U.S. Department of Labor

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

BRB No. 18-0078 BLA

WILLIE J. NORTH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY, LLC	)	DATE ISSUED: 07/17/2019
	)	
and	)	
	)	
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 Awarding Benefits on Remand 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand (2012-BLA-05929) of Administrative Law Judge Lystra A. Harris, rendered on a claim 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 subsequent claim filed on January 18, 2011, and is before the Board for the second time.[1]

When this case was initially before the administrative law judge, employer filed a motion to compel claimant to undergo post-bronchodilator pulmonary function testing, or in the alternative, to deny his claim as abandoned pursuant to 20 C.F.R. §725.414,[2] asserting that claimant unreasonably refused to submit to the post-bronchodilator testing employer requested. The administrative law judge denied the motion on the grounds that the regulations do not require post-bronchodilator pulmonary function testing. Reviewing the claim for benefits, she found that claimant established at least sixteen years of underground coal mine employment[3] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] Thus claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[5] The administrative law judge further found that employer did not rebut the presumption and awarded benefits.

[1] We incorporate the procedural background of this case, as set forth in the Board's prior decision. *North v. Harlan Cumberland Coal Co.*, BRB No. 16-0200 BLA, slip op. at 2 n.1, 3-6 (Feb. 2, 2017) (unpub.) (Hall, J., concurring and dissenting).

[2] 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).

[3] 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.

[4] Because the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that he established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.

[5] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially

Upon review of employer's appeal, a majority of the Board's three-member panel held that the administrative law judge did not sufficiently explain the rationale for her denial of employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing.[6] *North v. Harlan Cumberland Coal Co.*, BRB No. 16-0200 BLA, slip op. at 6 (Feb. 2, 2017) (unpub.) (Hall, J., concurring and dissenting). Therefore, the majority vacated her ruling and remanded the case for her to reconsider employer's motion and fully explain the rationale for her findings.[7] In light of that holding, the majority also vacated her findings that claimant invoked the Section 411(c)(4) presumption and that employer failed to rebut it. *Id*.

In the interest of judicial efficiency, the Board addressed employer's additional arguments regarding invocation and rebuttal. The Board vacated the administrative law judge's finding that claimant established at least sixteen years of underground coal mine employment, holding that the administrative law judge erred in applying the calculation method at 20 C.F.R. §725.101(a)(32)(iii)[8] when finding that claimant established 15.6 years of coal mine employment between 1972 and 1987. *North*, BRB No. 16-0200 BLA, slip op. at 7-8. Additionally, the Board held that the administrative law judge did not

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similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[6] The majority agreed with employer that the administrative law judge failed to address its argument that the fact that post-bronchodilator pulmonary function 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 testing denied employer evidence relevant to its defense of the claim. *North*, BRB No. 16-0200 BLA, slip op. at 6.

[7] Chief Administrative Appeals Judge Betty Jean Hall would have affirmed the denial of employer's motion to compel, but concurred in all other respects with the majority's decision. *North*, BRB No. 16-0200 BLA, slip op. at 17-18. (Hall, J., concurring and dissenting). *Id*. at 18.

[8] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

adequately explain her basis for crediting claimant with one year of coal mine employment for partial periods of work in 1952, 1954, 1969, and 1988. *Id.* at 7-8. Accordingly, the Board instructed the administrative law judge to make further findings on remand regarding the length of claimant's qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

The Board also vacated the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2). The Board rejected employer's argument that the administrative law judge erred in finding that the pulmonary function studies established total disability at 20 C.F.R. §718.204(b)(2)(i), *North*, BRB No. 16-0200 BLA, slip op. at 10-11, but agreed with employer that she erred in weighing the conflicting medical opinions at 20 C.F.R. §718.204(b)(2)(iv) by failing to first render a finding as to the exertional requirements of claimant's usual coal mine employment. *Id*. at 11-13. Thus, the Board instructed the administrative law judge to reweigh the medical opinions, and to then weigh all the relevant evidence together to determine whether claimant established total disability at 20 C.F.R. §718.204(b)(2). *Id*. at 14.

The Board found no merit in employer's arguments that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. *North*, BRB No. 16-0200 BLA, slip op. at 14-16. Thus, the Board affirmed the administrative law judge's findings that employer failed to rebut the presumed fact of legal pneumoconiosis, or establish that no part of claimant's total disability was caused by pneumoconiosis. *Id*. Accordingly, the Board held that if, on remand, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption, she could reinstate the award of benefits. *Id*.

On remand, the administrative law judge again denied employer's motion to compel post-bronchodilator pulmonary function testing. She also denied employer's request to transfer liability to the Black Lung Disability Trust Fund, finding no merit in employer's argument that it was denied due process. The administrative law judge credited claimant with 15.63 years of underground coal mine employment, and found that he established total disability.[9] She therefore determined that claimant invoked the Section 411(c)(4) presumption. The administrative law judge reinstated her finding that employer did not rebut the presumption, and awarded benefits.

On appeal, employer asserts that the administrative law judge abused her discretion in denying its motion to compel post-bronchodilator pulmonary function testing. Employer further asserts that the manner in which the administrative law judge resolved that issue

[9] Thus, she again found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

violated its right to due process. Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment and total disability and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *McClanahan v. Brem Coal Co.*, 25 BLR 1-171, 1-175 (2016).

I. Evidentiary Issue

In denying employer's motion to compel post-bronchodilator testing, the administrative law judge found that post-bronchodilator pulmonary function testing is not mandated by the regulations. Decision and Order on Remand at 5-6. Analogizing post-bronchodilator pulmonary function testing to CT-scans, which are not enumerated among the specific types of medical evidence the responsible operator may obtain under 20 C.F.R. §725.414, the administrative law judge ruled that employer needed to establish "good cause" to compel claimant to undergo post-bronchodilator pulmonary function testing.[10] *Id*. at 6-8. The administrative law judge found that employer failed to establish good cause and, thus, denied its motion to compel. *Id*. Based on employer's failure to establish good cause, she also rejected its argument that its due process rights were violated. *Id*.

[10] The administrative law judge reached that conclusion by applying the Board's analysis in *McCormick v. National Coal Corp*., BRB No. 16-0083 BLA (Nov. 28, 2016)(unpub.), a case in which an administrative law judge granted an employer's motion to compel the claimant to submit to a CT scan. Upon review of claimant's interlocutory appeal, the Board held that the administrative law judge applied the wrong standard by requiring claimant to prove that employer's request was unreasonable. Instead, because employer sought to obtain a type of medical test not listed among those that it was entitled to obtain under 20 C.F.R. §725.414, it was employer's burden to demonstrate good cause under 20 C.F.R. §725.456(b)(1) to justify an order compelling the claimant to undergo a CT scan. *McCormick*, BRB No. 16-0083, slip op. at 4-5.

Employer argues that the administrative law judge abused her discretion in holding that the regulations preclude it from obtaining post-bronchodilator testing, absent a showing of good cause. Employer's Brief at 17-21. We agree.

Contrary to the administrative law judge's analysis, post-bronchodilator pulmonary function testing is included within the two pulmonary function studies that employer is entitled to obtain and submit under the applicable regulations. *See* 20 C.F.R. §§718.103, 725.414(a)(3)(i). Under 20 C.F.R. §725.414, claimant and employer may obtain and submit, in support of their affirmative cases, "the results of no more than two pulmonary function tests." 20 C.F.R. §725.414(a)(2)(i), (3)(i). The regulation at 20 C.F.R. §718.103 sets forth the criteria for the development of a pulmonary function study. It contemplates that the physician who administers a pulmonary function study in connection with a claim is tasked with ascertaining whether a post-bronchodilator test should be conducted. Specifically, pulmonary function studies developed in connection with a claim must "include a statement signed by the physician or technician conducting the test setting forth . . . [w]hether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained." 20 C.F.R. §718.103(b)(8).

This conclusion is buttressed by the reasoning credited by the Department of Labor (DOL) in the preamble to the 1980 regulations when it established the criteria for the development of pulmonary function study evidence. The DOL addressed a commenter's contention that "the regulation [at 20 C.F.R. §718.103] should specify that a bronchodilator need not be used" when a pulmonary function study is administrated. 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). In rejecting the commenter's position, the DOL explained the value of post-bronchodilator pulmonary function testing as follows:

> Although the use of a bronchodilator does not provide an adequate assessment of the miner's disability, it may aid in determining the presence or absence of pneumoconiosis. There is no reason, therefore, to exclude from consideration the results of testing done after the administration of a bronchodilator. . . . Pulmonary function testing must always initially be performed without the use of a bronchodilator. If, for purposes of diagnosis, the physician feels that repeat spirometry after the administration of a bronchodilator is indicated, bronchodilation could then be performed.

Id. Thus the DOL contemplated that a physician who administers a pulmonary function study may choose to administer a bronchodilator and repeat the study. *Id*. Accordingly, based on the language of the regulations and the preamble, we hold that a party is entitled

to obtain post-bronchodilator testing when the party is obtaining its two pulmonary function studies under 20 C.F.R. §725.414(a)(2)(i), (3)(i).[11]

Because the regulations entitle employer to obtain post-bronchodilator pulmonary function testing, the relevant inquiry is whether claimant unreasonably refused to submit to a test requested by employer. 20 C.F.R. §725.414(a)(3)(i)(B). Therefore, the administrative law judge erred in requiring employer to establish good cause to obtain post-bronchodilator pulmonary function testing. As the administrative law judge improperly denied employer's motion without considering the reasonableness of claimant's refusal, we must vacate her denial of employer's motion to compel post-bronchodilator pulmonary function testing. *See Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 548 (7th Cir. 2002) (Wood, J., dissenting); *McClanahan*, 25 BLR at 1-175. Further, because the administrative law judge may not have based her Decision and Order on Remand on all admissible evidence, we must also vacate her award of benefits and remand this case for further consideration.

On remand, the administrative law judge must reconsider employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing, or in the alternative, to deny his claim as abandoned pursuant to 20 C.F.R. §725.414. She should first address the reasonableness of claimant's refusal and fully explain the rationale for her findings. 5 U.S.C. §557(c)(3)(A); *see also Hilliard*, 292 F.3d at 548. If she finds claimant's refusal to be reasonable, she should deny employer's motion. If she finds claimant's refusal to be unreasonable, she should give claimant the opportunity to undergo the relevant testing or, if claimant continues to refuse to undergo the test, address whether

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[11] The DOL also addressed a commenter's suggestion that "no pulmonary function study should be performed if medically contraindicated." 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980). In response, the DOL tasked the physician who conducted the study with ascertaining whether or not a pulmonary function study is medically contraindicated, explaining as follows:

> The supervising physician who is responsible for the conduct of the tests should use his or her own medical judgment whenever a claimant is scheduled for pulmonary function testing. If the physician believes that pulmonary function testing would impose a risk to the patient's well-being, the physician should so state and refuse to have the patient perform the pulmonary function tests. This procedure is accepted medical practice and the Department does not believe that it is necessary that an explicit statement to this effect be included in the regulation.

Id.

the claim should be denied as abandoned under 20 C.F.R. §725.414(a)(3)(i)(B). This regulation sets forth 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."

To promote judicial efficiency, however, we will address employer's additional arguments concerning the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and that employer failed to rebut the presumption.

II. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination if based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

Employer argues that the administrative law judge erred in crediting claimant with at least fifteen years of coal mine employment. Employer's Brief at 13-16. Employer's argument has no merit.

The administrative law judge's first task is attempting to determine the beginning and ending dates of all periods of coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 407 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019). She must consider and weigh all relevant evidence, which may include "earnings statements, pay stubs, specific remembrances, or other indicia of reliability." *Shepherd*, 915 F.3d at 406-07. Only "after such an evaluation" should she "determine whether the miner accumulated the [fifteen] years of coal mine employment necessary to invoke the rebuttable presumption." *Id.* The administrative law judge should give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32) when calculating claimant's coal mine employment. *Id.*

The administrative law judge considered claimant's employment history forms, testimony, and (Social Security Administration) SSA earnings statements. Decision and Order on Remand at 8-14. She declined to rely on claimant's employment history forms and testimony as establishing the beginning and ending dates of claimant's employment. *Id*. at 14. She found that claimant's SSA earnings statements were the "most credible evidence of [claimant's] coal mine employment history." *Id*. at 15. Because these findings are unchallenged, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *see also Shepherd*, 915 F.3d at 406-07; *Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Thus, having properly applied the regulatory framework, the administrative law judge then applied two methods to calculate the length of claimant's coal mine employment. She permissibly credited claimant with coal mine employment for every pre-1978 quarter in which he had earnings from coal mine operators that exceeded $50.00 as reflected in the SSA earnings statements. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd*, 915 F.3d at 405-06 (administrative law judge may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"); Decision and Order on Remand at 15-16. Using this method, the administrative law judge found that claimant's pre-1978 coal mine employment totaled 5.69 years. *Id*. at 17-18. We thus affirm the administrative law judge's finding that claimant had 5.69 years of coal mine employment before 1978.[12] *Muncy*, 25 BLR at 1-27; Decision and Order on Remand at 17-18.

For coal mine employment from 1978 to 1987, the administrative law judge noted that she was required to first address whether the record establishes that claimant was engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. Decision and Order on Remand at 15-16. She found that claimant established a calendar year of coal mine employment for each year he worked in coal mining:

> Because [c]laimant's [SSA earnings statement] provides the most credible evidence of [claimant's] coal mine employment history (aside from the W-2 Wage and Tax Statements), and because [SSA earnings statements] are generally provided on a per-year basis, [c]laimant has established that he held "employment relationship[s]" with coal mine employers for each calendar year of his employment. Absent evidence in the alternative, [c]laimant's [SSA earnings statement] reflects his employment relationships during a given year . . . .

[12] We note that the administrative law judge appears to have undercounted the number of quarters of pre-1978 coal mine employment that claimant established under the calculation method the administrative law judge applied. Claimant's SSA earnings statement reflects that he earned at least $50.00 for coal mining in one quarter of 1953, one quarter in 1954, two quarters in 1972, four quarters for each year from 1973 to 1976, and three quarters in 1977. Director's Exhibit 8. Those calculations yield a total of twenty-three quarters of coal mine employment, or 5.75 years, not 5.69 years, for claimant's pre-1978 coal mine work. Any error by the administrative law judge in underestimating claimant's pre-1978 coal mine employment was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Decision and Order on Remand at 15. Because employer does not challenge this finding, it is affirmed. *See Skrack*, 6 BLR at 1-711.

The administrative law judge then addressed whether the record "independently demonstrate[s]" that claimant had 125 working days within a calendar year. Decision and Order on Remand at 16. She divided claimant's yearly earnings, as reflected in his SSA earnings statement, by the average "daily" earnings for coal miners for each year as set forth in Exhibit 610. *Id*. at 16-18. Based on this analysis, the administrative law judge found that claimant had more than 125 working days in each calendar year from 1978 to 1987. *Id*. Thus she found that he established one year of coal mine employment for each year from 1978 to 1986. *Id*. For 1987, she found that claimant established only 0.83 of a year of coal mine employment because the evidence established that he left coal mining in November of 1987.[13] *Id*. She therefore credited claimant with a total of 9.83 years of coal mine employment from 1978 to 1987. *Id*. Contrary to employer's argument, the administrative law judge based her finding on a reasonable method of computation.[14] *See Shepherd*, 915 F.3d at 401 ("[I]f the miner was employed by a coal mining company for 365 (or 366 days if one day is February 29) *and* . . . worked for at least 125 days . . . [he]

[13] Contrary to employer's argument, the administrative law judge acknowledged that the evidence conflicted regarding whether claimant left coal mine employment in October or November of 1987. Employer's Brief at 15. The administrative law judge reasonably found that the evidence establishes that claimant worked for at least ten months in 1987. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order on Remand at n.15.

[14] Employer maintains that the administrative law judge erred in crediting claimant with a year of coal mine employment if his earnings for an individual year exceeded the industry average earnings for 125 days of coal mine employment for that year. Employer's Brief at 13-16. Employer, therefore, argues that the administrative law judge "impermissibly defined a year as 125 days" when calculating claimant's coal mine employment. *Id*. In *Shepherd*, the Sixth Circuit held that a claimant need not establish a full calendar year employment relationship under the formula at 20 C.F.R. §725.101(a)(32)(iii). *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402-05 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019). Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id*. at 402. If the results yield less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id*. Thus, under *Shepherd*, claimant is entitled to a full year of coal mine employment for the years in which the administrative law judge found he had more than 125 working days.

clearly established one year of coal mine employment" under 20 C.F.R. §725.101(a)(32)); *Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established at least fifteen years of coal mine employment. Further, because it is unchallenged on appeal, we affirm her finding that all of claimant's coal mine employment was in underground coal mines. *Skrack*, 6 BLR at 1-711.

III. Invocation of the Section 411(c)(4) Presumption—Total Disability

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

On remand, the administrative law judge reiterated her finding that the pulmonary function studies establish total disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order on Remand at 24. Employer challenges this finding. Employer's Brief at 21-22. In doing so, employer resurrects arguments the Board considered and rejected in the prior appeal. *North*, BRB No. 16-0200 BLA, slip op. at 9-11; Employer's Brief at 21-22. Because employer has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition.[15] *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that claimant's usual coal mine work as a roof bolter required "mostly moderate labor with occasional heavy labor."[16] Decision and Order on Remand at 20. She noted that Drs.

[15] Even if post-bronchodilator pulmonary function testing is admitted into the record by the administrative law judge on remand, this evidence would not change our holding at 20 C.F.R. §718.204(b)(2)(i). The DOL has recognized that the use of a bronchodilator does not provide an adequate assessment of disability. *See* 45 Fed. Reg. at 13,682.

[16] Because employer does not challenge the administrative law judge's finding that claimant's usual coal mine employment required "mostly moderate labor with occasional

Baker and Rosenberg opined that claimant is totally disabled by a respiratory or pulmonary impairment, while Dr. Vuskovich opined that claimant is not totally disabled based on the results of the pulmonary function and arterial blood gas testing. *Id*. at 20-23; Director's Exhibits 12, 13; Employer's Exhibit 2. The administrative law judge discredited Dr. Baker's opinion because he did not identify the exertional requirements of claimant's usual coal mine employment. Decision and Order at 22. She found that Dr. Rosenberg's opinion was well-reasoned and documented and entitled to significant weight. *Id*. at 22-23. She discredited Dr. Vuskovich's opinion because she found that he also did not consider the exertional requirements of claimant's usual coal mine employment, and because she found his opinion "equivocal" and "inconclusive."[17] *Id*.

Employer asserts that the administrative law judge erred in finding that Dr. Rosenberg diagnosed a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 21-22. Contrary to employer's argument, Dr. Rosenberg specifically opined that claimant "has significant obstructive lung disease which would be considered disabling."[18] Director's Exhibit 13. Therefore, the administrative law judge did not err in her consideration of his opinion. Because it is unchallenged on appeal, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion is well-reasoned and documented and entitled to significant weight. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 22-23. Further, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability based on the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv).

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heavy labor," it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 20.

[17] Employer has not challenged the administrative law judge's discrediting of Dr. Vuskovich's opinion. Therefore, we affirm that finding. *See Skrack*, 6 BLR at 1-711; Decision and Order at 22-23.

[18] Employer argues that the administrative law judge failed to consider evidence of record that claimant's "shortness of breath" as diagnosed by Dr. Rosenberg "had a cardiac rather than a pulmonary origin." Employer's Brief at 21-22. Contrary to employer's argument, the relevant inquiry at 20 C.F.R. §718.204(b)(2)(iv) is whether the miner's respiratory or pulmonary impairment precludes the performance of his usual coal mine work. The etiology of the miner's pulmonary impairment concerns the issue of total disability causation, which is addressed at 20 C.F.R. §718.204(c), or in consideration of whether employer can rebut the Section 411(c)(4) presumption. *See* 20 C.F.R. §718.305(d)(1); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015).

The administrative law judge weighed the pulmonary function study and medical opinion evidence with the blood gas study evidence, and found that, when weighed together, the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 24. Because employer does not allege any error in the administrative law judge's weighing of the evidence together at 20 C.F.R. §718.204(b)(2), this finding is affirmed.[19] *See Skrack*, 6 BLR at 1-711.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm her determination that claimant invoked the Section 411(c)(4) presumption.

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

As discussed above, the Board previously affirmed the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption because it failed to rebut the presumed fact of legal pneumoconiosis, or establish that no part of claimant's total disability was caused by pneumoconiosis. *North*, BRB No. 16-0200 BLA, slip op. at 14-16.

The content of the evidentiary record in this case, however, may change on remand contingent on the administrative law judge's resolution of employer's motion to compel post-bronchodilator pulmonary function testing. Thus our affirmance of the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption was premature.[20] We hold, however, that if the administrative law judge finds that claimant reasonably refused to undergo post-bronchodilator pulmonary function testing and again denies employer's motion to compel, she may reinstate her finding that employer failed to rebut the presumption. If the administrative law judge grants employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing, she should reconsider whether employer has rebutted the Section 411(c)(4) presumption, based on her consideration of all the relevant evidence. The administrative law judge must resolve the conflicts in the evidence, take into consideration the respective physicians' explanations for their conclusions, the documentation underlying their medical judgments, and the

[19] We affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c).

[20] Employer maintains that obtaining post-bronchodilator pulmonary function testing would have allowed it to prove that claimant does not have legal pneumoconiosis and, thus, rebut the Section 411(c)(4) presumption. Employer's Brief at 17-21.

sophistication of, and bases for, their diagnoses. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this claim for the administrative law judge to again consider whether claimant must undergo post-bronchodilator pulmonary function testing.

As the administrative law judge correctly stated, nothing in the Act or regulations requires a miner to undergo pulmonary function testing after inhaling bronchodilator medication. While employer is "entitled to obtain" from claimant "the results of no more than two pulmonary function tests," 20 C.F.R. §725.414(a)(3)(i), the regulations mandate only that such testing be performed without bronchodilators. 20 C.F.R. §718.103. The

only reference to bronchodilator medication states, "[i]f a bronchodilator is administered," the physician "must" report the values obtained both before and after administration of the bronchodilator. 20 C.F.R. §718.103(b)(8). The Department of Labor has explained why the two types of tests are treated differently: pulmonary function testing without medication is an accepted medical procedure for assessing the degree of a lung impairment, while "the use of a bronchodilator [during such testing] does not provide an adequate assessment of disability[.]" 45 Fed. Reg. 13,678, 13,682 (Feb. 29, 1980).

Although the Department acknowledged that testing after the inhalation of a bronchodilator "may aid in determining the presence or absence of pneumoconiosis," it did not state that such testing is a required component of a miner's pulmonary evaluation. 45 Fed. Reg. at 13,682. Instead, it amended the regulations to clarify that "in the event a bronchodilator is used, tests should be conducted before and after its use[.]" *Id.* This language simply reinforces the importance of testing *without medication*, while acknowledging the possibility that post-bronchodilator testing may have probative value in some cases. It does not support an inference that the regulations entitle employer to obtain such testing in every case or that such testing is always relevant. Had the Department intended every miner to undergo pulmonary function testing after inhaling bronchodilators, it could have easily done so by stating in the regulations that such testing "shall" or "must" be conducted.[21]

Because post-bronchodilator pulmonary function testing is not among the tests employer is "entitled to obtain" from claimant under the evidentiary limitations at Section 725.414, it is not claimant's burden to establish the reasonableness of his decision to forego such testing. *See* 20 C.F.R. §725.414(a)(3)(i)(B) (miner's refusal to submit to required medical test must be reasonable). Instead, if an employer wishes to submit medical evidence "in excess of the limitations contained in §725.414," it must establish "good cause" for doing so; absent such a showing, the evidence "shall not be admitted." 20 C.F.R. §725.456(b)(1); *McClanahan v. Brem Coal Co.*, 25 BLR 1-165, 1-177-78 (July 7, 2016) (reversing order requiring claimant to undergo a pulmonary evaluation in excess of those

[21] The regulation at 20 C.F.R. §718.103 sets forth a number of aspects of pulmonary function testing that must be done. For example, the test "shall record the results of flow versus volume (flow-volume loop)" and "shall simultaneously provide records of volume versus time (spirometric tracing)." 20 C.F.R. §718.103(a). The test "shall provide the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC)" and "shall also provide the FEV1/FVC ratio, expressed as a percentage." *Id.* The "results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings." 20 C.F.R. §718.2013(b). The regulation does not state that post-bronchodilator testing "shall" or "must" be conducted.

enumerated in Section 725.414; employer failed to establish good cause); *McCormick v. National Coal Corp.*, BRB No. 16-0038 BLA (Nov. 28, 2016) (unpub.) (employer failed to establish good cause to require claimant to undergo CT scan; not claimant's burden to show reasonableness of decision to forego testing not enumerated in Section 725.414). Further, relevance alone is not a sufficient basis for establishing good cause; employer must make a "particularized showing" as to why the additional evidence is needed in this case. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297 n.18 (4th Cir. 2007) (establishing good cause based on relevance would render the evidentiary limitations "meaningless"); *accord McClanahan*, 25 BLR at 1-177-78.

Contrary to employer's argument, the administrative law judge applied the correct legal standard and did not abuse her discretion in denying its request to have claimant undergo post-bronchodilator pulmonary function testing. She properly found Dr. Vuskovich's statement that post-bronchodilator testing "would have helped establish an accurate diagnosis" to be "a general statement of necessity" that is insufficient to establish good cause. Decision and Order on Remand at 7; *see Blake*, 480 F.3d at 288-89; *McClanahan*, 25 BLR at 1-177-78. She further permissibly found that Dr. Rosenberg's opinion does not establish good cause, as he did not persuasively explain why a potential diagnosis of asthma based on post-bronchodilator testing would enable him to exclude coal mine dust exposure as a cause or aggravator of the asthma. Decision and Order on Remand at 7; *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); *Blake*, 480 F.3d at 288-89; *McClanahan*, 25 BLR at 1-177-78. Because the administrative law judge properly placed the burden on employer to establish good cause, and acted well within her discretion in finding that it failed to meet this standard, I would affirm her denial of employer's request to have claimant undergo a post-bronchodilator pulmonary function test.[22] *Peabody Coal Co. v. Groves*, 277 F.3d 829, 833 (6th Cir. 2002) (administrative law judge's findings are

[22] Employer's additional argument, that the administrative law judge violated its due process rights by conducting a good cause analysis without providing "notice . . . and an opportunity to respond," is without merit. Employer's Brief at 19. The party seeking to obtain and admit evidence beyond the testing enumerated in Section 725.414 has an obligation to proactively raise its good cause arguments to the administrative law judge. *See Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006) (administrative law judge not required to raise the issue sua sponte). The administrative law judge's application of the correct legal standard on a second remand from the Board is not, as employer suggests, a "sleight-of-hand" or "the equivalent of pulling a rabbit out of a hat." Employer's Brief at 19.

conclusive if they are supported by substantial evidence and in accordance with law); *Blake*, 480 F.3d at 288-89; *McClanahan*, 25 BLR at 1-175.

Finally, I agree with the majority's previous affirmance of the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, based on her permissible rejection of the opinions of Drs. Rosenberg and Vuskovich on legal pneumoconiosis and disability causation.[23] In particular, the majority held that she "rationally found that, even if the *general* pattern of obstruction due to coal mine dust results in a preserved [FEV1/FVC] ratio, Dr. Rosenberg did not explain why the pattern of obstruction in claimant's particular case has no relationship to coal mine dust-exposure." *North v. Harlan Cumberland Coal Co.*, BRB No. 16-0200 BLA, slip op. at 15 (Feb. 2, 2017) (Hall, J., concurring and dissenting) (unpub.), *citing Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726 (7th Cir. 2008); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). It also held that she "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 [his] obstruction." *North*, BRB No. 16-0200 BLA, slip op. at 15-16, *citing Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); *Peabody Coal Co. v. Director, OWCP* [*Opp*], 746 F.3d

[23] In its previous decision, the majority initially stated that it was vacating the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption because she "may not have based her Decision and Order on all admissible evidence." *North v. Harlan Cumberland Coal Co*., BRB No. 16-0200 BLA, slip op. at 6 (Feb. 2, 2017) (Hall, J., concurring and dissenting) (unpub.). It nevertheless proceeded to affirm her rejection of the opinions of Drs. Rosenberg and Vuskovich on rebuttal and advised that she "may reinstate the award of benefits" if she again finds the presumption invoked. *Id*. at 13-16.

1119, 1127 (9th Cir. 2014); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324 (4th Cir. 2013) (Traxler, C.J., dissenting).

As employer failed to rebut the Section 411(c)(4) presumption, claimant established his entitlement to benefits. I, therefore, would affirm the award.

GREG J. BUZZARD
Administrative Appeals Judge