U.S. Department of Labor

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

BRB No. 17-0061 BLA

ROBERT C. GILLENWATER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	DATE ISSUED: 11/29/2017
	)	
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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06277) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on March 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1]

This case was initially before Administrative Law Judge Larry S. Merck, who held a hearing on October 30, 2012. In an Order issued on February 14, 2014, Judge Merck determined that the Department of Labor (DOL)-sponsored pulmonary evaluation performed by Dr. Rao did not constitute a complete pulmonary evaluation as required by Section 413(b) of the Act, 30 U.S.C. 923(b), and 20 C.F.R. §725.406, because it did not address the issue of total disability in a manner that permitted resolution of the claim. Director's Exhibit 45. Therefore, Judge Merck remanded the case for the district director "to obtain clarification from Dr. Rao on the issue of total disability, in order to provide a complete pulmonary evaluation . . . ." *Id*. at 4.

On remand, the district director scheduled claimant for a new pulmonary evaluation with a different physician, Dr. Manoj Prakash.[2] Director's Exhibit 46. Dr. Prakash examined claimant on April 11, 2014, and issued a medical report. Director's Exhibits 47, 49. Thereafter, the case was returned to the Office of Administrative Law Judges and assigned to the current administrative law judge, who held a telephonic hearing on March 16, 2016.

During the hearing, when counsel for the Director, Office of Workers' Compensation Programs (the Director), proffered the Director's Exhibits for admission into the record, employer objected that they contained two DOL-sponsored pulmonary evaluation reports, one from Dr. Rao and one from Dr. Prakash. Hearing Transcript (Tr.) at 6-7. Employer argued that the regulations allowed only "one of those DOL

[1] Claimant filed four previous claims for benefits, all of which were finally denied. Director's Exhibit 1. Claimant's most recent previous claim, filed on March 28, 2002, was denied by Administrative Law Judge Stephen L. Purcell on December 13, 2004, because claimant failed to establish any element of entitlement. *Id*. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Gillenwater v. Ranger Fuel Corp.*, BRB No. 05-0337 BLA/A (Dec. 12, 2005) (unpub.).

[2] The district director's reasons for scheduling a new examination with a different physician are not reflected in the record.

examination reports [to] be considered in this claim." Tr. at 6. Citing "the interest of justice," the administrative law judge admitted the reports of both Drs. Rao and Prakash into the record. Tr. at 7.

In a Decision and Order issued on October 5, 2016, the administrative law judge credited claimant with eighteen years and nine months of coal mine employment, at least fifteen years of which took place in underground coal mines.[3] The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant 20 C.F.R. §718.204(b)(2).[4] Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable 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. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in admitting the reports of two DOL-sponsored medical examinations into the record. Employer further asserts that the administrative law judge erred in finding total disability established pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Additionally, employer argues that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director has filed a limited response, in which he agrees that the administrative law judge erred in admitting

[3] Claimant's coal mine employment was in West Virginia. Decision and Order at 2 n.1; Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[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 claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Decision and Order at 24.

[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 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.

two DOL-sponsored medical reports into the record, but argues that the error was harmless.[6]

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).

I. Department of Labor-Sponsored Pulmonary Evaluation

Employer first argues that the district director impermissibly obtained a new pulmonary evaluation from Dr. Prakash, when Judge Merck ordered the district director to obtain clarification from Dr. Rao on the issue of total disability. Employer's Brief at 31-34. Employer, however, did not raise this argument before the administrative law judge, or object to the admission of Dr. Prakash's medical report on the basis that the district director violated Judge Merck's remand order by obtaining the report. Instead, employer argued that only one report, either that of Dr. Rao or of Dr. Prakash, could be admitted as the report of the DOL-sponsored pulmonary evaluation.[7] Tr. at 6-7. Because employer did not argue below that the district director improperly obtained Dr. Prakash's examination report, it waived the argument. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

Employer next argues that the administrative law judge erred in admitting the reports of both Drs. Rao and Prakash. Employer's Brief at 31-35. The Director agrees, noting that only one DOL-sponsored examination report may be considered where an employer, rather than the Director, is the party opposing entitlement. Director's Brief at 2; *see* 20 C.F.R. §725.406(a); 20 C.F.R. §725.414(a)(3)(iii). The Director, however, argues that the error was harmless because, given that Dr. Rao's opinion was incomplete on the issue of total disability, the administrative law judge did not rely on Dr. Rao's

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established eighteen years and nine months of coal mine employment, with at least fifteen years in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Employer argues that it "moved to strike Dr. Prakash's report" before the administrative law judge. Employer's Brief at 32. Review of the hearing transcript, however, reveals that employer argued only that either Dr. Rao's or Dr. Prakash's report should be excluded. Hearing Transcript at 6-7. In its post-hearing brief, employer did not argue that Dr. Prakash's report should be excluded.

opinion to find that claimant established total disability and invoked the Section 411(c)(4) presumption. Although the Director's position has merit, because the case is being remanded for reconsideration of the evidence of disability, *see infra*, we agree with employer that on remand the administrative law judge must consider only one of the two physicians' opinions provided.[8]

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

Employer argues that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment. A miner is totally disabled if the miner has a respiratory or pulmonary impairment which, standing alone, prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 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).

The administrative law judge found that claimant failed to establish total disability based on the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i), but established total disability based on the arterial blood gas study and medical opinion evidence at 20 C.F.R. §718.204(b)(2)(ii), (iv).[9] Decision and Order at 11-24. Employer contends that the administrative law judge erred in weighing the arterial blood gas study and medical opinion evidence.

A. Arterial Blood Gas Study Evidence

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered seven arterial blood gas studies conducted on February 3, 2011, December 5, 2011, January 23, 2012, February 20, 2012, April 11, 2014, January 20, 2016, and June 2, 2016. Decision and Order at 7; Director's Exhibits 14, 34, 47; Claimant's Exhibits 1, 2, 5;

[8] We further note the Director's concession on appeal that "only Dr. Prakash's opinion satisfies the Director's duty under [S]ection 413(b) to provide the miner with a complete pulmonary evaluation." Director's Brief at 2.

[9] The administrative law judge found that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11-12.

Employer's Exhibit 11. Two blood gas studies, those conducted at rest on February 20, 2012 and on January 20, 2016, were qualifying for total disability.[10] The remaining five blood gas studies were non-qualifying.[11] Because the three most recent blood gas studies "postdate[d] the four earlier [studies] by between two and four years," the administrative law judge found that the April 11, 2014, January 20, 2016, and June 2, 2016 blood gas studies were the "best indicators" for total disability. Decision and Order at 11-12.

The January 20, 2016 resting blood gas study, conducted by Dr. Habre, was qualifying for total disability, while the April 11, 2014 resting and exercise studies, conducted by Dr. Prakash, and the June 2, 2016 resting study, conducted by Dr. Fino,[12] were non-qualifying. Decision and Order at 11-12. However, the administrative law judge concluded that Dr. Prakash's April 11, 2014 blood gas study "support[ed] a finding of total disability based on Dr. Prakash's narrative comments." Decision and Order at 12. Specifically, the administrative law judge noted that the exercise portion of Dr. Prakash's study, "though non-qualifying, produced serious side effects as [claimant's] heart rate soared to 138, a dangerous form of tachycardia, after four minutes and fifteen seconds of exercise." *Id*. The administrative law judge noted that "Dr. Prakash testified that this alone indicated that [claimant] was totally disabled from returning to his previous coal mine employment." *Id*.

With respect to the June 2, 2016 blood gas study performed by Dr. Fino, the administrative law judge noted that Dr. Fino exercised claimant on a treadmill, and conducted a cardiac stress test that did not reveal the tachycardia evidenced by the April 11, 2014 testing. Decision and Order at 12. Although Dr. Fino's blood gas study produced non-qualifying values, the administrative law judge discounted the study

[10] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those in the table. 20 C.F.R. §718.204(b)(2)(ii).

[11] The February 3, 2011, January 23, 2012, and April 11, 2014 blood gas studies were non-qualifying both at rest and on exercise. Director's Exhibits 14, 47; Claimant's Exhibit 1. The December 5, 2011 and June 2, 2016 blood gas studies, taken at rest only, were non-qualifying. Director's Exhibit 34; Employer's Exhibit 11.

[12] Although Dr. Fino exercised claimant for six minutes on a treadmill, he did not report any pO2 or pCO2 exercise values obtained based on an arterial blood draw. Employer's Exhibits 10, 11. However, Dr. Fino stated that an "oxygen transfer study . . . showed no drop in oxygen saturations with exertion." Employer's Exhibit 11.

because Dr. Fino did not conduct an exercise arterial blood draw. *Id*. The administrative law judge concluded that Dr. Fino's blood gas study thus failed to approximate the "moderate-to-heavy" exertional requirements of claimant's usual coal mine employment,[13] and was not probative on the issue of total disability. *Id*. Based on these findings, the administrative law judge concluded that the arterial blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).

Employer asserts that the administrative law judge erred in finding that the arterial blood gas study conducted by Dr. Prakash supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Employer's Brief at 6-8. Employer's argument has merit. A review of the administrative law judge's Decision and Order reflects that the administrative law judge found that the preponderance of the arterial blood gas testing was qualifying for total disability at 20 C.F.R. §718.204(b)(2)(ii).[14] As employer argues, however, Dr. Prakash's diagnosis of "tachycardia" on cardiac stress testing is not relevant to whether the blood gas study values are equal to or less than the values set out in the

[13] Later in his Decision and Order, the administrative law judge found that claimant's usual coal mine employment included work as a "coal driller" and that claimant "ran the cutting machine and scoops" in that position. Decision and Order at 24. The administrative law judge noted that claimant testified at the hearing that his coal driller position required that he clean-up and haul supplies with a scoop and load coal at the face. Decision and Order at 4; Hearing Transcript at 24. Claimant also testified at the hearing before Administrative Law Judge Larry S. Merck, and stated that coal drilling and running the cutting machine and scoop required heavy labor. Director's Exhibit 42. In addition, claimant stated that he worked as a foreman at the same time as working at the coal driller, which required that he move equipment and assemble conveyor belts, primarily while on his knees. *Id*. Based on claimant's testimony, the administrative law judge found that claimant's usual coal mine work required moderate to heavy manual labor. *Id*. Because employer does not challenge the administrative law judge's findings regarding the exertional requirements of claimant's usual coal mine employment, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[14] Specifically, in weighing Dr. Habre's medical opinion on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Habre "based his opinion on [claimant's] qualifying [arterial blood gas study] results, which accord with my own findings as to the weight of the [arterial blood gas study] evidence in this case." Decision and Order at 21. Moreover, in weighing the medical opinions of Drs. Castle and Vuskovich on the issue of legal pneumoconiosis on rebuttal, the administrative law judge indicated that he "found that [claimant's] total disability was actually premised on the qualifying [arterial blood gas studies] . . . ." *Id*. at 31.

table at 20 C.F.R. Part 718, Appendix C. *See* 20 C.F.R. §718.204(b)(2)(ii). Dr. Prakash's comments that claimant experienced an increased heart rate during exercise cannot convert an arterial blood gas study that produced non-qualifying pO2 and pCO2 values into a qualifying one at 20 C.F.R. §718.204(b)(2)(ii).

Furthermore, the administrative law judge did not adequately set forth his rationale for resolving the conflict in the blood gas study evidence. The administrative law judge accorded greater weight to the April 11, 2014, January 20, 2016, and June 2, 2016 blood gas studies. Decision and Order at 11-12. He acknowledged that two of the three resting studies were non-qualifying for total disability, and that the only study performed during exercise was non-qualifying. Decision and Order at 11-12, 24. However, the administrative law judge did not explain his basis for finding that the preponderance of the blood gas study evidence was qualifying for total disability. *Id*.

Therefore, the administrative law judge's decision does not comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We must therefore vacate the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). On remand, the administrative law judge must reconsider whether the arterial blood gas study evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), and fully explain his basis for resolving the conflict in this evidence. *See Wojtowicz*, 12 BLR at 1-165.

B. Medical Opinion Evidence

Employer next argues that the administrative law judge erred in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Klayton, Splan, Prakash, and Habre that claimant is totally disabled by a respiratory or pulmonary impairment and the medical opinions of Drs. Vuskovich, Castle, and Fino that claimant is not totally disabled.

The administrative law judge assigned "full weight" to the opinions of Drs. Klayton[15] and Splan,[16] finding that their opinions are "based on a combination of

[15] Dr. Klayton opined that claimant's January 23, 2013 pulmonary function study evidenced a significantly reduced MVV of "57 liters per minute or 40% [of] predicted" and an FEV1 of "2.28 liters or 59% [of] predicted." Claimant's Exhibit 1. He indicated

abnormalities observed on . . . [pulmonary function studies] and [arterial blood gas studies], as well as [their] clinical examination[s]." Decision and Order at 15-16. Moreover, the administrative law judge noted that Dr. Splan concluded that claimant's blood gas study results "would preclude him from returning to his last coal mine employment, a finding that accords with my own." *Id*. at 16.

The administrative law judge also found that the opinions of Drs. Prakash and Habre were credible on the issue of total disability. Specifically, the administrative law judge determined that Dr. Prakash[17] "based his conclusions on [claimant's arterial blood gas study] results, which he stated showed dangerous tachycardia with exercise." Decision and Order at 23. The administrative law judge determined that Dr. Prakash's "findings accord with my own as to the weight of [claimant's arterial blood gas study]

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that these values are qualifying for total disability. *Id*. He also identified "moderately severe resting hypoxia" on the January 23, 2012 arterial blood gas study. *Id*. Dr. Klayton concluded that, "[g]iven these objective [test] results," claimant is totally disabled because "he would not have the capacity to lift the 80 pounds he was required to lift" in his usual coal mine employment. *Id*.

[16] Dr. Splan opined that claimant suffers from a moderate obstructive ventilatory impairment, based on a February 20, 2012 pulmonary function study, and from chronic CO2 retention and moderate hypoxemia at rest, based on a February 20, 2012 arterial blood gas study. Claimant's Exhibit 2. Dr. Splan noted that claimant's hypoxemia "precluded [claimant] from having [an] exercise stud[y]." *Id*. Dr. Splan concluded that claimant's pulmonary impairment "is thought to be severe based upon his ventilatory study as well as his arterial blood gases" and, therefore, claimant is totally disabled. *Id*.

[17] Dr. Prakash diagnosed mild hypoxemia and hypercapnia, evidenced by the April 11, 2014 resting arterial blood gas study. Director's Exhibit 47. He testified that claimant's pO2 and pCO2 levels improved during exercise, and that this was a normal response to exercise. Employer's Exhibit 6 at 30-31, 50. He noted that claimant's heart rate rose to 138 during exercise, and that claimant began wheezing and experiencing shortness of breath. *Id*. 31-32, 49. He also noted that claimant was "deconditioned," as he needed to put forth too much effort to maintain those pO2 and pCO2 levels, reflected in his rapid heart rate or "tachycardia." *Id*. Dr. Prakash explained that, although claimant's blood gas values were normal during exercise, claimant was totally disabled from his usual coal mine employment because of the tachycardia. *Id*. at 35.

results." *Id*. The administrative law judge found that Dr. Habre's opinion[18] was based on claimant's qualifying January 20, 2016 blood gas study results, which the administrative law judge found "accord[s] with my own findings as to the weight of the [arterial blood gas study] evidence in this case." *Id*. at 21.

The administrative law judge discounted the contrary opinions of Drs. Vuskovich, Castle, and Fino. Specifically, the administrative law judge found that the opinions of Drs. Vuskovich and Castle were "equivocal and ultimately not fully probative" on the issue of total disability. Decision and Order at 17-19. Moreover, the administrative law judge found that Dr. Fino's opinion was unpersuasive and contrary to the weight of the arterial blood gas study evidence. *Id*. at 19-20.

Employer challenges the administrative law judge's decision to credit the opinions of Drs. Klayton, Splan, and Habre. Because the administrative law judge relied on his erroneous weighing of the arterial blood gas study evidence to conclude that their opinions established total pulmonary or respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), we must vacate his finding that these medical opinions are credible and remand the case to the administrative law judge for further consideration of this evidence.

Employer also argues that the administrative law judge erred in weighing Dr. Prakash's opinion. We agree. Insofar as the administrative law judge found that the cardiac stress testing that accompanied the arterial blood gas testing established that claimant suffered from "tachycardia" and, therefore, supported Dr. Prakash's ultimate conclusion, the administrative law judge failed to explain his basis for resolving the conflict in the objective evidence. Decision and Order at 11-12. The administrative law judge noted that claimant experienced "tachycardia" during Dr. Prakash's April 11, 2014 cardiac stress test, but did not experience the same "tachycardia" during the cardiac stress test conducted by Dr. Fino on June 2, 2016. *Id*. Although the administrative law judge discounted Dr. Fino's blood gas study, based on Dr. Fino's failure to conduct an arterial blood draw during exercise, the administrative law judge did not adequately explain why

[18] Dr. Habre opined that claimant was totally disabled from his usual coal mine employment. Claimant's Exhibit 5. He based his opinion on the decline in FEV1 and FVC, seen on claimant's pulmonary function studies, and the existence of "severe" hypoxemia, evidenced by a pCO2 of 44 and pO2 of 52 on a resting arterial blood gas study. Employer's Exhibits 5; 9 at 17-18. He also stated that claimant's O2 saturation at rest was 90%, indicating that claimant would not be able to perform any activity without oxygen. Employer's Exhibit 9 at 17-18, 36.

an arterial blood draw would have any bearing on whether claimant suffered from tachycardia during Dr. Fino's cardiac stress test.

Further, we note, as employer argues, that when the administrative law judge found disability established based in part on the tachycardia, he did not explain how the tachycardia was related to a chronic respiratory or pulmonary impairment. A "nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability" cannot be considered in determining disability under the regulations. 20 C.F.R. §718.204(a). However, a nonpulmonary or nonrespiratory condition which causes a chronic respiratory or pulmonary impairment shall be considered. *Id*. We must therefore vacate the administrative law judge's decision to credit Dr. Prakash's medical opinion, and instruct the administrative law judge, on remand, to reconsider Dr. Prakash's opinion, and explain his findings. *See Wojtowicz*, 12 BLR at 1-165.

Employer argues that the administrative law judge erred in finding the contrary medical opinion of Dr. Vuskovich to be equivocal.[19] Employer's Brief at 14-16. We disagree. In his December 26, 2011 report, Dr. Vuskovich diagnosed claimant with a restrictive ventilatory impairment caused by a "weakened or paralyzed diaphragm," which "degraded" his pulmonary function study measurements. Director's Exhibit 34 (December 26, 2011 report). Dr. Vuskovich explained that this condition can cause an abnormally low volume of air rushing into the lungs, as the lungs do not fully expand. *Id*. However, he opined that, over thirteen years, claimant's "pulmonary oxygen transport remained stable and normal." *Id*. He further explained that, after November 2002, claimant's diaphragm strengthened and claimant experienced improvement in his pulmonary function study measurements. *Id*. Dr. Vuskovich therefore opined that claimant was not totally disabled by a respiratory or pulmonary impairment. *Id*.

In an October 8, 2012 deposition, Dr. Vuskovich reiterated that claimant's pulmonary function studies revealed a variable, restrictive ventilatory impairment caused by a weakened or partially paralyzed diaphragm. Director's Exhibit 34 (October 8, 2012 deposition at 23-24). Dr. Vuskovich testified that claimant "might have trouble doing heavy manual labor" as a result of his diaphragm dysfunction, as "reflected in [claimant's] MVV . . . ." *Id*. at 27-28. Dr. Vuskovich stated that the MVV "most closely simulates the ventilatory effort required for heavy manual labor . . . ." *Id*. at 28. He also indicated that the weakened diaphragm prevented claimant from taking deep breaths, as

[19] Employer does not challenge the administrative law judge's discrediting of Dr. Castle's opinion on the issue of total disability. Therefore, this finding is affirmed. *Skrack*, 6 BLR at 1-711; Decision and Order at 17.

"you need an intact diaphragm to take a deep breath." *Id*. at 27. Dr. Vuskovich again stated that claimant did not suffer from a respiratory or pulmonary impairment due to coal mine dust exposure. *Id*. at 28-29. However, because Dr. Vuskovich also opined that claimant's diaphragm impairment was causing a restrictive ventilatory impairment reflecting claimant's inability to take deep breaths, and that the inability to take deep breaths "may prevent claimant from performing heavy manual labor," Director's Exhibit 34 (October 8, 2012 deposition at 28), the administrative law judge permissibly found Dr. Vuskovich's opinion to be "equivocal" with respect to whether claimant suffers from a totally disabling respiratory or pulmonary impairment. Decision and Order at 18-19; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Employer next argues that the administrative law judge erred in discounting Dr. Fino's opinion. Employer's Brief at 12-14. We agree. Dr. Fino issued a medical report on June 2, 2016. Employer's Exhibit 10. He indicated that claimant had normal arterial blood gas studies and no oxygen transfer abnormality. *Id*. He noted that claimant has "mild reductions in the FVC and the FEV1" on pulmonary function studies. *Id*. He opined that claimant is not totally disabled based on pulmonary function testing because claimant "is among the 5% of individuals who are normal but statistically have pulmonary function studies that fall below the lower limit of normal." *Id*. He further opined that claimant has no reduced diffusion capacity. *Id*. In a July 18, 2016 supplemental report, Dr. Fino indicated that he reviewed other medical testing, and acknowledged that "[s]ome low arterial blood gases have been recorded . . . ." Employer's Exhibit 11. However, Dr. Fino opined that claimant is not totally disabled because the most recent blood gas study, taken by Dr. Fino on June 2, 2016, revealed a pO2 of 71.7, and because a corresponding "oxygen transfer study" evidenced "no drop in oxygen saturation with exertion." *Id*.

The administrative law judge rejected Dr. Fino's opinion because it was based on the results of the non-qualifying June 2, 2016 resting arterial blood gas study. Decision and Order at 20. The administrative law judge reiterated his conclusion that the weight of the blood gas study evidence "actually supports a finding of total disability . . . ." *Id*. Because the administrative law judge relied on his erroneous weighing of the arterial blood gas study evidence, which we have vacated, we must vacate his credibility determination with respect to Dr. Fino. Furthermore, we are unable to affirm the administrative law judge's remaining reasons for discrediting Dr. Fino's opinion, as they are based on whether Dr. Fino adequately addressed the existence of a respiratory or pulmonary impairment on claimant's pulmonary function studies.[20] The administrative

[20] Dr. Fino issued a report on October 28, 2015, based on his review of pulmonary function studies taken on January 23, 2012, February 20, 2012, and April 11, 2014. Employer's Exhibit 3. Although he found that they produced valid FVC results, he

law judge, however, ultimately determined that the pulmonary function study evidence "did not support a finding of total disability," and that instead, the arterial blood gas study evidence "favored a finding of total disability . . . ." Decision and Order at 24. The administrative law judge has not adequately explained why Dr. Fino's discussion of the pulmonary function studies has any bearing on Dr. Fino's opinion that the arterial blood gas studies do not support the existence of a disabling respiratory or pulmonary impairment. Therefore, we instruct the administrative law judge to reconsider Dr. Fino's opinion on remand, and fully explain his findings. *See Wojtowicz*, 12 BLR at 1-165.

On remand the administrative law judge should reconsider the medical opinions of Drs. Klayton, Splan, Prakash, Habre, and Fino on the issue of total disability. In weighing the medical opinions, the administrative law judge should address the physicians' respective credentials, the explanations for their conclusions, the documentation underlying their medical judgment, and the sophistication of, and bases for, their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Furthermore, the administrative law judge is instructed to set forth his credibility findings on remand in detail, including the underlying rationale for his decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

In light of our decision to vacate the administrative law judge's finding that the new evidence established total disability at 20 C.F.R. §718.204(b)(2), we also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4)

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concluded that they produced invalid MVV results and, therefore, he opined that the MVV results underestimated claimant's true pulmonary function and should not be used as evidence of a respiratory impairment. *Id*. The administrative law judge was not persuaded by Dr. Fino's rationale for invalidating the MVV results. Decision and Order at 19-20. Specifically, the administrative law judge noted that Drs. Vuskovich and Castle indicated that these results were due to claimant's inability to take a deep breath, based on his diaphragm impairment. *Id*. Finding that Dr. Fino "did not consider this extrinsic cause of [claimant's] respiratory impairment," the administrative law judge found that Dr. Fino's "conclusions as to the validity of the pulmonary function study results are not probative." *Id*. The administrative law judge also was not persuaded by Dr. Fino's opinion that claimant is not totally disabled, based on the reduced FEV1 and FVC results on pulmonary function testing. *Id*. The administrative law judge explained that Dr. Fino "provided no explanation for [claimant's] variable results on objective testing except to state that [claimant] was a statistical anomaly and whatever pulmonary condition he had must have resolved." *Id*.

presumption of total disability due to pneumoconiosis and that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

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

In the interest of judicial economy, we will address employer's contentions that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the presumption invoked. If claimant invokes the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[21] or by establishing that "no part of the miner's 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 establish rebuttal by either method.

In determining whether employer established that claimant does not have legal pneumoconiosis,[22] the administrative law judge considered the medical opinions of Drs. Vuskovich and Castle that claimant has a restrictive ventilatory impairment caused solely by his weakened or partially paralyzed diaphragm, and has no obstructive respiratory impairment. Decision and Order at 28-32. The administrative law judge also considered Dr. Fino's opinion that claimant does not suffer from a respiratory or pulmonary impairment arising out of coal mine dust exposure. *Id.* at 31. The administrative law judge discounted all three opinions.

As employer contends, however, the administrative law judge relied exclusively on his erroneous finding of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2) to discredit Dr. Fino's medical opinion on the issue of legal pneumoconiosis. Employer's Brief at 17-18; Decision and Order at 30. We must

[21] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[22] The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, based on the x-ray and medical opinion evidence. Decision and Order at 30.

therefore vacate the administrative law judge's credibility findings with respect to Dr. Fino and instruct the administrative law judge to reconsider Dr. Fino's opinion.

Further, we agree with employer that the administrative law judge did not adequately explain his resolution of the conflicting medical evidence when he discounted the opinions of Drs. Vuskovich and Castle for failing to explain why claimant's obstructive impairment is unrelated to coal mine dust exposure and, thus, is not legal pneumoconiosis. Specifically, employer notes that Drs. Vuskovich[23] and Castle[24] opined that claimant's pulmonary function studies reflect that he does not have an obstructive impairment. Employer's Brief at 18-26. The administrative law judge found that claimant has an obstructive impairment based primarily on the opinion of Dr. Prakash, who diagnosed claimant with chronic bronchitis and COPD, Decision and Order at 29, 31,[25] but the administrative law judge did not explain his reasons for crediting the opinion

[23] Dr. Vuskovich opined that claimant's "mild pulmonary impairment," evidenced by the MVV and lung volume results on pulmonary function testing, was a restrictive impairment, and was caused by his weakened or partially paralyzed diaphragm. Director's Exhibit 34 (December 26, 2011 report). He concluded that the restrictive impairment was unrelated to coal mine dust exposure because claimant has normal pulmonary oxygen transfer. *Id*. Moreover, he opined that claimant's "pulmonary oxygen transport remained normal and stable" over thirteen years, which was not compatible with the chronic and progressive disease of pneumoconiosis. *Id*. He stated that claimant's resting arterial blood gas studies were "consistently low due to increased ventilation to perfusion mismatch[ing] caused by [claimant's] paralyzed-weakened right hemi-diaphragm." Employer's Exhibit 5 at 5. Further, he opined that claimant does not have an obstructive respiratory impairment. Director's Exhibit 34 (December 26, 2011 report).

[24] Dr. Castle opined that claimant's restrictive lung impairment, evidenced by the MVV results on claimant's pulmonary function testing and associated ventilation/perfusion mismatching, was caused by his weakened or partially paralyzed diaphragm, and was unrelated to coal mine dust exposure. Director's Exhibit 34 (September 8, 2012 report). He also opined that, in the past, claimant "demonstrated a variable degree of mild airway obstruction with significant reversibility," and attributed this obstruction to claimant's history of bronchial asthma, and not coal mine dust exposure. *Id*. However, Dr. Castle indicated that, at the time of his September 18, 2012 report, there was no evidence that claimant suffered from any obstructive impairment. *Id*.

[25] The administrative law judge also cited the opinions of Drs. Rao, Klayton, and Habre. Decision and Order at 31. However, as was discussed earlier regarding Dr. Rao's opinion, only one DOL physician's opinion is admissible in this case. The administrative

of Dr. Prakash diagnosing obstruction, over the contrary opinions of Drs. Vuskovich and Castle. Further, the record reflects that Dr. Fino reviewed the April 11, 2014 pulmonary function study conducted by Dr. Prakash and opined that it reflects that claimant does not have an obstructive impairment. Employer's Exhibit 11 at 7.

Because the administrative law judge did not resolve relevant, conflicting evidence, we must vacate his credibility determination regarding Drs. Vuskovich and Castle, and instruct the administrative law judge, on remand, to resolve the conflict in the evidence as to whether claimant has an obstructive impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. If the administrative law judge finds that claimant has an obstructive impairment, he should then consider whether the rebuttal opinions have credibly addressed the etiology of the obstruction.

Further, the administrative law judge erred in discrediting the opinions of Drs. Vuskovich and Castle that claimant's restrictive ventilatory impairment is due solely to his weakened or partially paralyzed diaphragm, on the basis that the physicians did not "convincingly show that [the weakened diaphragm] alone has caused all of [claimant's] respiratory symptoms." Decision and Order at 32. In order to establish that claimant does not have legal pneumoconiosis, employer's physicians must establish that coal mine dust exposure did not significantly contribute to, or aggravate, a chronic respiratory or pulmonary *disease or impairment*. *See* 20 C.F.R. §718.201(b). As neither disability nor pneumoconiosis are established based solely on symptoms, the administrative law judge's rationale for discrediting the opinions of Drs. Vuskovich and Castle is not adequately explained. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Wojtowicz*, 12 BLR at 1-165.

Furthermore, although the administrative law judge additionally found that Drs. Vuskovich and Castle did not explain why coal mine dust exposure did not contribute to or aggravate claimant's restrictive impairment, the administrative law judge did not address the credibility of the physicians' explanations, which focused on the variable nature of claimant's impairment and on the fact that it has improved over time. Director's Exhibit 34. The credibility of those explanations will depend, in part, on whether the administrative law judge finds that claimant has a totally disabling respiratory impairment, an issue that we have instructed the administrative law judge to reconsider. Therefore, we instruct the administrative law judge to reconsider the opinions of Drs. Vuskovich and Castle with respect to whether claimant's restrictive ventilatory

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law judge did not identify a diagnosis of obstruction by either Dr. Klayton or Dr. Habre. Decision and Order at 28-29.

impairment is legal pneumoconiosis. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274.

For the foregoing reasons, we vacate the administrative law judge's finding that employer failed to rebut the presumed fact of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i), and instruct the administrative law judge to reconsider that issue if reached, on remand. Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge found that the same reasons for which he discredited the opinions of Drs. Vuskovich, Castle, and Fino, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. Decision and Order at 32-33. Because we have vacated the administrative law judge's finding that employer failed to disprove legal pneumoconiosis, we must vacate his finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis at 20 C.F.R. §718.305(d)(1)(ii).

IV. Conclusion

If the administrative law judge finds on remand that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption, and cannot establish entitlement under 20 C.F.R. Part 718. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). However, if the administrative law judge finds that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant will have invoked the Section 411(c)(4) presumption. The administrative law judge should then reconsider whether employer has rebutted the Section 411(c)(4) presumption.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge