**U.S. Department of Labor**

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

BRB No. 16-0034 BLA

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| ARLIN SHEPHERD (deceased) | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| WILDER COAL CORPORATION | ) | |
| | ) | DATE ISSUED: 10/17/2016 |
| and | ) | |
| | ) | |
| OLD REPUBLIC INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (09-BLA-5024) of Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on September 19, 2006, and is before the Board for the second time.[1]

In its prior decision, upon review of employer's appeal, the Board affirmed the administrative law judge's findings that employer is the responsible operator, and that claimant[2] had thirty-one years of qualifying coal mine employment[3] for purposes of invoking 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). *Shepherd v. Wilder Coal Corp.*, BRB No. 12-0082 BLA, slip op. at 3-8 (Nov. 28, 2012)(unpub.). The Board, however, vacated the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, the Board held that the administrative law judge did not identify claimant's usual coal mine work or determine the exertional requirements of that work, and did not assess whether the medical opinions diagnosing a totally disabling respiratory or pulmonary impairment were based on an accurate understanding of claimant's job duties.[4] *Shepherd*, slip op. at 9-10. Because the

[1] The Board set forth the full procedural history of this case in its prior decision. *Shepherd v. Wilder Coal Corp.*, BRB No. 12-0082 BLA, slip op. at 2-4 (Nov. 28, 2012)(unpub.).

[2] Claimant died on February 20, 2012. Employer's Brief at 7. The Director, Office of Workers' Compensation Programs (the Director), notes that claimant's widow is pursuing the claim. Director's Brief at 1 n.1.

[3] Because claimant's last coal mine employment was in Kentucky, the Board determined that it will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shepherd*, slip op. at 3 n.5, *citing Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The Board, however, rejected employer's arguments that the administrative law judge erred in her weighing of the medical opinions of Drs. Jarboe and Rosenberg at 20 C.F.R. §718.204(b)(2)(iv). Specifically, the Board held that substantial evidence supported the administrative law judge's finding that Dr. Jarboe diagnosed a totally disabling respiratory impairment. *Shepherd*, slip op. at 9. Additionally, the Board held

Board vacated the administrative law judge's finding of total disability and remanded the case for further consideration of that issue, it also vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

In the interest of judicial economy, the Board also addressed employer's allegations of error in the administrative law judge's findings that employer did not rebut the Section 411(c)(4) presumption. *Id*. at 11-12. Finding no merit in those arguments, the Board affirmed the administrative law judge's determination that employer did not rebut the presumption. Accordingly, the Board held that if the administrative law judge, on remand, found that claimant established total disability, claimant would invoke the Section 411(c)(4) presumption, and would be entitled to benefits as a matter of law.[5] *Id*.

On remand, the administrative law judge found that claimant had a totally disabling respiratory or pulmonary impairment, 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 of total disability due to pneumoconiosis. Noting that the Board previously affirmed her determination that employer did not rebut the presumption, the administrative law judge awarded benefits.

On appeal, employer again contends that the administrative law judge erred in finding that employer is the responsible operator. Employer argues further that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, thus, 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 failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response limited to the responsible operator issue, noting that employer generally makes the same arguments that were rejected by the Board in the prior appeal. The Director argues further that, to the extent employer raises new arguments as to why it is not the responsible operator, it

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that the administrative law judge permissibly discounted Dr. Rosenberg's opinion that claimant was not totally disabled, because Dr. Rosenberg considered only how claimant's lung function compared to predicted values on objective tests, rather than considering whether claimant could perform his coal mine work despite his reduced lung function. *Id*.

[5] The Board summarily denied employer's motion for reconsideration. *Shepherd v. Wilder Coal Corp.*, BRB No. 12-0082 BLA (Mar. 21, 2013)(unpub.)(Order).

waived those arguments by failing to raise them previously. Alternatively, the Director argues that employer's new arguments lack merit. Employer has filed a combined reply to the responses of claimant and Director, reiterating its contentions on appeal.

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).

**Responsible Operator**

In the prior appeal, the Board rejected employer's allegations of error, and affirmed the administrative law judge's determination that two coal mine operators that more recently employed claimant were properly dismissed, and that employer was properly designated as the responsible operator. *Shepherd*, slip op. at 4-6. In relevant part, the Board held that the administrative law judge reasonably determined that the most recent employer, A&T Augering (A&T), which claimant owned and operated himself, could not be designated as the responsible operator because it was not insured on the date of claimant's last exposure to coal dust, October 16, 1993,[6] and it lacked assets with which to pay benefits. *Id*. at 5.

In the current appeal, employer argues that the administrative law judge was mistaken as to when claimant's coal mine employment with A&T ended. Employer argues that claimant's last day of coal mine work with A&T was sometime before August 1993, when, employer asserts, A&T was still insured by Old Republic Insurance Company (Old Republic).[7] Employer's Brief at 16. Alternatively, employer contends that, even if claimant did not cease his coal mine work with A&T until October 1993, A&T must be considered as insured on that date, notwithstanding that claimant canceled his black lung insurance with Old Republic in August 1993. Employer's Brief at 16-17,

[6] The administrative law judge found that claimant dropped his black lung insurance in August 1993. Order Denying Employer's Motion to Dismiss Responsible Operator (Order) at 3.

[7] The Director, however, accurately notes that, before the administrative law judge and the Board, employer did not dispute that A&T Augering (A&T) was not insured for black lung claims on the date of claimant's last exposure to coal dust. Director's Brief at 4; *Shepherd*, slip op. at 5. Moreover, employer's position before the administrative law judge was that claimant's last exposure to coal dust with A&T was sometime *after* October 16, 1993. Order at 3.

*citing Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998) and *Creek Coal Co., Inc. v. Bates*, 134 F.3d 734, 21 BLR 2-260 (6th Cir. 1997).

As the Director notes, however, employer did not raise these arguments previously, either before the administrative law judge, or before the Board in the prior appeal. Accordingly, employer has waived these arguments. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995). Therefore, we decline to consider them.[8]

Additionally, employer reiterates the arguments it made in the prior appeal. Employer's Brief at 17-20. We decline to reconsider these arguments, as they were previously rejected by the Board and employer has not demonstrated any exception to the law of the case doctrine. *See Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-246 (2003).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge reiterated her previous findings that the pulmonary function studies and blood gas studies did not establish total disability, and there is no evidence that claimant had cor pulmonale with right-sided congestive heart failure. Decision and Order on Remand at 12. Before analyzing the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the evidence of record regarding claimant's usual

[8] Moreover, even if we considered employer's new arguments, we would reject them. Citing Director's Exhibit 50, employer argues that, by August 1993, claimant's "mine work was inactive." Employer's Brief at 16. A review of this exhibit reflects that on January 3, 1993, it was reported that A&T was no longer working at the site of Cobra Coals, Inc., and that claimant was "in the process of finding a new location." Director's Exhibit 50 at 94. That fact is not inconsistent with claimant's testimony, which was not discredited by the administrative law judge, that claimant last worked augering coal on October 16, 1993, at a different coal company's site. Order at 3; Decision and Order at 4. Additionally, employer's reliance on *Lovilia Coal Co. v. Williams*, 143 F.3d 317, 21 BLR 2-353 (7th Cir. 1998), and *Creek Coal Co., Inc. v. Bates*, 134 F.3d 734, 21 BLR 2-260 (6th Cir. 1997), to argue that A&T was insured, is misplaced. Employer cites those cases for the proposition that under the Act, all the coal miners of an insured employer must be covered by its policy. Those cases are inapposite because here, claimant canceled his black lung insurance before ceasing his coal mine employment with A&T. Moreover, employer argues that claimant merely "excluded himself from coverage," Employer's Brief at 16, but does not point to evidence that A&T had any employees other than claimant.

coal mine work.[9] Decision and Order on Remand at 4-7. Based on her review of the evidence, the administrative law judge determined that claimant's usual coal mine employment "was varied and consisted of operating an auger, working as a mechanic and performing other odd jobs, and frequently involved heavy manual labor . . . ." Decision and Order on Remand at 7.

Employer contends that the administrative law judge erred because she did not determine the functional demands of claimant's last coal mine job as an auger operator, but instead considered the demands of all of his jobs over his mining career. Employer's Brief at 20-21. Employer maintains that the administrative law judge did not adequately resolve the conflicts in the evidence regarding the exertional requirements of claimant's last job operating an auger. *Id*. We disagree.

The task of weighing the evidence and rendering findings of fact is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In the present case, the administrative law judge rationally determined, based on claimant's description in his current claim form, that throughout his self-employment with A&T, claimant "had to be his own mechanic and he also . . . perform[ed] odd jobs for the companies with whom he contracted, including mechanic work, which involved crawling. Claimant further explained . . . that running his auger business required him to stand for long periods and lift and carry 100 pounds." Decision and Order on Remand at 7; *see Rowe*, 710 F.2d at 255, 5 BLR at 2-103. That description supports the administrative law judge's determination that claimant's usual coal mine employment "consisted of operating an auger, working as a mechanic and performing other odd jobs, and frequently involved heavy manual labor . . . ." *Id.*

Employer contends that the administrative law judge did not explain why she credited that job description. Employer's Brief at 21. Contrary to employer's contention, the administrative law judge explained that, while claimant left the "sections pertaining to crawling, lifting and carrying blank" in his two previous claim forms, he "provided more detail regarding the exertional requirements of his auger business in his 2006" claim form. Decision and Order on Remand at 7. In sum, the administrative law judge

[9] A miner's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). To determine claimant's usual coal mine employment, the administrative law judge considered the employment histories and work descriptions set forth in claimant's three claim forms, his deposition testimony, and his hearing testimony. Decision and Order on Remand at 4-7; Director's Exhibits 1, 2, 5, 26, 50; Claimant's Exhibit 3.

complied with the Board's remand instructions, considered claimant's description of the entire range of activities he performed as the owner and operator of A&T, and reasonably found that claimant's usual coal mine work entailed heavy manual labor. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvidzak v. N. Am. Coal Corp.*, 7 BLR 1-469 (1984). We affirm, therefore, the administrative law judge's finding.

After determining the exertional requirements of claimant's usual coal mine employment, the administrative law judge considered the medical opinions of Drs. Alam, Baker, Jarboe, and Rosenberg. Dr. Alam opined that claimant's impairment in his FEV1 value left him with insufficient respiratory capacity to perform the manual labor required by his job operating an auger and performing repair work. Director's Exhibits 17, 20. Drs. Baker and Jarboe also opined that claimant lacked the respiratory capacity to perform his last coal mine job. Claimant's Exhibits 1, 2, 4; Employer's Exhibits 3-6. The administrative law judge interpreted Dr. Rosenberg's opinion as one that claimant was not totally disabled by a respiratory or pulmonary impairment.[10] Decision and Order on Remand at 10, 12; Director's Exhibit 21; Employer's Exhibits 8, 16.

The administrative law judge found that Dr. Alam set forth "an accurate and descriptive account of the exertional requirements of claimant's usual coal mine work," because Dr. Alam indicated he understood that claimant "operated an auger, in addition to performing repair and maintenance work on equipment, which required lifting and carrying heavy loads." Decision and Order on Remand at 11, *citing* Director's Exhibit 17. The administrative law judge further found that Dr. Alam provided "a reasoned opinion as to how [c]laimant's reduced FEV1 value would prevent him from performing that work." Decision and Order on Remand at 12. The administrative law judge further found that, although Drs. Baker and Jarboe did not demonstrate that they understood the

[10] The record reflects that in Dr. Rosenberg's first two reports, dated March 10, 2008 and October 19, 2009, he opined that claimant was not totally disabled, because claimant's reduced FEV1 and FVC values improved with the administration of bronchodilators. Director's Exhibit 21; Employer's Exhibit 7. In two later reports, dated June 14, 2011 and August 4, 2011, Dr. Rosenberg stated that, at the time of his evaluation, claimant's "airflow measurements [were] above disability standards," but at other times, claimant's "hyperactive airways . . . worsened and he reache[d] qualifying spirometric levels. Such disability does not relate to past coal mine dust exposure or the presence of [coal workers' pneumoconiosis]." Employer's Exhibit 8 at 3; *see also* Employer's Exhibit 16 at 2.

specific duties of claimant's usual coal mine employment,[11] their opinions that claimant was totally disabled for his last coal mine job were consistent with that of Dr. Alam. The administrative law judge discounted Dr. Rosenberg's opinion, because she found that Dr. Rosenberg did not indicate "an adequate understanding of the amount of heavy labor in which [c]laimant regularly engaged, performing maintenance and repairs of equipment." Decision and Order on Remand at 12. Additionally, the administrative law judge reiterated her previous determination that Dr. Rosenberg's opinion merited less weight because Dr. Rosenberg "based his opinion solely on how [c]laimant's functionality compared to predicted values." *Id*. Finding that "Dr. Alam's reasoned and documented opinion on total disability merits controlling weight," the administrative law judge found that the preponderance of the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer contends that the administrative law judge erred in according greater weight to Dr. Alam's opinion, and less weight to Dr. Rosenberg's opinion. Employer's Brief at 22-23. We disagree. Contrary to employer's contention, the administrative law judge acted within her discretion as the fact-finder in determining that Dr. Alam demonstrated a better understanding of the exertional requirements of claimant's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Substantial evidence supports the administrative law judge's permissible credibility determination, and the Board is not empowered to reweigh the evidence. *Anderson*, 12 BLR at 1-113. Moreover, the administrative law judge reiterated her previous determination, already affirmed by the Board, to accord less weight to Dr. Rosenberg's opinion because Dr. Rosenberg did not focus specifically on whether claimant could perform his usual coal mine work despite his reduced lung function. *Shepherd*, slip op. at 9. Therefore, we reject employer's allegation of error.

Additionally, employer contends that the administrative law judge erred in finding that Dr. Alam's opinion was supported by those of Drs. Baker and Jarboe, even though the administrative law judge found that Drs. Baker and Jarboe did not adequately understand claimant's exertional requirements. Employer's Brief at 22. We need not resolve this issue. Any error in the administrative law judge's determination was harmless, because the administrative law judge accorded "controlling weight" to Dr. Alam's opinion, and she permissibly discounted Dr. Rosenberg's opinion, the only opinion that claimant was not totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984). We therefore

[11] The administrative law judge found that Drs. Baker and Jarboe did not elaborate on the exertional requirements of claimant's work operating an auger and serving as a mechanic. Decision and Order on Remand at 11-12.

affirm the administrative law judge's finding that the preponderance of the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Weighing all of the relevant evidence together, the administrative law judge found that the medical opinion evidence of total disability at 20 C.F.R. §718.204(b)(2)(iv) outweighed the contrary probative evidence at 20 C.F.R. §718.204(b)(2)(i),(ii), and that claimant established total disability. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). As employer raises no further challenges to the administrative law judge's finding of total disability, that finding is affirmed.

We have affirmed the administrative law judge's findings that claimant had thirty-one years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

The administrative law judge observed that the Board previously affirmed her finding that employer did not rebut the Section 411(c)(4) presumption, and thus found that employer did not establish rebuttal. Decision and Order on Remand at 13; *Shepherd*, slip op. at 11-12. Employer challenges the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption, for the same reasons set forth in the prior appeal. Employer's Brief at 23-28. We decline to reconsider employer's arguments, as employer has not asserted any exception to the law of the case doctrine. *See Braenovich*, 22 BLR at 1-246. Because we have affirmed the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption, we affirm the administrative law judge's determination that claimant established his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge