U.S. Department of Labor

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

BRB No. 17-0657 BLA

AUSTINE SALMONS Claimant-Respondent v. EDD POTTER COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)))))))) DATE ISSUED: 11/30/2018))))))) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting 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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2013-BLA-06080) of Associate Chief Administrative Law Judge William S. Colwell 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 miner's claim filed on August 15, 2011.

The administrative law judge initially found that employer is the responsible operator. He also credited claimant with at least twenty-seven years of underground coal mine employment and found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Thus, 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).[1] He further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in identifying it as the responsible operator. Employer also contends that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Further, employer challenges the administrative law judge's finding that it did not rebut the presumption. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's identification of employer as the responsible operator. Employer has filed a reply brief, reiterating its contentions.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Under Section 411(c)(4) of the Act, claimant is presumed to be 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 impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has at least twenty-seven years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for at least one year. *See* 20 C.F.R. §§725.494, 725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[4] Once a potentially liable operator has been properly identified by the district director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

Employer argues that the administrative law judge erred in finding that it is the operator that most recently employed claimant for a cumulative period of at least one year. Specifically, employer asserts that two more recent employers, Mack Coal Corporation (Mack Coal) and Rife & Hall Coal Company, Incorporated (Rife & Hall), each employed claimant for at least one year. Employer's Brief at 12-19; Reply Brief at 1-5.

In a Schedule for the Submission of Additional Evidence issued on August 16, 2012, the district director designated Rife & Hall as the potentially liable responsible operator. Director's Exhibit 16. In a subsequent Schedule for the Submission of Additional Evidence issued on March 4, 2013, however, the district director designated employer as the responsible operator. Director's Exhibit 30. The district director determined that Rife & Hall employed claimant for less than one year.[5] The district director also determined that

[4] An employer must meet five criteria to be considered a potentially liable operator: (1) the miner worked for the operator for a cumulative period of at least one year (this requires that the miner was employed by the operator for a calendar year or portions of a calendar year totaling 365 days, during which the miner worked in or around a coal mine(s) for 125 "working days"; (2) his employment included at least one working day after December 31, 1969; (3) his disability or death arose at least in part out of his employment with the operator; (4) the operator was an operator after June 30, 1973; and (5) the operator is capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

[5] The record reflects that claimant worked for Edd Potter Coal Company from 1981 to 1983; Bounty Mining Corporation in 1983; Mack Coal Corporation (Mack Coal) from 1983 to 1985 and in 1987; Liberty Coal Corporation in 1986; Brian Coal Company,

while Mack Coal employed claimant for at least one year,[6] it was financially incapable of assuming liability for the payment of benefits. Director's Exhibit 34. Specifically, the district director noted that both Mack Coal and its insurer, Rockwood Insurance Company (Rockwood), are insolvent and time-barred from filing a claim against Rockwood's guarantor, the Virginia Property and Casualty Insurance Guaranty Association (VPCIGA).[7] *Id.* Having found that employer was the last operator to have employed claimant for a cumulative period of not less than one year, the district director designated it as the responsible operator. Director's Exhibits 6, 34. On July 2, 2013, the district director issued a Proposed Decision and Order denying benefits and designating employer as the responsible operator. Director's Exhibit 34.

Following a hearing held at claimant's request, the administrative law judge addressed employer's contention that another operator more recently employed claimant for one year. Decision and Order at 3-6. The administrative law judge noted that while Mack Coal employed claimant as an underground foreman after he worked for employer, he agreed with the district director's determination that Mack Coal was insolvent and time-barred from accepting liability for claims. He also determined that claimant was employed for less than one year with Rife & Hall. Finding that Edd Potter Coal Company was the last operator to employ claimant for a cumulative period of at least one year of coal mine employment, the administrative law judge concluded that it is the responsible operator.

Employer argues that the administrative law judge erred in finding that Mack Coal is not a potentially liable operator because it is financially incapable of assuming liability for the claim. Employer's Brief at 14-19. Specifically, employer asserts that it was VPCIGA's responsibility as guarantor to raise the final date for filing a claim as a defense from liability. Employer further asserts that any final date enacted under Virginia law is inapplicable because claimant did not develop pneumoconiosis until after the final date for filing, and because Virginia law, which is preempted by the Act, requires that all insurers

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Incorporated in 1987; Double J Coal Company, Incorporated in 1988; and Rife & Hall Coal Company, Incorporated in 1988 and 1989. Director's Exhibits 6, 34.

[6] The parties do not dispute that Mack Coal employed claimant for more than one year. Director's Brief at 9; Employer's Brief at 14.

[7] The Virginia Property and Casualty Insurance Guaranty Association (VPCIGA) assumes liability for covered claims against Rockwood Insurance Company (Rockwood). The "final date for filing" claims against Rockwood was August 26, 1992. *See RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 282 (4th Cir. 2016). Claimant filed his claim for black lung benefits on August 15, 2011. Director's Exhibit 2.

and reinsurers assume full liability for black lung claims. Employer's Brief at 14-19; Reply Brief at 1-5. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected these arguments, holding that under these circumstances VPCIGA is not an insurer within the meaning of the Black Lung Benefits Act (BLBA) and, thus, is not covered by the BLBA. *RB & F Coal, Inc. v. Mullins,* 842 F.3d 279, 285-87, 25 BLR 2-841, 2-853-57 (4th Cir. 2016). For the reasons set forth in *Mullins*, we reject employer's arguments.

Employer next argues that the administrative law judge erred in calculating claimant's length of coal mine employment with Rife & Hall. Employer asserts that the administrative law judge understated the length of claimant's employment with Rife & Hall by discrediting claimant's testimony. Employer's Brief at 12-14; Reply Brief at 5. We disagree.

As summarized by the administrative law judge, when claimant was deposed he testified that he was not sure of the specific dates he worked for Rife & Hall, but thought that it was less than a year. Decision and Order at 4; Director's Exhibit 16, Exhibit A at 8, Exhibit D at 3. At the April 26, 2016 hearing, however, claimant testified that he worked at Rife & Hall for "a year, year and a half . . . I guess somewhere around a year or so." Hearing Transcript at 23; *see* Decision and Order at 4. Noting claimant's conflicting testimony about the specific dates he worked for Rife & Hall and the length of that employment, the administrative law judge permissibly determined that claimant's testimony on that issue is not credible. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.,* 9 BLR 1-67, 1-68 (1986); Decision and Order at 4.

We also reject employer's argument that the administrative law judge erred by failing to consider an accident report indicating that claimant worked one year for Rife & Hall. Employer's Brief at 12-14; Reply Brief at 5. The administrative law judge found no evidence of the specific date that claimant began working for Rife & Hall, but noted that the record establishes that his employment with Rife & Hall ended on January 24, 1989.[8] The administrative law judge further found that claimant's Social Security Administration (SSA) earnings records, employment history form, and description of coal mine work and other employment form show that claimant worked for Rife & Hall from 1988 to 1989. Decision and Order at 3.

[8] Claimant testified that his last day working for Rife & Hall was January 24, 1989, when he had an occupational injury. Director's Exhibit 16, Exhibit A at 14, Exhibit B; Hearing Transcript at 26-27.

The administrative law judge permissibly found that claimant's SSA earnings records are the most probative evidence regarding the length of his coal mine employment because they are reliable and contain more detailed information than his employment history form. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 4-5; Director's Exhibit 6. Using the formula set forth at 20 C.F.R. §725.101(a)(32)(iii),[9] the administrative law judge determined that claimant worked 127 days for Rife & Hall.[10] Decision and Order at 6; Director's Exhibit 6. The Commonwealth of Virginia Department of Workmen's Compensation accident report signed by James Rife on January 25, 1989 notes that claimant worked one year for Rife & Hall, but it does not provide the specific date that he began working for it. Director's Exhibit 28 at 19. Given the report's lack of a specific starting date for claimant's employment, employer does not explain how the administrative law judge's length of coal mine employment determination would have changed if he considered it. Therefore, any error by the administrative law judge in failing to consider it is harmless. *See Shinseki v. Sanders,* 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *see also Osborne*

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[9] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii).

[10] Comparing claimant's income from the Social Security Administration (SSA) earnings records for Rife & Hall in 1988 ($14,543.77) and 1989 ($1,700.00) with the Bureau of Labor Statistics-reported industry average daily earnings for him in 1988 ($127.52) and 1989 ($130.00), respectively, the administrative law judge credited claimant with 114 days of employment in 1988 ($14,543.77 / $127.52 = 114) and 13 days of employment in 1989 ($1,700 / $130 = 13) for a total of 127 days. Decision and Order at 6; Director's Exhibits 5, 6; *see* Exhibit 610, Black Lung Benefits Act Procedure Manual at http://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610TR16.02.pdf. The administrative law judge determined that a reasonable estimate for a year is 250 working days. Decision and Order at 5-6.

v. Eagle Coal Co., 25 BLR 1-195, 1-204-05 (2016) (recognizing the preference for the use of direct evidence to compute length of employment).

Employer further argues that the administrative law judge erred in ignoring claimant's testimony that he earned $100 per day from Rife & Hall. Employer asserts that the administrative law judge's use of the daily wages listed in Exhibit 610 for 1988 and 1989, rather than his testimony that he earned a daily wage of $100.00, understated the length of claimant's coal mine employment with Rife & Hall. Employer's Brief at 13, *referencing* Decision and Order at 6; Director's Exhibits 16, Exhibit A at 8; 28 at 19.

Contrary to employer's assertion, using a $100 daily wage as the divisor of claimant's annual income from Rife & Hall in 1988 and 1989 would not establish that he worked one year for it. The administrative law judge stated that a reasonable estimate for a year is 250 working days.[11] Decision and Order at 5-6. The SSA earnings records show that claimant's income from Rife & Hall was $14,543.77 in 1988 and $1,700.00 in 1989. Director's Exhibit 6. Dividing those yearly earnings by a daily wage of $100.00 (i.e., $14,543.77 / 100 = 145 days; $1700.00 / 100 = 17 days; 145 + 17 = 162 days) totals 162 days. Thus, the administrative law judge's error, if any, in failing to consider claimant's testimony that he earned $100 per day from Rife & Hall is harmless. *See Shinseki,* 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278.[12]

As it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to prove that claimant worked at least one year for Rife & Hall after he worked for employer. *See Armco, Inc. v. Martin*, 277 F.3d 468, 475 (4th Cir. 2002). We therefore affirm the administrative law judge's determination that employer failed to prove that it is not the responsible operator liable for payment of benefits. 20 C.F.R. §§725.494, 725.495.

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[11] Employer does not challenge the administrative law judge's determination that there are 250 working days in a year.

[12] We note that the regulations provide for the miner being employed by the employer for a calendar year (365 days) or partial periods totaling one year, during which the miner worked in and around a coal mine for at least 125 "working days." 20 C.F.R. §§725.494(c), 725.101(a)(32). Employer has not shown, however, aside from the testimony which the administrative law judge permissibly found was unreliable, that claimant was employed by Rife & Hall for a calendar year or partial periods totaling one year.

Invocation of the 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. Specifically, employer contends that the administrative law judge erred in weighing the conflicting pulmonary function study, arterial blood gas study, and medical opinion evidence under 20 C.F.R. §718.204(b)(2)(i), (ii), (iv).[13]

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four pulmonary function studies dated February 29, 2012, October 17, 2012, February 11, 2014, and January 27, 2015.[14] Decision and Order at 10-11; Director's Exhibit 33; Claimant's Exhibits 4, 5. He found that the February 29, 2012 and October 17, 2012 studies, conducted by Drs. Rosenberg and Fino, respectively, produced non-qualifying[15] results both before and after the administration of a bronchodilator.[16] Director's Exhibit 33. He found that, in contrast, the February 11, 2014 and January 27, 2015 studies, conducted by Dr. Almaturi, produced qualifying pre-bronchodilator results, and included no post-bronchodilator results. Decision and Order at 10; Claimant's Exhibits

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[13] The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). On appeal, no party alleges that the record contains any evidence of cor pulmonale with right-sided congestive heart failure under 20 C.F.R. §718.204(b)(2)(iii).

[14] The administrative law judge did not consider the September 20, 2011 pulmonary function study administered by Dr. Forehand on behalf of the Department of Labor. Decision and Order at 10-11. Dr. Forehand identified claimant's height as sixty-seven inches and his age as seventy. Director's Exhibit 10. At the listed height and age, the study is non-qualifying.

[15] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[16] The administrative law judge correctly noted the Board's holding in *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008), that in the absence of contrary probative evidence, pulmonary function studies performed on a miner who is over the age of 71 must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. Claimant was 70 years old at the time of Dr. Forehand's September 20, 2011 study and was 71 or older at the time of each subsequent study. Decision and Order at 10-11.

4, 5. Giving greater weight to the qualifying results of the two most recent pulmonary function studies, the administrative law judge concluded that the preponderance of the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 11.

Employer argues that in finding the February 11, 2014 and January 27, 2015 pulmonary function studies to be qualifying, the administrative law judge erred in failing to resolve the conflicting heights recorded on the pulmonary function studies. Employer's Brief at 19-20. We agree. The United states Court of Appeals for the Fourth Circuit and the Board have held that where there are substantial differences in the recorded heights among the pulmonary function studies of record, an administrative law judge must make a factual finding to determine a miner's "correct" height. *See Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-80-81 (4th Cir. 1995); *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Here, the administrative law judge identified the height recorded by the physicians who administered the pulmonary function studies as being sixty-six, sixty-eight, sixty-eight, and sixty-nine inches, and utilized those heights to determine whether their respective tests were qualifying under the tables set forth in Appendix B to 20 C.F.R. Part 718.[17] Decision and Order at 10-11; Director's Exhibit 33; Claimant's Exhibits 4, 5. Because the administrative law judge's failure to resolve claimant's height discrepancy may affect whether the pulmonary function studies are qualifying, we must vacate his finding that the pulmonary function study evidence established total disability at 20 C.F.R. §718.204(b)(2)(i).[18] On remand, the administrative law judge must resolve the conflicting heights, reconsider all the pulmonary function studies of record, including Dr. Forehand's September 20, 2011 study, to determine whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i), and explain his findings in accordance with the Administrative Procedure Act (APA).[19] *See Toler*, 43

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[17] Claimant's height was measured as sixty-six inches for the February 29, 2012 pulmonary function study, sixty-eight inches for the October 17, 2012 and January 27, 2015 studies, and sixty-nine inches for the February 11, 2014 study. Director's Exhibit 33; Claimant's Exhibits 4, 5.

[18] For example, the January 27, 2015 study would not be qualifying if claimant's "correct" height is sixty-six inches.

[19] The Administrative Procedure Act (APA) 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

F.3d at 114, 19 BLR at 2-80-81; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Protopappas*, 6 BLR at 1-223.

We reject, however, employer's assertion that the administrative law judge erred in weighing the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered three blood gas studies dated September 20, 2011, February 29, 2012, and October 17, 2012. Decision and Order at 12; Director's Exhibits 10, 33. The September 20, 2011 blood gas study conducted by Dr. Forehand produced qualifying results both at rest and during exercise. Decision and Order at 12; Director's Exhibit 10. The February 29, 2012 blood gas study conducted by Dr. Rosenberg and the October 17, 2012 blood gas study conducted by Dr. Fino produced non-qualifying values at rest; neither physician conducted an exercise study. Decision and Order at 12; Director's Exhibit 10. The administrative law judge accorded greatest weight to the September 20, 2011 qualifying blood gas study because it was performed at rest and with exercise. Decision and Order at 12. Thus, the administrative law judge found that the blood gas study evidence established total disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

Contrary to employer's argument, the administrative law judge did not err in declining to give greater weight to the February 29, 2012 and October 17, 2012 resting blood gas studies because they are the most recent. An administrative law judge may, but need not, credit the more recent medical evidence. *See Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993). Moreover, here, unlike the pulmonary function studies, there is less than six months between Dr. Forehand's September 20, 2011 qualifying resting and exercise studies and Dr. Rosenberg's February 29, 2012 non-qualifying resting study.[20] *See*, *e.g.*, *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990) (administrative law judge may consider amount of time separating studies); *Conley v. Roberts and Shaefer Co.*, 7 BLR 1-309 (1984) (no requirement to credit later blood gas study simply because it is most recent evidence by six months); Director's Exhibits 10, 33. Further, the administrative law judge permissibly determined that Dr. Forehand's qualifying September 20, 2011 study is more probative than the studies conducted only at rest, because exercise testing is a better predictor of a claimant's ability to work in the mines.[21] *See Coen v. Director*, *OWCP*, 7

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[20] In contrast, there is approximately sixteen months between Dr. Fino's October 17, 2012 non-qualifying pulmonary function study and Dr. Almaturi's February 11, 2014 qualifying study. Director's Exhibit 33; Claimant's Exhibit 4.

[21] We reject employer's contention that the administrative law judge erred in failing to consider that both Dr. Rosenberg and Dr. Fino stated that they did not perform exercise blood gas studies because of claimant's history of heart problems. Employer's Brief at 20-21; Director's Exhibit 33. Employer has not shown how the reasons provided by Drs. Rosenberg and Fino for declining to exercise claimant detracted from the probative value

BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980); Decision and Order at 12. We therefore affirm the administrative law judge's finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer next contends that the administrative law judge erred in finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rosenberg, Forehand, and Fino regarding claimant's ability to perform his work as a mine foreman.[22] Decision and Order at 13-14. Dr. Rosenberg opined that claimant's respiratory impairments "appear disabling." Director's Exhibit 33. Dr. Forehand opined that claimant has a totally disabling respiratory impairment. Director's Exhibit 10. In contrast, Dr. Fino opined that from a respiratory standpoint claimant is not totally disabled from returning to his last coal mining job. Director's Exhibit 33.

The administrative law judge found that Dr. Rosenberg's opinion is based on an accurate understanding of claimant's mining jobs and is supported by the objective testing, but did not specifically address whether claimant had the pulmonary capacity to perform his last coal mining job. Decision and Order at 14. Thus he accorded "less weight" to Dr. Rosenberg's opinion. Decision and Order at 14. The administrative law judge found that Dr. Forehand's opinion is also based on an accurate understanding of claimant's mining jobs and is consistent with the evidence available to him and, in contrast to Dr. Rosenberg, he specifically addressed whether claimant had the capacity to perform his last coal mine job.[23] Decision and Order at 13. Thus he found Dr. Forehand's opinion that claimant is totally disabled entitled to "weight*.*" *Id.* Finally, the administrative law judge found that Dr. Fino's opinion that claimant is not totally disabled is also entitled to "weight" because it is supported by the objective testing and because Dr. Fino specifically addressed whether

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of Dr. Forehand's exercise study. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference.").

[22] The administrative law judge did not make a determination as to the nature of claimant's usual coal mine work. Claimant testified, however, that he worked as a mine foreman for the last fifteen to eighteen years of his employment. Hearing Transcript at 21-22. Moreover, Drs. Rosenberg, Forehand, and Fino all considered claimant's usual coal mine work to be that of a mine foreman. Director's Exhibits 10, 33.

[23] Dr. Forehand stated that claimant has "insufficient residual gas exchange . . . to return to [his] last coal mining job." Director's Exhibit 10.

claimant had the pulmonary capacity to perform his usual coal mine work.[24] Decision and Order at 14. *Id.* The administrative law judge concluded:

> In sum, two of the three physicians, Dr. Forehand and Dr. Fino, have given well-reasoned and well-documented opinions. Both opinions addressed the issue of total disability as defined in the regulations. However, Dr. Forehand's opinion included an accurate understanding of [c]laimant's mining jobs, where as [sic] Dr. Fino's opinion did not. Therefore, I find that the preponderance of the medical opinion evidence supports a finding of total disability.

Decision and Order at 14.

Employer asserts that the administrative law judge mischaracterized the physicians' opinions regarding their understanding of claimant's usual coal mine work. Employer's Brief at 21. We agree. In his September 20, 2011 report, Dr. Forehand noted that claimant worked underground for thirty-seven years and that his last coal mine work for at least one year was as a "mine section foreman." Director's Exhibit 10. Dr. Fino similarly noted, in his November 2, 2012 report, that claimant worked underground for forty years and that his last job was as a "working foreman."[25] Director's Exhibit 33. Dr. Fino further noted that "there was very heavy and heavy labor involved in his last job." *Id.* As employer correctly asserts, in light of the physicians' descriptions of claimant's job, the administrative law judge has not explained his conclusion that Dr. Forehand had an accurate understanding of claimant's usual coal mine work while Dr. Fino did not. If anything, Dr. Fino provided more detail as he discussed the exertional requirements of claimant's last mining job. Thus, the administrative law judge's evaluation of the medical opinion evidence does not comport with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Nor has the administrative law judge adequately explained his determination to accord less weight to Dr. Rosenberg's opinion on the grounds that he did not specifically address claimant's capacity to perform his usual coal mine work. In a report dated April 4, 2012, Dr. Rosenberg noted that claimant's last coal mine work for approximately ten years was that of a mine foreman, but concluded that based on the testing available at that

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[24] Dr. Fino stated that claimant "retains the necessary functional capacity to perform his last mining job or a job requiring similar effort." Director's Exhibit 33 at 11.

[25] Claimant testified that he routinely had to take the place of any miner who did not report to work. Hearing Transcript at 21-22.

time, claimant was not disabled from performing that job. Director's Exhibit 33. In a subsequent report dated April 6, 2016, however, Dr. Rosenberg opined that "from an impairment perspective, [claimant] has worsened" and his "impairments at the present time appear disabling." Employer's Exhibit 1. The administrative law judge has not explained why Dr. Rosenberg's opinion does not support a finding of total respiratory disability. *Wojtowicz*, 12 BLR at 1-165. For the foregoing reasons, we vacate the administrative law judge's finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge must reconsider whether the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). He should take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, the sophistication and bases for their diagnoses, and must explain his findings. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Wojtowicz*, 12 BLR at 1-165. In reconsidering the medical opinions, the administrative law judge should determine the exertional requirements of claimant's usual coal mine employment as a mine foreman, and consider the physicians' opinions regarding total disability in light of those requirements. *See Eagle v. Armco, Inc.*, 943 F.2d 509, 511, 15 BLR 2-201, 2-204 (4th Cir. 1991); *accord Killman v. Director, OWCP*, 415 F.3d 716, 721, 23 BLR 2-250, 2-259 (7th Cir. 2005).

On remand, should the administrative law judge find that the evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (iv), he must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[26] *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc).

Because we have vacated the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b), we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Further, we decline to address employer's challenge to the administrative law judge's determination that it failed to rebut the presumption. On remand, should the administrative law judge again find that claimant has invoked the Section 411(c)(4) presumption, he may reinstate

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

his rebuttal findings. Employer may challenge the administrative law judge's findings on rebuttal in a future appeal to the Board.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge