U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 17-0502 BLA
and 17-0503 BLA

BARBARA ANN LOVE, o/b/o and Widow of WALTER GUY LOVE	)	
Claimant-Respondent	)	
v.	)	
PREMIUM COAL COMPANY	)	DATE ISSUED: 07/30/2018
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Carl M. Brashear (Hoskins Law Offices, PLLC), Washington, D.C., for employer.

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

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Award of Benefits (2015-BLA-05329 and 2015-BLA-05330) of Administrative Law Judge Daniel F. Solomon on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (2012) (the Act). This case involves a miner's subsequent claim filed on September 27, 2013[1] and a survivor's claim filed on October 30, 2014.

The administrative law judge found that the miner had at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, he found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found that because the miner

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[1] The miner's most recent prior claim, filed on December 4, 2009, was denied by the district director on September 15, 2010 because he failed to establish total respiratory disability. Miner's Claim (MC) Director's Exhibit 2. The miner took no further action until filing the present subsequent claim. The miner died on August 18, 2014. Survivor's Claim (SC) Director's Exhibit 4. Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. Hearing Tr. at 5.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. The administrative law judge found that the miner worked in excess of twenty years in surface coal mine employment as an auger driller and a washer, which was the equivalent "to at least fifteen years of underground mining." Decision and Order at 5.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he did not establish total respiratory disability. MC Director's Exhibit 2. Consequently, to obtain review on the merits of the miner's current claim, claimant had to submit new evidence establishing total disability. *See* 20 C.F.R. §725.309(c).

was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[4]

On appeal, employer challenges the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2), and thus his finding that claimant invoked the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's determination that it failed to rebut the presumption. Neither claimant nor the Director, Office of Workers' Compensation Programs, filed a response brief in this appeal.[5]

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.[6] 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).

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

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner "had at the time of his death, a totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.305(b)(iii). A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv).

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[4] Under Section 422(*l*) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner had at least fifteen years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

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

Employer argues that the administrative law judge erred in his evaluation of the new pulmonary function study and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and thus erred in finding that the miner was totally disabled.[7]

The record contains two new pulmonary function studies, dated November 6, 2013 and June 25, 2014, both of which produced qualifying[8] values. Decision and Order at 8; Miner's Claim (MC) Director's Exhibits 12, 14. The administrative law judge noted that the reliability of the June 25, 2014 study was called into question by the uncontradicted opinion of Dr. Dahhan, who conducted the study and stated that the miner put forth less than optimum effort.[9] Decision and Order at 8; MC Director's Exhibit 14. The administrative law judge noted that there was a conflict in medical opinions, however, regarding the validity of the November 6, 2013 study, conducted as part of Dr. Forehand's examination. Decision and Order at 8-9. Drs. Forehand and Gaziano concluded that the study is valid, while Dr. Castle, who reviewed the tracings, opined that the study is invalid. *Id*. at 9. The administrative law judge credited the opinions of Drs. Forehand and Gaziano over that of Dr. Castle to conclude that the November 6, 2013 study is a valid, qualifying study that supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8-10; MC Director's Exhibit 12.

Employer argues that the administrative law judge should have found that the November 6, 2013 pulmonary function study is invalid based on Dr. Castle's opinion that the miner gave "less than maximal effort and inadequate exhalation time in all but one of the forced vital capacity maneuvers." Employer's Brief at 3; Employer's Exhibit 3 at 7-8. Employer asserts that in discrediting Dr. Castle's opinion because he is "a minority of one," the administrative law judge impermissibly relied on the numerical superiority of the

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[7] The administrative law judge found that the blood gas study evidence does not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9; MC Director's Exhibits 12, 14. Further, total respiratory disability cannot be demonstrated under 20 C.F.R. §718.204(b)(2)(iii) because the record does not contain evidence of cor pulmonale with right-sided congestive heart failure.

[8] 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).

[9] In his June 25, 2014 narrative report, Dr. Dahhan provided the values obtained on a pulmonary function study he administered to the miner, which were qualifying. Director's Exhibit 14. The record does not contain, however, the report of the June 25, 2014 pulmonary function study or any associated tracings. MC Director's Exhibit 14.

medical opinions. Employer's Brief at 3. Employer further asserts that the administrative law judge ignored that the comments of the technician who performed the test support Dr. Castle's opinion. *Id*.

Contrary to employer's argument, the administrative law judge noted that the technician who performed the November 6, 2013 study stated that the miner was "unable to complete maneuvers [without] coughing." Decision and Order at 8. In contrast to Dr. Castle, however, the technician also noted that the miner gave "good effort and cooperation." MC Director's Exhibit 12. Further, both Drs. Forehand and Gaziano indicated that the November 6, 2013 pulmonary function study is valid. *Id.* Thus, the administrative law judge correctly observed that Dr. Castle is "a minority of one" in opining that the November 6, 2013 study is invalid. Decision and Order at 9.

Nor is there merit to employer's assertion that in finding the November 6, 2013 pulmonary function study to be valid, the administrative law judge impermissibly relied solely on the numerical superiority of the medical opinions. Employer's Brief at 3. Rather, the administrative law judge critically analyzed Dr. Castle's opinion, correctly noting that while he stated that the test was technically invalid, "he did not actually state that there was no evidence of disability."[10] Decision and Order at 9; Employer's Exhibit 3 at 7-8. In contrast, Dr. Forehand stated that the miner's cooperation and comprehension on the November 6, 2013 study were "good" and explained that "the shape of [the miner's] flow volume loop clearly demonstrated obstruction." MC Director's Exhibit 30. Thus, the administrative law judge permissibly found that Dr. Castle's assessment did not outweigh the opinions of Drs. Forehand and Gaziano that the November 6, 2013 qualifying pulmonary function is a reliable indicator of disability.[11] *See Jericol Mining, Inc. v. Napier*,

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[10] Dr. Castle opined that there were no totally valid pulmonary function studies in the data he reviewed but he nonetheless drew conclusions from two of the studies. Employer's Exhibit 3 at 17. He noted that the May 13, 1992 pulmonary function study was "totally normal despite several technical difficulties," including the miner's inability to accurately produce the FVC due to coughing. *Id.* at 8-9. Dr. Castle stated that the "[February 2, 2010] pulmonary function study was also invalid but significant and useful data could be obtained" that indicated that the miner was not disabled at that time. *Id*. at 2. Dr. Castle did not state whether any significant or useful data could be obtained from the November 6, 2013 study. In contrast, while Dr. Dahhan similarly stated that the miner gave less than optimum effort with premature termination of airflow on the June 25, 2014 pulmonary function study he administered, he nonetheless stated that it reflected "severe ventilatory impairment" and "pulmonary disability." MC Director's Exhibit 14 at 2.

[11] Contrary to our dissenting colleague's views, the administrative law judge's consideration of whether Dr. Castle adequately addressed the probative value of the

301 F.3d 703, 713-714 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe,* 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 9-10. As employer raises no further arguments regarding the administrative law judge's evaluation of the pulmonary function study evidence, we affirm the finding that the November 6, 2013 pulmonary function study is valid and qualifying, and supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer next argues that the administrative law judge erred in finding total disability established by the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Forehand, Dahhan, and Castle, together with the miner's medical treatment notes and claimant's testimony. Dr. Forehand[12] opined that the miner was totally disabled from a respiratory standpoint from performing his usual coal mine work. Decision and Order at 10. The administrative law judge found that Dr. Dahhan[13] also "accepts that the Miner was totally

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November 6, 2013 pulmonary function study does not amount to a shifting of the burden of proof. Although claimant bears the burden of establishing total disability, employer's experts' opinions must nonetheless be sufficiently reasoned to constitute contrary probative evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, (6th Cir. 2002) (whether a physician's opinion is sufficiently reasoned is essentially a credibility matter); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714 (6th Cir. 2002) (it is the role of the administrative law judge to make credibility determinations).

[12] In a report dated November 6, 2013, based on the results of his physical examination and objective testing, Dr. Forehand opined that the miner was totally disabled from a respiratory standpoint. MC Director's Exhibit 12. In supplemental reports dated September 29, 2015 and April 19, 2016, Dr. Forehand reviewed additional evidence, including the reports of Drs. Dahhan and Castle, and reiterated his conclusion that the miner had a totally disabling respiratory impairment. MC Director's Exhibits 29, 30.

[13] Dr. Dahhan stated that the miner had a severe ventilatory impairment based on the June 25, 2014 pulmonary function studies "though [the studies] underestimated the miner's true ventilatory capacity due to less than optimum effort. MC Director's Exhibit 14. While Dr. Dahhan appeared to question the pulmonary function study results, he nonetheless repeatedly referred to the miner's "pulmonary impairment and secondary disability" and "pulmonary disability." *Id.*

disabled from a respiratory standpoint." *Id.* at 9. Finally, the administrative law judge found that Dr. Castle[14] did not render an opinion as to total respiratory disability. *Id.*

The administrative law judge found that Dr. Forehand credibly opined, based on his review of the objective testing and the miner's work history that the miner did not have sufficient respiratory capacity to return to his usual coal mine work as an auger/driller operator. The administrative law judge further found that claimant's testimony that the miner was on oxygen in the months leading to his death, and the treatment records from Dr. Dimeo and Methodist Medical Center,[15] supported Dr. Forehand's conclusion. Decision and Order at 6, 9-10; Hearing Tr. at 17; MC Director's Exhibit 14. Thus, the administrative law judge found that the medical opinion evidence establishes that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer raises no specific challenge to the administrative law judge's finding that the medical opinion evidence establishes that the miner was totally disabled from performing his usual coal mine work at the time of his death, pursuant to 20 C.F.R.

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[14] Dr. Castle noted that the miner lost 20% of his lung capacity due to his lobectomy and had also undergone numerous revascularization procedures which could impact pulmonary function. Employer's Exhibit 3 at 16-17. While he stated that pulmonary function studies performed on May 13, 1992 and February, 2, 2010 did not reflect total disability under the Department of Labor disability criteria, he did not offer an opinion as to whether the miner was disabled at the time of his death on August 18, 2014. *Id.* at 17. Rather, he stated only that the miner did not have a significant impairment "related to coal workers' pneumoconiosis." *Id.* Moreover, to the extent Dr. Castle relied on the 1992 and 2010 studies to conclude that the miner was not disabled, the administrative law judge correctly noted that those studies predate the denial of the prior claim. Decision and Order at 8-9. Thus, they are not relevant to whether claimant established a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(c). Further, based on their age, the administrative law judge permissibly accorded those studies little probative value, overall. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988); Decision and Order at 8-9.

[15] The miner was hospitalized at Methodist Medical Center from April 20 to April 25, 2013 and from June 25 to June 28, 2013. MC Director's Exhibit 13. The discharge summary dated June 28, 2013 indicates that the miner suffered from numerous diseases, including aspiration pneumonia, hypertension, coronary artery disease, gastroesophageal reflux disease, chronic obstructive pulmonary disease, coal workers' pneumoconiosis, and lung cancer with a right lower lobectomy. *Id.*

§718.204(b)(1)(i).[16] Rather, employer asserts that the administrative law judge's "analysis [of the evidence] was incomplete" because "it must be shown not only that the miner is incapable of performing his usual coal mine work, but also that he lacks the pulmonary capacity to perform work of similar physical demand which is available in the area where he lives." Employer's Brief at 4, *citing* 20 C.F.R. §718.204(b)(1)(ii).

Contrary to employer's contention, the administrative law judge addressed this issue. Relying on *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87 (1988), he noted that once a claimant has established the miner's inability to perform his usual coal mine work, a prima facie case for total disability exists and the party opposing entitlement bears the burden to prove that the miner was capable of performing comparable and gainful employment pursuant to 20 C.F.R. §718.204(b)(2).[17] Decision and Order at 10. Further, the administrative law judge found that employer "did not proffer rebuttal to Dr. Forehand's conclusion" that the miner was totally disabled from a respiratory standpoint. *Id*.

Because employer raises no other specific allegation of error with regard to the administrative law judge's weighing of the new medical opinion evidence, we affirm his

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[16] As this finding is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[17] In *Taylor*, a case that also arose in the Sixth Circuit, the Board held that if 20 C.F.R. §718.204(b) is interpreted as requiring claimant to prove not only an inability to perform his usual coal mine work, but also inability to perform comparable gainful work, it would impose upon the claimant a burden of proof that various Courts of Appeals, including the Sixth Circuit, have not imposed upon claimants under Section 223(d) of the Social Security Act. *E.g. O'Banner v. Secretary of Health, Education & Welfare*, 587 F.2d 321 (6th Cir. 1978); *Myers v. Weinberger*, 514 F.2d 293 (6th Cir. 1975); *Noe v. Weinberger*, 512 F.2d 588 (6th Cir. 1975); *see also Brinker v. Weinberger*, 522 F.2d 13 (8th Cir. 1975); *Taylor v. Weinberger*, 512 F.2d 664 (4th Cir. 1975). Because the Black Lung Benefits Act prohibits the Secretary of Labor from defining total disability with more restrictive criteria than that imposed under Section 223(d) of the Social Security Act, *see* 30 U.S.C. §902(f), the Board declined to interpret 20 C.F.R. §718.204(b) in such a manner. Thus, the Board held that, under 20 C.F.R. Part 718, once a claimant has established an inability to perform his usual coal mine employment, a *prima facie* case for total disability exists. Thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove that claimant is able to perform comparable and gainful employment as defined in 20 C.F.R. §718.204(b)(2). *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87 (1988).

finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We also affirm his finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2) overall, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[18] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). Consequently, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[19] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.[20]

Employer contends that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Castle, asserting that both physicians "stated how they concluded that the Miner's pulmonary impairment was due to factors other than pneumoconiosis." *Id.* Employer has not identified any specific error of law or fact, however, in the administrative law judge's findings that the opinions of Drs. Dahhan and Castle, the only opinions relevant to whether employer established rebuttal, are not

[18] In determining whether claimant established total disability, the administrative law judge reasonably accorded greater weight to the evidence submitted with the current claim, as more indicative of claimant's current condition. *See Cooley*, 845 F.2d at 624, 11 BLR at 2-149; Decision and Order at 9-10.

[19] "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).

[20] The administrative law judge found that the record contains no evidence of clinical pneumoconiosis. Decision and Order at 12.

credible.[21] *See Cox v. Benefits Review Board*, 791 F.2d 445 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Rather, employer seeks a reweighing of the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). As the trier-of-fact, the administrative law judge has the discretion to assess the credibility of the medical opinions and to assign those opinions appropriate weight, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Big Branch Res., Inc. v. Ogle,* 737 F.3d 1063, 1072-73 (6th Cir. 2013); *Napier*, 301 F.3d at 713-714; *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Therefore, we affirm the administrative law judge's determinations that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii). Decision and Order at 12-19.

Because claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 19-20. As the administrative law judge's findings are supported by substantial evidence, and employer raises no specific challenge thereto, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

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[21] The administrative law judge also considered the opinion of Dr. Forehand, who diagnosed legal pneumoconiosis. Decision and Order at 13-18; MC Director's Exhibits 12, 29, 30.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

GREG J. BUZZARD
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that Dr. Forehand's November 6, 2013 pulmonary function study is valid and qualifying, and supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Specifically, I disagree with the majority that the administrative law judge adequately explained his resolution of the conflicting medical opinion evidence regarding the validity of the study.

Dr. Castle stated that the miner gave "less than maximal effort and inadequate exhalation time in all but one of the forced vital capacity maneuvers," and that the November, 6, 2013 pulmonary function study "is invalid."[22] Employer's Exhibit 3 at 7-8. In discrediting Dr. Castle's opinion because "he did not actually state that there was no evidence of disability," the administrative law judge has applied an improper burden of

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[22] Dr. Castle found no "totally valid pulmonary function studies" in the materials he reviewed, but Claimant's best efforts during a February 2, 2010 study reflected normal FEV1 and FEV1/FVC values. EX-3 at 17. The physician concluded that Claimant's "physiological function does not meet Department of Labor criteria for disability." *Id.*

proof, and fails to reconcile the conflicting evidence as to the validity of the November, 6 2013 pulmonary function study. Employer is not required to establish that claimant is not totally disabled; that is claimant's burden to affirmatively establish. *See* 30 U.S.C. §901; 20 C.F.R. §718.204; *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, 1-2 (1986) (en banc). Further, while Dr. Forehand reviewed Dr. Castle's criticisms of the November 6, 2013 pulmonary function study and did not dispute them, the administrative law judge did not address this aspect of his opinion. *See* 30 U.S.C. §923(b) (the fact finder must address all relevant evidence); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Finally, as employer asserts, the administrative law judge's additional reason for discrediting Dr. Castle's opinion, that "he is a minority of one" cannot be affirmed. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992) (holding that it is error for an administrative law judge to rely on a head count of the physicians providing assessments, rather than on a qualitative analysis of their interpretations); *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244 (4th Cir. 2016) (holding that an administrative law judge may not base a decision on numerical superiority of the same items of evidence). Therefore, I would vacate the administrative law judge's finding that the pulmonary function study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

I would also vacate the administrative law judge's finding that the medical opinion evidence supports total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), because the credibility of Dr. Forehand's opinion, that claimant is totally disabled, is contingent upon the validity of his November 6, 2013 pulmonary function study. While the administrative law judge alternatively found that the miner's need for "24 hour oxygen" for "the last two years of his life," standing alone, would have rendered him totally disabled, I am unable to discern the basis for this determination. Decision and Order at 9-10. Claimant testified that the miner was on "night oxygen only" for "maybe" the last three months before he died. Hearing Tr. at 17. Thus the administrative law judge's alternative finding does not comport with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Therefore, I would remand this case for the administrative law judge to weigh the evidence relevant to total disability, with the burden on claimant, render findings, and

explain the bases for those findings in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

RYAN GILLIGAN
Administrative Appeals Judge