U.S. Department of Labor

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

BRB No. 16-0017 BLA

DONALD A. DEAL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONE MOUNTAIN PROCESSING, INCORPORATED	)	
	)	
	)	DATE ISSUED: 10/31/2016
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05306) of Administrative Law Judge Scott R. Morris 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 claimant's request for modification of a subsequent claim[1] filed on July 14, 2008.

In a Decision and Order dated May 31, 2011, Administrative Law Judge John P. Sellers, III, found that the medical evidence developed since the denial of the prior claim established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that, therefore, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Judge Sellers further found, however, that claimant did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Judge Sellers therefore determined that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), or affirmatively establish entitlement to benefits pursuant to 20 C.F.R. Part 718, and he denied benefits.[2] Director's Exhibit 71. Claimant timely requested modification pursuant to 20 C.F.R. §725.310 on December 23, 2011. Director's Exhibit 72. The district director denied modification and claimant requested a hearing, which was held on April 30, 2014. Director's Exhibit 87.

In a Decision and Order dated September 14, 2015, which is the subject of the current appeal, Administrative Law Judge Scott R. Morris (the administrative law judge) credited claimant with thirty years of underground coal mine employment. The administrative law judge found that the evidence submitted on modification, considered with the evidence originally submitted in the subsequent claim, established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption. The

[1] Claimant filed his first application for benefits on January 3, 1997, which was deemed administratively closed on May 7, 1997 because claimant did not further pursue the claim. Director's Exhibit 1 at 117. On June 8, 2001, claimant filed a second application for benefits, which the district director denied on March 8, 2003 based on claimant's failure to establish any element of entitlement. Director's Exhibit 2 at 167, 393. On August 29, 2003, claimant filed a petition for modification. Director's Exhibit 2 at 141. In a Decision and Order issued on September 14, 2006, Administrative Law Judge Thomas F. Phalen, Jr. denied modification and benefits. Director's Exhibit 2 at 3. Claimant took no further action on this claim. Subsequently, on July 14, 2008, claimant filed a third application for benefits, which is pending herein. Director's Exhibit 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

administrative law judge further found that employer failed to rebut the presumption. Finding that claimant established a change in conditions since the prior decision denying benefits, and that granting modification would render justice under the Act, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in his analysis of the pulmonary function study, blood gas study, and medical opinion evidence when he found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and (iv) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant did not file a response in this appeal.[3] The Director, Office of Workers' Compensation Programs, filed a letter indicating that he would not file a substantive brief.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1.

[3] Sharon McDevitt, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, represented claimant before the Office of Administrative Law Judges, but is not currently representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 2 n.1.

[5] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 6. Accordingly, the Board will apply the law 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).

Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(c).

Additionally, because this case involves a request for modification of the denial of a subsequent claim, the administrative law judge was required to consider whether the evidence developed in the subsequent claim, in conjunction with the evidence submitted with the request for modification, establishes a change in conditions or a mistake in a determination of fact with regard to the prior denial of claimant's subsequent claim. *See* 20 C.F.R. §725.310; *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62-3 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 724-5, 18 BLR 2-26, 2-28 (4th Cir. 1993).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of the three new pulmonary function studies submitted on modification, dated August 3, 2011, April 20, 2012, and October 6, 2012, and correctly noted that all three studies produced qualifying[6] values both before and after the administration of bronchodilators.[7] Decision and Order at 13-15; Director's Exhibits 74, 80; Claimant's Exhibit 2.

The administrative law judge also considered the validity of the pulmonary function studies. With respect to the August 3, 2011 study, the administrative law judge noted that the administering technician indicated that claimant's effort and cooperation were good. However, the administrative law judge found that "[n]evertheless, [c]laimant's post bronchodilator values [are] likely invalid [pursuant to Appendix B to Part 718 at (2)(ii)(G)], because the degree of variability between the two greatest FEV1 values (1.42 and 1.28) was over 100ml and almost 10% of the largest value."[8] Decision

[6] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[7] The administrative law judge also considered the pulmonary function study evidence submitted in support of the subsequent claim, dated February 19, 2008, August 20, 2008, November 24, 2008, and April 23, 2009, noting that only the August 20, 2008 test produced valid, qualifying values. Director's Exhibits 12, 15, 16, 63. However, the administrative law judge reasonably accorded greater weight to the three pulmonary function studies submitted on modification, conducted in 2011 and 2012, as more indicative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); Decision and Order at 14-15.

[8] The applicable quality standard provides, in pertinent part:

and Order at 13; Director's Exhibit 74. The administrative law judge also noted that Dr. Jarboe reviewed the study and opined that both the pre-bronchodilator and post-bronchodilator results of the August 3, 2011 pulmonary function study are invalid due to variable and inconsistent effort, non-matching FVC values, and inadequate forced expiratory time. Decision and Order at 13; Director's Exhibit 81. Thus, the administrative law judge ultimately concluded that both the pre-bronchodilator and post-bronchodilator results are invalid.

With respect to the validity of the April 20, 2012 study, the administrative law judge noted that the administering technician reported good cooperation and comprehension. Decision and Order at 13. The administrative law judge found, however, that "[n]evertheless [c]laimant's post-bronchodilator FEV1 values demonstrate excessive variability," and are not in conformance with the criteria set forth at Part 718, Appendix B(2)(G). *Id.* Thus, the administrative law judge concluded that only the pre-bronchodilator results are valid. *Id.* at 15.

Regarding the validity of the October 16, 2012 study, the administrative law judge again noted the administering technician's comments that the test results reflected the "best effort [claimant] could give at this time" and that he was "short of breath." Decision and Order at 14. The administrative law judge concluded, however, that this test is "not valid," because the test results are not accompanied by three tracings, or any underlying data, as required by 20 C.F.R. §718.103(b). The administrative law judge further noted that Dr. Jarboe opined that the test is invalid. Decision and Order at 14; Employer's Exhibit 3.

In sum, the administrative law judge found that, while all of the pulmonary function studies produced qualifying results, "[o]nly the pre-bronchodilator value from Dr. Dahhan's April 20, 2012 pulmonary function test [is] valid." Decision and Order at 15 (internal citations omitted). The administrative law judge further found that, "[t]hough predominantly invalid," the pulmonary function studies "preponderate toward a finding of total disability" and "provide some weight toward the claimant's success" in establishing total disability. Decision and Order at 15.

> The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater.
>
> 20 C.F.R. Part 718, Appendix B(2)(ii)(G).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), employer asserts that the administrative law judge did not adequately explain how the pulmonary function study evidence, while "predominantly invalid," nonetheless "preponderated toward a finding of total disability." Employer's Brief at 9-11. Employer further asserts that, in finding that the pre-bronchodilator results of the April 20, 2012 pulmonary function study, administered by Dr. Dahhan, supported a finding of total disability, the administrative law judge did not consider Dr. Jarboe's opinion that the results are not valid. Employer's Brief at 13. Employer's arguments have merit.

When considering pulmonary function study evidence, the administrative law judge must determine whether the studies are in substantial compliance with the quality standards. 20 C.F.R. §718.103(c); *Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (en banc). If a study does not precisely conform to the quality standards, but is in substantial compliance, the administrative law judge must determine whether it constitutes credible evidence of claimant's pulmonary function. *Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *see Orek v. Director, OWCP*, 10 BLR 1-51, 1-54-5 (1987) (Levin, J., concurring). In accomplishing this task, the administrative law judge must evaluate the reasoning and credibility of the medical opinions as to the reliability of the testing, but cannot substitute his or her opinion for that of the medical experts. *See Mancia v. Director, OWCP*, 130 F.3d 579, 588, 21 BLR 2-215, 2-234 (3d Cir. 1997); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

In his report dated May 28, 2012, Dr. Jarboe reviewed the results of Dr. Dahhan's April 20, 2012 pulmonary function study and explained his conclusion that both the pre-bronchodilator and post-bronchodilator test results are invalid, due to variable and inconsistent effort. Director's Exhibit 81. Because there is no indication that the administrative law judge considered Dr. Jarboe's opinion regarding the validity of the April 20, 2012 pulmonary function study, we agree with employer that the administrative law judge's evaluation of the pulmonary function study evidence contravenes the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires the administrative law judge to consider all relevant evidence when rendering his findings of fact. Moreover, with respect to the remaining pulmonary function study results, which the administrative law judge found to be invalid, the administrative law judge did not explain how these invalid studies nonetheless constitute credible evidence to support claimant's burden of proof. *See Siwiec*, 894 F.2d at 638, 13 BLR at 2-265; *Orek*, 10 BLR at 1-54. Thus, we must vacate both the administrative law judge's finding that the April 20, 2012 qualifying pulmonary function study is valid, and his related finding that the pulmonary function study

evidence, overall, supports a finding of total disability under 20 C.F.R. §718.204(b)(2)(i).[9]

Employer also challenges the administrative law judge's determination that the arterial blood gas study evidence supports a finding of total disability pursuant to Section 718.204(b)(2)(ii). The administrative law judge considered the results of the three new blood gas studies submitted on modification, dated August 3, 2011, April 20, 2012, and October 16, 2012.[10] The August 3, 2011 blood gas study, conducted by Dr. Alam, claimant's treating physician, produced qualifying[11] values at rest. Exercise studies were not performed. Decision and Order at 17; Director's Exhibit 63. The April 20, 2012 blood gas study, conducted by Dr. Dahhan, produced non-qualifying values both at rest and with exercise. Director's Exhibit 80. The October 16, 2012 blood gas study, also conducted by Dr. Alam, produced qualifying values at rest. No exercise studies were performed. Decision and Order at 17; Director's Exhibit 80; Claimant's Exhibit 3. Weighing the conflicting evidence, the administrative law judge concluded that, because two of the three studies produced qualifying values, the arterial blood gas studies of record "preponderate toward a finding" of total respiratory disability under 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 18.

[9] There is no merit, however, to employer's contention that the administrative law judge failed to consider Dr. Jarboe's opinion regarding the validity of the August 3, 2011 pulmonary function study results. Employer's Brief at 7-11, 12-15. While the administrative law judge initially stated that the August 3, 2011 pre-bronchodilator test results are both "qualifying and apparently valid," as set forth above, the administrative law judge considered Dr. Jarboe's opinion to the contrary, and ultimately concluded that both the pre-bronchodilator and post-bronchodilator results of the August 3, 2011 pulmonary function study are invalid. Decision and Order at 13; Director's Exhibit 81.

[10] The administrative law judge also considered the blood gas studies submitted in support of the subsequent claim, dated February 19, 2008, August 20, 2008, November 24, 2008, and April 23, 2009, all of which produced non-qualifying results. Decision and Order at 16; Director's Exhibits 12, 15, 63, 80. However, the administrative law judge reasonably accorded greater weight to the more recent blood gas studies submitted on modification, conducted in 2011 and 2012, as more indicative of claimant's current condition. *See Cooley*, 845 F.2d at 624, 11 BLR at 2-149; Decision and Order at 18.

[11] 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).

Employer specifically avers that, in concluding that the blood gas study evidence supported a finding of total disability, the administrative law judge failed to consider that "Dr. Jarboe invalidated the qualifying blood gas values . . . ." Employer's Brief at 12. Contrary to employer's argument, however, Dr. Jarboe did not opine that the results of the qualifying blood gas studies are technically invalid. Rather, Dr. Jarboe opined that the totality of the evidence, including the non-qualifying blood gas study results, and the results of other testing conducted by claimant's treating physician, reflected that the hypoxemia demonstrated by the qualifying blood gas studies had resolved. Director's Exhibit 81-8; Employer's Exhibit 3 at 6. Because employer raises no other arguments regarding the validity of the blood gas study evidence, we affirm the administrative law judge's finding that the blood gas studies of record "preponderate toward a finding" of total respiratory disability under 20 C.F.R. §718.204(b)(2)(ii). Employer's arguments regarding Dr. Jarboe's medical opinion as to the issue of total disability are addressed below.

We next address employer's challenge to the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Alam, Dahhan, and Jarboe, together with claimant's medical treatment records. Dr. Alam and Dr. Dahhan examined claimant and performed objective testing, and opined that claimant suffers from a totally disabling respiratory impairment. In contrast, Dr. Jarboe reviewed the available medical evidence and opined that there is no evidence that claimant is totally disabled from a respiratory standpoint. The administrative law judge initially stated that all of the physicians' opinions are "generally unreasoned" because the physicians did not link their opinions regarding claimant's level of impairment to the exertional requirements of claimant's usual coal mine work. Decision and Order at 26. The administrative law judge further found that the opinions of Drs. Alam and Dahhan are "otherwise well reasoned and well documented" on the issue of total disability, and he credited their opinions.[12] Decision and Order at 26-27. In contrast, the administrative law judge found

[12] Employer asserts that the administrative law judge's initial statement that each of the physicians' opinions is "generally unreasoned," appears to conflict with his subsequent determination to credit the opinions of Drs. Alam and Dahhan on the issue of total disability. Employer's Brief at 6, 15, *referencing* Decision and Order at 26. The context of the administrative law judge's analysis reflects, however, that the administrative law judge found the opinions of Drs. Alam and Dahhan to be flawed, but still entitled to probative weight. Decision and Order at 27-28. Further, the administrative law judge noted that Drs. Alam and Dahhan were aware that claimant last worked as a maintenance man or repairman. Decision and Order at 19-20. As summarized by the administrative law judge, claimant's duties as a maintenance man included roof bolting, rock dusting, driving a shuttle car, hanging cable, and "anything

Dr. Jarboe's opinion, that claimant is not disabled, to be undocumented and inadequately explained and, therefore, entitled to the least weight. *Id.* at 27-28. Thus, the administrative law judge found that the medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 27.

Employer contends that the administrative law judge erred in finding the opinions of Drs. Alam and Dahhan to be sufficiently reasoned and documented to support claimant's burden of proof. Employer's Brief at 15-16. Specifically, employer asserts that the administrative law judge failed to adequately consider the extent to which their diagnoses of a disabling respiratory impairment are based on invalid objective test results.[13] Employer's Brief at 16-17.

Employer's contention has merit. While the regulations do not require a physician's diagnosis of total disability to be based on qualifying objective testing, *see* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000), the determination of whether a medical opinion is reasoned and documented requires the fact finder to examine the validity of the physician's reasoning in light of its objective supporting material, accounting for contrary test results and diagnoses. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Employer is correct that, in rendering their disability assessments, Drs. Alam and Dahhan each relied on objective testing that was found invalid by the administrative law judge or, as discussed above, objective testing whose validity must be reconsidered by the administrative law judge on remand.[14] Director's Exhibits 12, 15, 74, 80. Because we have vacated the administrative law judge's finding that the pulmonary function study

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that had to be done." Decision and Order at 3; Hearing Tr. at 19; Director's Exhibits 2-31, 7.

[13] Specifically, as set forth above, the administrative law judge found Dr. Alam's August 3, 2011 and October 16, 2012 qualifying pulmonary function study results to be entirely invalid. The administrative law judge also found Dr. Dahhan's April 20, 2012 qualifying post-bronchodilator results to be invalid.

[14] In concluding that Dr. Dahhan's qualifying pre-bronchodilator pulmonary function study results are valid, the administrative law judge failed to consider Dr. Jarboe's opinion to the contrary.

evidence supports total disability and have instructed the administrative law judge to reconsider that issue, we also vacate his findings regarding the medical opinion evidence, and instruct him to reconsider the medical opinions on remand, after he has reconsidered the pulmonary function study evidence.

On remand, the administrative law judge should also reconsider Dr. Jarboe's opinion. The administrative law judge found that, in opining that claimant is not totally disabled, Dr. Jarboe did not rely on the August 3, 2011 and October 16, 2012 qualifying pulmonary function study results because he determined that they were invalid. The administrative law judge discredited Dr. Jarboe's opinion, stating:

> Although Dr. Jarboe was correct that such tests were invalid, he never explained why such tests merit no weight whatsoever. The regulations require an adjudicator to 'only consider [the fact that a test does not conform to the regulatory requirements] in determining the evidentiary weight to be given to the results of the ventilatory function tests.' To inform the current analysis, Dr. Jarboe's physician's opinion would be expected to state how and why the invalid tests deserved no weight. Without more, Dr. Jarboe's failure to consider all of the pulmonary function tests of record leaves his physician's opinion not well documented.

Decision and Order at 27 (internal citations omitted). We agree with employer that, under the facts of this case, where the administrative law judge credited Dr. Jarboe's opinion in finding that most of the pulmonary function studies are invalid, the administrative law judge has not adequately explained how Dr. Jarboe's disinclination to rely on those invalid studies undermined his opinion. Employer's Brief at 13-14, 17. Further, contrary to the administrative law judge's finding, and as employer asserts, Dr. Jarboe explained that "because the [pulmonary function] studies are invalid, [claimant's] true ventilatory function cannot be accurately established." Employer's Brief at 13-14,17; Employer's Exhibit 81-8.

The administrative law judge also discredited Dr. Jarboe's opinion, in part, because he "relied on the non-qualifying values of Dr. Dahhan's April 20, 2012 arterial blood gas test [to conclude that claimant is not disabled], but did not discuss Dr. Alam's two contemporaneous arterial blood gas tests, each of which showed qualifying values." Decision and Order at 27 (internal citations omitted).

Contrary to the administrative law judge's finding, in his May 28, 2012 report, Dr. Jarboe acknowledged that Dr. Alam's August 3, 2011 blood gas study produced qualifying values, but opined that because Dr. Dahhan's subsequent blood gas study, performed on April 20, 2012, showed normal values both at rest and with exercise, the evidence does not demonstrate "a totally and permanently disabling impairment of gas

exchange." Employer's Exhibit 81-8. In his June 20, 2014 report, following his review of additional evidence, including Dr. Alam's medical treatment notes, Dr. Jarboe reiterated his conclusion that the overall pattern of testing did not reflect the presence of a disabling respiratory impairment. Employer's Exhibit 3. Specifically, Dr. Jarboe explained that while Dr. Alam's most recent blood gas study, dated October 16, 2012, also yielded qualifying results, Dr. Alam recorded completely normal oxygen saturation on visits claimant made on January 29, 2013 and February 18, 2014. Dr. Jarboe further noted that on February 18, 2014, Dr. Alam recorded that claimant's oxygen saturation was normal both at rest, and with a six-minute walk test and that, as a result, claimant could not be recertified for oxygen therapy. Thus, Dr. Jarboe explained, this evidence reflects that "the significant hypoxemia and oxygen desaturation measured [by Dr. Alam's blood gas study] on October 16, 2012 had resolved" and that "[c]laimant no longer had hypoxemia that was disabling." Employer's Exhibit 3 at 6. Thus, as employer asserts, substantial evidence does not support the administrative law judge's finding that Dr. Jarboe did not address Dr. Alam's qualfying blood gas studies. Employer's Brief at 14-15.

The administrative law judge further discredited Dr. Jarboe's opinion, that Dr. Alam's normal oxygen saturation test results reflected that claimant's hypoxia had resolved, in part because he found that the treatment records also indicated that claimant was on supplemental oxygen "at least during his February 18, 2014 exam," a factor which the administrative law judge noted could account for claimant's elevated oxygen levels.[15] Decision and Order at 27-28. Contrary to the administrative law judge's characterization, however, while the treatment records indicate that claimant was on supplemental oxygen for most of his visits to Dr. Alam,[16] the record does not reflect that claimant was on oxygen when he was last tested by Dr. Alam on February 18, 2014.

[15] The administrative law judge also discredited Dr. Jarboe's opinion because there "was no indication that the [pulse oximetry] results [upon which Dr. Jarboe relied] were obtained in conformance with any of the regulatory standards, set forth at [20 C.F.R.] §718.105. Decision and Order at 27. As employer correctly asserts, the quality standards do not apply to tests contained in medical treatment notes and hospital records. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008). Moreover, the quality standards referenced by the administrative law judge pertain to blood gas studies, not to pulse oximetry testing. However, despite the inapplicability of specific quality standards, an administrative law judge is required to address whether the results of testing contained in medical treatment notes or hospital records are sufficiently reliable. 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[16] In each of his treatment notes, dating from January 29, 2013 through September 18, 2013, Dr. Alam recorded that claimant was on supplemental oxygen. Claimant's Exhibit 5.

Claimant's Exhibit 5. Rather, as noted by Dr. Jarboe, Dr. Alam's treatment note reflects that claimant's request for continued oxygen use was declined because his pulse oxygen levels on that date were normal.[17]

Additionally, the administrative law judge discounted Dr. Jarboe's opinion, that the testing in claimant's treatment records refuted the qualifying blood gas studies, because "the regulations do not seemingly permit a trier of fact to look at treatment notes . . . when opining on [c]laimant's total disability . . . ." Decision and Order at 28. As employer correctly asserts, however, the regulation at 20 C.F.R. 718.107 specifically provides that results of any medically acceptable test or procedure which tends to demonstrate the presence of "a respiratory or pulmonary impairment," may be submitted in connection with a claim and shall be given appropriate consideration. 20 C.F.R. §718.107(a). Thus, the administrative law judge did not adequately consider Dr. Jarboe's opinion that the August 3, 2011 and October 16, 2012 arterial blood gas studies, while qualifying, do not reflect the presence of a disabling respiratory impairment, Employer's Brief at 14.

Because the administrative law judge's reasons for discrediting Dr. Jarboe's opinion are not supported by substantial evidence, we vacate his determination that Dr. Jarboe's opinion "merits the least weight of the physician's [sic] opinions of record." *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); Decision and Order at 28.

In light of the foregoing, we must vacate the administrative law judge's determination that the weight of the evidence establishes total disability at 20 C.F.R. §718.204(b)(2). Decision and Order at 28. Therefore, we also vacate the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption and established a change in conditions under 20 C.F.R. §725.310. On remand, the administrative law judge must consider all of the relevant evidence, weigh the medical opinions in light of their reasoning and documentation, and determine whether the weight of the evidence, like and unlike, establishes total respiratory disability at 20 C.F.R. §718.204(b)(2). *See Hicks*, 138 F.3d at 532-34, 21 BLR at 2-334-37; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 171, 21 BLR 2-34, 2-42 (4th Cir. 1997) (a claimant may establish total disability using just one of the four types of evidence at 20 C.F.R. §718.204(b)(2), but only in the absence of contrary probative evidence).

[17] In his February 18, 2014 treatment note, Dr. Alam recorded that claimant had been "on [oxygen] but today [a] six minute walk [shows] no significant [pulse oxygen] desaturation and sats remain 92% all along." Claimant's Exhibit 5. Thus, Dr. Alam recorded that claimant "will not qualify for [oxygen]." *Id.*

If the administrative law judge, on remand, finds that the evidence establishes that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b), claimant is entitled to invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. In that case, the administrative law judge should re-evaluate the evidence on rebuttal, in light of his weighing of the evidence relevant to total disability, as appropriate. However, if the administrative law judge finds that the evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b) and, therefore, determines that claimant did not invoke the Section 411(c)(4) presumption, claimant cannot establish all elements of entitlement under 20 C.F.R. Part 718 and benefits must be denied. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988).

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

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge