presumptive total disability." Decision and Order at 7 (footnote omitted). The administrative law judge got the burden of proof backwards.

What the administrative law judge called the "standard for presumptive total disability" is the relevant value found in Appendix C of Part 718 of the Code of Federal Regulations. Under 20 C.F.R. §718.204(b)(2)(ii), the arterial blood gas value listed in Appendix C shall establish a miner's total disability in the absence of contrary probative evidence. That principle is repeated in Appendix C, which states in relevant part: "A miner who meets the following medical specifications shall be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met…." Appendix C was promulgated after the Department held hearings and received comments concerning a proposed rulemaking notice in 43 Fed. Reg. 17,722-17,732 (Apr. 25, 1978). The Department acknowledged that altitude affects arterial blood gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,712 (Feb. 29, 1980). Hence, the Department adopted a sliding scale designating three levels of altitude, as an "acceptable and valid compromise…." *Id*.

Comments that the values listed in the proposed table were too liberal to account for the factor of age persuaded the Department to revise the proposed table because "many claimants are in the older age groups…." *Id*. Accordingly, the tables of Appendix C were changed to establish a level of arterial oxygen tension below which a claimant can be considered to be disabled regardless of age. *Id*. Thus, the values set forth in Appendix C were determined by the Department after consideration of elevation and the advanced age of many claimants.

The administrative law judge erred in relying upon Dr. Castle's conclusory statement to reject application of Appendix C showing claimant's exercise study result to

[15] Appendix C states that the relevant pO_2 which would evidence total disability for claimant after exercise would be 62 or below. Claimant's pO_2 after exercise was 61. Dr. Castle opined that normal for claimant would be 60.59. Employer's Exhibit 1 at 6.

be totally disabling. Without any statement of the elevation, or of his basis for determining the barometric pressure at the elevation, and, more importantly, without any reference to the scientific formula he may have applied, Dr. Castle stated: "the pO_2 noted was above the predicted lower limit of normal for his age and the barometric pressure at which it was done." Employer's Exhibit 6 at 8. The case at bar is essentially identical to *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], 93 Fed.Appx. 551, 2004 WL 720254 (4th Cir. Apr. 5, 2004)(unpub.), in which the United States Court of Appeals for the Fourth Circuit upheld the administrative law judge's discrediting of a doctor's opinion which contradicts Appendix C. I quote the court's full exposition of the facts because the majority's selective quotations create a false impression of the court's analysis. The court stated:

> Dr. Zaldivar was asked to explain the 1995 blood gas test conducted by Dr. Forehand that, under the applicable regulations, indicated that Frye was totally disabled. Dr. Zaldivar stated that "the blood gases obtained by [Dr. Forehand] are not disabling anyway, and would allow [Frye] to perform arduous labor." J.A. 243. Dr. Zaldivar went on to explain that although "pO_2 in the 60s is not normal at sea level … Dr. Forehand's tests [were conducted at] … 2000 feet above sea level, and at that point the pO_2 is normal." J.A. 100-01. Both of these statements plainly contradict federal regulations. Under the table contained in Appendix C of 20 C.F.R. §718, Frye's 1995 blood gas study results indicate that he is presumed to be totally disabled. J.A. 239 n. 21-22. Yet Dr. Zaldivar's comments show that he presumed just the opposite. The federal regulations also demonstrate that an elevation of 2000 feet does not affect the results of a blood gas study. *See* 20 C.F.R. §718, Appendix C (noting that "A miner who meets the following medical specification shall be found to be totally disabled … (1) For arterial blood gas studies performed at test sites up to 2,999 feet above sea level… " (emphasis added). Because Zaldivar's analysis disregarded the plain language of the regulations, there is "a sufficient factual basis to support one reason for discrediting [Zaldivar's] opinion." [Citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 213 n.13 (4th Cir. 2000).]

Frye, slip op. at 9. Like Dr. Zaldivar's statement in *Frye*, Dr. Castle's opinion, that the barometric pressure (resulting from elevation) gave a false positive result, should have been rejected because it contradicts the federal regulations which, in Appendix C, incorporate appropriate consideration of elevation. Furthermore, as discussed *supra*, the Department adjusted the blood gas values in Appendix C to be appropriate for the older age groups of many claimants so that the values would be reliable indicators of disability at any age. 45 Fed. Reg. 13,712 (Feb. 29, 1980). The majority's attempt to distinguish the case at bar from *Frye* is unavailing. The majority states: "Dr. Castle does not rule out

or demean application of the regulatory scheme, but provides medically discernable reasons for his conclusion that the values of this particular blood gas test were nonetheless normal for claimant." Those medically discernable reasons are age and barometric pressure resulting from elevation, both of which are accounted for in Appendix C.

Although the majority attempts to obfuscate the court's reasoning in *Frye*, the court clearly stated that Dr. Zaldivar's opinion was properly discredited "[b]ecause Zaldivar's analysis disregarded the plain language of the regulations…," *i.e.*, opining that an elevation of 2000 feet had caused a false positive result. *Frye*, slip op. at 9. Because Dr. Castle's opinion, like Dr. Zaldivar's opinion, contradicts the regulations, it must be rejected, according to the Fourth Circuit's teaching in *Frye*. Similarly, in *Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 13 BLR 2-372 (10th Cir. 1990), the Tenth Circuit declared: "We see no reason why the administrative law judge should accept [the doctor's] unsupported assertion that altitude caused a 'false positive' in this case, over the contrary result that is reached by comparing the test results with the altitude–adjusted Appendix C tables."

The majority tries to evade the force of *Frye* by suggesting that in *West v. Eastern Associated Coal Corp.*, 873 F.2d 1442 (Table), 1989 WL 37373 (4th Cir. 1989)(unpub.), the Fourth Circuit approved an administrative law judge's consideration of elevation in evaluating medical opinions on the reliability of blood gas study results. The majority points out that the *West* court held that the administrative law judge properly rejected a medical opinion of total disability because medical testimony revealed that the doctor had "incorrectly read his own blood gas results as if they were performed at sea level." *West*, however, does not purport to resolve a conflict between medical testimony and Appendix C, which is the issue presented in the instant case and in *Frye*, as well as in *Alley*. *West* does not even mention Appendix C. *West* stands for the sound proposition that an opinion which rests on an erroneous premise is properly rejected. The *West* court explained that administrative law judges should "examine the reasoning and documentation supporting a physician's conclusions." *Id*., slip op. at 3. That is exactly what the administrative law judge did not do when he credited Dr. Castle's opinion. *West* does not suggest that the administrative law judge's crediting of Dr. Castle's opinion should be affirmed; rather, it demonstrates that the administrative law judge's decision should be vacated.

Because Dr. Castle's opinion which conflicted with the regulations was unsupported by reference to any scientific or medical authority, data, analysis or explanation, the administrative law judge's determination to credit that opinion was clear error. In *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389, 21 BLR 2-639, 2-647 (4th Cir. 1999), the Fourth Circuit explained that an administrative law judge's gate keeping responsibility is required by law to ensure a fair trial:

> To assure both a fairness in the process and an outcome consistent with the underlying statutory scheme, the administrative law judge has, under §556(d) of the Administrative Procedure Act, the affirmative duty to qualify evidence as "reliable, probative, and substantial" before relying upon it to grant or deny a claim. 5 U.S.C. §556(d). Absent such a discipline to qualify evidence, administrative findings and orders could unacceptably rest on suspicions, surmise, and speculation. *See White v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999)("Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence." (citations omitted)).

Id. The administrative law judge compounded the irrationality of his decision by saying that claimant had failed to rebut Dr. Castle's opinion that the exercise study provided a false positive. The regulations establish that claimant's exercise study result proves respiratory disability in the absence of contrary probative evidence. 20 C.F.R. §718.204(b)(2)(ii). The burden is on employer to provide contrary probative evidence. A bald-faced assertion, contradicting the regulations without explanation, analysis or reference to authority is not substantial evidence sufficient to rebut the Department of Labor's findings set forth in the tables of Appendix C. *See Jarrell*, 187 F.3d at 389, 21 BLR at 2-647.

Nevertheless, the administrative law judge attempted to bolster his reliance on Dr. Castle's opinion by claiming to find support for it in Dr. Cardona's testimony. Decision and Order at 7 n.9. This is puzzling because the administrative law judge described Dr. Cardona's testimony as "muddled" and deserving "no confidence." *Id.*; Decision and Order at 8. The administrative law judge stated that Dr. Cardona's testimony "would tend to support Dr. Castle's opinion that normal blood gas test results are substantially lower in Southern West Virginia than at sea level." *Id*. Review of Dr. Cardona's testimony reveals the selective nature of the administrative law judge's analysis. Dr. Cardona testified that a normal post exercise pO_2 at sea level would be 100, but at the elevation of Bluefield, it would be 70, and that below 70 is below normal. Claimant's Exhibit 4 at 15-16. Dr. Cardona's testimony corroborates Dr. Castle's thesis that barometric pressure affects pO_2, but it contradicts Dr. Castle's conclusion that normal for claimant would be 60.59 and that claimant's result of 61 was not evidence of disability. Dr. Cardona's testimony corroborates Appendix C, indicating that a pO_2 of 62 or less is evidence of total disability for a blood gas test performed up to 2,999 feet above sea level. Consideration of Dr. Cardona's testimony suggests that the Department achieved its goal in promulgating Appendix C, *i.e.*, to set forth levels which would be reliable indicators of disability regardless of elevation up to 2,999 feet and regardless of age. 45 Fed. Reg. 13,712 (Feb. 29, 1980).

Although the administrative law judge never mentioned or referenced Dr. Castle's statement that the exercise study result reflected ventilation/perfusion mismatching due to bronchial asthma, the majority asserts that the administrative law judge credited Dr. Castle's opinion in general, and his finding in particular that the exercise study result was normal, therefore, the majority concludes that the administrative law judge must have credited the doctor's unmentioned statement. The majority proceeds to argue that the unmentioned statement provides another support for the administrative law judge's determination to credit Dr. Castle's opinion that the exercise result was normal, over application of Appendix C, indicating total disability. From there, the majority proceeds to insist that the administrative law judge's determination to credit the unmentioned statement must be affirmed unless it is clear error. Assuming *arguendo* that the administrative law judge credited a statement he did not see fit to reference, *Jarrell* makes clear that crediting this statement is error because the opinion is completely undocumented and unreasoned. *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000)("bald conclusion [is] insufficient to support the administrative law judge's finding").

Accordingly, the administrative law judge erred in crediting Dr. Castle's statement that claimant's recent exercise blood gas study was normal, over the table of Appendix C, showing that it evidenced total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Because the only recent exercise blood gas study was qualifying, it established total disability at Section 718.204(b)(2)(ii), notwithstanding the two recent non-qualifying at rest studies. *Kidwell v. Cedar Coal Co.*, 110 F.3d 59, 1997 WL 158113 (4th Cir. Apr. 4, 1997)(unpub.)(administrative law judge erred in finding total disability was not established because he weighed two non-qualifying at rest studies against one qualifying exercise study). The Fourth Circuit has explained that these are "separate tests entitled to independent weight…." *Hale v. Island Creek Coal Co.*, 14 F.3d 594, 1993 WL 25594 (4th Cir. Dec. 20, 1993)(unpub.). Needless to say, the blood gas study evidence in the record from the earlier proceedings (1983-2001) are too remote in time to reflect claimant's current condition; hence, they cannot undermine the validity of claimant's 2004 exercise blood gas study. *Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-64-5 (4th Cir. 1992).

The administrative law judge's failure to recognize that the blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii) poisoned his analysis of the medical opinion evidence. First, he erroneously rejected Dr. Rasmussen's opinion of total disability because it rests on claimant's qualifying exercise study. Second, he asserted that even if claimant is totally disabled, the doctor's opinion is seriously flawed because he considered coal mine employment and smoking as the only possible causes of claimant's respiratory impairment, when he should have also considered obesity and cardiac disease. Decision and Order at 9. The administrative law judge overlooked Dr. Rasmussen's specific finding that the blood gas study revealed a "pattern of impairment,

i.e., impairment in oxygen transfer absent ventilatory impairment, consistent with coal mine induced dust disease." Claimant's Exhibit 1 at 4. The administrative law judge did not address this statement which supported the doctor's opinion of a totally disabling respiratory impairment due to coal dust exposure. Moreover, the doctor exhibited knowledge of claimant's previous coal mine employment and determined "[t]he amount of exercise causing this impairment in oxygen transfer is far below that required of his previous coal mine employment." Claimant's Exhibit 1 at 3. Thus, the doctor explained how the objective data supported his conclusion that claimant was disabled from performing his prior coal mine work by a respiratory impairment caused by coal dust exposure. The administrative law judge's conclusion that Dr. Rasmussen's opinion does not constitute substantial evidence of a totally disabling respiratory impairment is premised on his erroneous rejection of Dr. Rasmussen's exercise blood gas study and on his refusal to acknowledge those portions of Dr. Rasmussen's report in which he analyzes claimant's testing, discusses his job duties and their exertional requirements, and references articles he has authored on exercise blood gas studies which were published in medical journals, to fully explain his conclusion that claimant suffers from a totally disabling respiratory impairment due, in part, to coal mine employment. Claimant's Exhibit 1. Hence, the administrative law judge's determination to discredit Dr. Rasmussen's opinion cannot be affirmed.

Although review of the record demonstrates that the administrative law judge erred in failing to recognize that Dr. Rasmussen's opinion constitutes substantial evidence of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), the record does not support claimant's contention that the administrative law judge abused his discretion in discrediting Dr. Cardona's opinion for confusion and lack of precision in his medical report and testimony, notwithstanding Dr. Cardona's status as claimant's treating physician. *See Held*, 314 F.2d 184, 22 BLR 2-564.

The administrative law judge's consideration of employer's doctors' opinions cannot be affirmed. The administrative law judge erred in fully crediting Dr. Castle's opinion of no total disability and in according any weight, albeit limited, to Dr. Hippensteel's opinion.

It is surprising that the administrative law judge credited Dr. Castle's disability opinion as "the best reasoned" opinion and "very well explained," when, as discussed *supra*, Dr. Castle offered neither reasoning nor explanation to support the statement which the administrative law judge chose to credit: "[t]he normal predicted lower limit of pO_2 for a man his age with the barometric pressure of 697 mm Hg is 60.59 mm Hg." Dr. Castle thereby contradicted Table 1 of Appendix C showing a pO_2 of 62 or below to be totally disabling when, as here, the pCO_2 is 38. Unlike Dr. Rasmussen, Dr. Castle does not support his opinion by reference to any medical or scientific articles, which he or anyone else has authored. As discussed *supra*, an unreasoned, undocumented opinion

which contradicts Appendix C does not constitute substantial evidence. *See Jarrell*, 187 F.3d 384, 21 BLR 2-639; *Frye*, 93 Fed. Appx. 551, 2004 WL 720254; *Alley*, 897 F.2d 1052, 13 BLR 2-372. Because this statement is the cornerstone of Dr. Castle's opinion of no disability, the opinion cannot be credited.

The administrative law judge also erred in according even limited weight to Dr. Hippensteel's opinion. The administrative law judge stated, "given that both of Dr. Hippensteel's conclusions are based on incomplete objective data, and he believes the claimant does not have pneumoconiosis, his opinion is entitled to limited weight." Decision and Order at 9. This was error because the doctor failed to account for claimant's qualifying exercise study in his opinion. Because the exercise study results meet the qualifying standards of Appendix C, they establish the miner's total disability in the absence of contrary probative evidence. 20 C.F.R. §718.204(b)(2). In order to constitute contrary probative evidence, the evidence must be seen "as being in direct offset or 'contrary' to the findings of [the qualifying evidence]." *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1041, 17 BLR 2-16, 2-22 (6th Cir. 1993). In *Tussey*, the pulmonary function evidence was qualifying but the blood gas evidence was not. Because the different studies measure different kinds of impairment, the court held that the blood gas evidence was not "contrary" to the findings of the pulmonary function evidence. However, medical opinion evidence has been held to be "contrary probative evidence" to qualifying blood gas evidence when the medical opinion explains in detail the medical reasons for considering the blood gas tests to be inaccurate. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Essentially the same rationale underlies the Fourth Circuit's decision in *Beavan v. Bethlehem Mines Corp.*, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984). In *Beavan*, the Board had reversed an administrative law judge's decision awarding benefits and the court reversed the Board. The court declared that where the presumption of total disability due to pneumoconiosis arising out of coal mine employment was invoked by blood gas evidence at 20 C.F.R. §727.203(a)(3), employer's medical opinions stating that claimant was not disabled could not rebut the presumption of total disability at 20 C.F.R. §727.203(b)(2), because neither doctor had discussed the blood gas study which "independently established disability." *Id.* at 692, 6 BLR at 2-109. The court also held that the third medical opinion in the record could not rebut the presumption of total disability because the doctor "only speculates about the inconsistencies in the objective evidence and the cause of the abnormal blood gas results." *Id.*; *accord Micheli v. Director, OWCP*, 846 F.2d 632, 636, 11 BLR 2-171, 2-180 (10th Cir. 1988). In *Micheli*, the Tenth Circuit expressed total agreement with the Fourth Circuit's decision in *Beavan*, declaring, "an opinion which fails to account for contrary objective evidence is not sufficiently reasoned to constitute substantial evidence." 846 F.2d at 636, 11 BLR at 2-180. This analysis is the same as that used to determine whether a medical opinion constitutes "contrary probative evidence" at Section 718.204(b)(2), that is, an opinion

that fails to account for the qualifying objective evidence is not "in direct offset or 'contrary' to the findings of [the qualifying objective evidence]." *Tussey*, 982 F.2d at 1041, 17 BLR at 2-22.

In sum, the administrative law judge's decision denying benefits should be reversed because he committed fundamental errors in his analysis of the evidence: first, he failed to recognize that the qualifying exercise study established total disability at 20 C.F.R. §718.204(b)(2)(ii); second, that Dr. Castle's bald assertion contradicting the regulations cannot constitute substantial evidence to undermine the qualifying study, *see Jarrell*, 187 F.3d 384, 21 BLR 2-639; *Frye*, 93 Fed. Appx. 551, 2004 WL 720254; third, he appears to have mistakenly considered that Dr. Hippensteel's opinion undermined the qualifying study, even though it could not constitute contrary probative evidence, *see Tussey*, 982 F.2d 1036, 17 BLR 2-16; *Beavan*, 741 F.2d 689, 6 BLR 2-101; and finally, he erroneously rejected Dr. Rasmussen's opinion for invalid reasons, finding the doctor's reliance on the qualifying exercise study was proved wrong by Dr. Castle's opinion and suggesting that the doctor attributed claimant's pulmonary impairment in part to coal mine employment based solely on employment history, whereas the doctor identified medical facts in the record as well as scientific articles to support his diagnosis. In light of this thorough analysis of the relevant evidence, the only credible evidence establishes that claimant is totally disabled due to pneumoconiosis. Accordingly, the decision of the administrative law judge denying benefits would be reversed. *See Beavan*, 741 F.2d 689, 6 BLR 2-101; *see also Adkins*, 958 F.2d 49, 16 BLR 2-61.

REGINA C. McGRANERY
Administrative Appeals Judge