U.S. Department of Labor

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

BRB No. 18-0439 BLA

EDWIN L. FREEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEXIE COAL CORPORATION	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 10/17/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Andrea L. Berg and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

BOGGS, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05204) of Administrative Law Judge Carrie Bland, rendered on a claim filed on October 24, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with 28.43 years of underground coal mine employment,[1] Decision and Order at 16-17, and found the evidence established total disability. 20 C.F.R. §718.204(b)(2). She therefore found he 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).[2] She further found employer did not rebut the presumption and awarded benefits.

On appeal, employer contends the administrative law judge erred in finding total disability, in finding claimant invoked the Section 411(c)(4) presumption, and in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits.[3] The Director, Office of Worker's Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its arguments.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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).

---

[1] Claimant's coal mine employment was in West Virginia. Director's Exhibit 4; Hearing Transcript at 22. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where claimant establishes at least fifteen years of underground or substantially similar coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

[3] Claimant's cross appeal was dismissed at his request. *Freeman v. Lexie Coal Corp.*, BRB No. 18-0439 BLA-A (Oct. 18, 2018) (Order) (unpub.).

[4] We affirm, as unchallenged on appeal, the finding of 28.34 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16.

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

The administrative law judge found the pulmonary function and arterial blood gas studies do not establish total disability. 20 C.F.R. §718.204(b)(2)(i), (ii); Decision and Order at 20-21. She found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 20-21.

Before weighing the medical opinions, the administrative law judge assessed claimant's usual coal mine employment. Decision and Order at 16-19. She found claimant first worked underground primarily as a roof bolter from April 1966 to November 1995 and then outside as a bathhouse attendant from October 1996 to July 1997.[5] *Id*. at 16-17; Director's Exhibit 4. She found the roof bolter work required heavy manual labor and the bathhouse attendant work required light manual labor. Decision and Order at 17. She concluded claimant began working as a bathhouse attendant, in part, because of a "respiratory inability" to perform his work as a roof bolter. *Id*. at 17-18. Thus she found claimant's usual coal mine employment was as a roof bolter. *Id*.

The administrative law judge then weighed the medical opinions. Decision and Order at 26-27. Drs. Rasmussen, Sood, and Cohen opined claimant has a respiratory impairment that prevents him from performing the work of a roof bolter. Director's Exhibits 14, 16, 36; Claimant's Exhibits 1, 2. Drs. Zaldivar and Basheda opined claimant does not have a disabling respiratory or pulmonary impairment. Director's Exhibit 33; Employer's Exhibits 1, 2, 9, 10. The administrative law judge found Drs. Rasmussen, Sood, and Cohen correctly identified the exertional requirements of claimant's usual coal mine employment and their opinions were well-reasoned and documented. Decision and

[5] Claimant did not address why his employment history form reflects an eleven month gap in coal mine employment between November 1995 and October 1996. Director's Exhibit 4. Claimant's counsel noted that his earnings records reflect earnings with Pollyanna Coal Company and Oasis Contracting in 1996. Hearing Transcript at 21. Claimant could not recall working for these entities. *Id*. He stated the largest gap in employment between 1966 and 1997 "would have been for about three weeks for a strike." *Id*. at 22.

Order at 26-27. She found the opinions of Drs. Zaldivar and Basheda were not well-reasoned. *Id*. Thus she found that claimant established total disability based on the medical opinions. *Id*.; 20 C.F.R. §718.204(b)(2)(iv).

Employer argues the administrative law judge erred in finding claimant's usual coal mine employment to be a roof bolter rather than a bathhouse attendant and thus erred in crediting the medical opinions that claimant was totally disabled from roof bolter work.[6] Employer's Brief at 4-8. Employer's argument has merit, in part. A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co*., 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of respiratory inability to do his usual coal mine work. *Pifer* v. *Florence Mining Co.,* 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.,* 7 BLR 1-124, 1-127 (1984). The determination will vary on a case by case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co*., 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539.

The administrative law judge found claimant worked underground primarily as a roof bolter from April 1966 to November 1995, which required heavy manual labor, and then as a bathhouse attendant from October 1996 to July 1997, which required light manual labor. Decision and Order at 16-17. The administrative law judge erred by failing to make an initial finding as to whether these jobs that claimant performed were "done regularly and over a substantial period of time." *See Brown*, 8 BLR at 1-87; *Shortridge*, 4 BLR at 1-539.

The administrative law judge also erred by not considering all the relevant evidence when finding claimant began working as a bathhouse attendant due to a respiratory inability to do the roof bolter job. Decision and Order at 17-18; *see* 30 U.S.C. §923(b); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 531-33 (4th Cir. 1998); *Walker v. Director, OWCP*, 927 F.2d 181, 184 (4th Cir. 1991); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984). Claimant testified he began working as a bathhouse attendant because he could not "pass the physical to go underground" and his employer "gave [him] an easy job." Hearing Transcript at 25-26. He could not recall why he failed the physical. *Id*. at

[6] It is claimant's burden to establish the exertional requirements of his usual coal mine employment in order that the administrative law judge may compare its physical demands with each physician's assessment of impairment or disability and reach a conclusion regarding whether claimant is totally disabled. *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984). Because they are unchallenged, we affirm the administrative law judge's findings that the roof bolter job required heavy manual labor and the bathhouse attendant job required light manual labor. Decision and Order at 17-18; *see Skrack*, 6 BLR at 1-711.

36. Dr. Basheda also summarized claimant's work history based on his interview of claimant. Employer's Exhibit 2. Claimant informed Dr. Basheda his last job was as a roof bolter. Employer's Exhibit 2. He indicated he "left the mines in 1992 due to various medical complaints," but "could not be more specific." *Id*. at 2. He stated he had "broken arms and legs that caught up with [him]" and "had some shortness of breath at the time of leaving the coal mines" that "progressed since that time period." *Id*. (internal quotations omitted).

The administrative law judge found claimant's testimony was "inconclusive" to establish he moved to the bathhouse attendant job "due to a 'respiratory inability' to do" the roof bolter work. Decision and Order at 17. She also found "it is unclear whether [c]laimant left the mines due to pulmonary or non-pulmonary issues" based on Dr. Basheda's descriptions. *Id*. She concluded, however, that claimant had "breathing problems" when he stopped working as a roof bolter based on his statement to Dr. Basheda that he "had some shortness of breath at the time of leaving the coal mines."[7] Decision and Order at 17-18. She further noted a May 1, 1989 chest x-ray from Summerville Memorial Hospital was positive for "a mild degree of emphysema" and an October 24, 1996 x-ray from the same hospital showed "no remarkable change" since the earlier x-ray. *Id*.; Employer's Exhibit 1. She found, therefore, "that the medical evidence prior or contemporaneous to his last year as a roof bolter" established that claimant "was unable to work underground, at least in part, due to breathing problems, which persisted at the time he left the mines." Decision and Order at 18.

As employer points out, however, she did not address an October 23, 1996 pulmonary function study that Dr. Basheda indicated was "normal."[8] Employer's Exhibits 1 at 4; 2 at 17-18. Further, she acknowledged that the record contains a December 20, 1996 chest x-ray a radiologist interpreted as "normal." Decision and Order at 18; Employer's Exhibit 1 at 6. She also noted that none of the other doctors who took claimant's history

[7] The administrative law judge noted that the point in time that claimant was referring to as to when he "left the mines" in his discussion with Dr. Basheda was unclear. Decision and Order at 17-18. She found claimant was referring either to the time period he stopped working as a roof bolter or the time period he started working as a bathhouse attendant. *Id*.

[8] The administrative law judge should address employer's argument that "Dr. Basheda also testified in his deposition that [c]laimant's emphasis of the medical issues when he left mining was orthopedic and his breathing problems were more recent." Employer's Brief at 7.

"report[ed] that [c]laimant had breathing problems 'at the time of leaving the mines.'"[9] Decision and Order at 18. She did not, however, weigh this evidence when finding that claimant began working as a bathhouse attendant because of a respiratory inability to perform his roof bolter job. 30 U.S.C. §923(b); *Hicks*, 138 F.3d at 531-33; *Walker*, 927 F.2d at 184; *McCune*, 6 BLR at 1-998.

Based on the foregoing errors, we must vacate the administrative law judge's finding that claimant's usual coal mine employment was as a roof bolter. Decision and Order at 17-18. As this finding affected her weighing of the medical opinions, we vacate her finding that they established total disability. 20 C.F.R. §718.204(b)(2)(iv).

On remand, the administrative law judge should initially determine whether either of the two jobs that claimant performed as a roof bolter or a bath attendant constitutes a "regular and substantial period of employment." *See Brown*, 8 BLR at 1-87; *Shortridge*, 4 BLR at 1-539. If she finds his work as a roof bolter meets this standard but his work as a bathhouse attendant does not, she may reinstate her finding that claimant's usual coal mine employment was as a roof bolter and need not address whether a respiratory condition caused him to change positions. *Id*. If she finds the bathhouse attendant work was performed regularly and over a substantial period of time, however, she should evaluate whether the evidence establishes that claimant began working in this job because of his respiratory inability to perform his roof bolter job. *Id*. In doing so, she must consider all relevant evidence and adequately explain her findings, as required by the Administrative Procedure Act (APA).[10] *Hicks*, 138 F.3d at 531-33; *Walker*, 927 F.2d at 184; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Pifer*, 8 BLR at 1-155; *Daft*, 7 BLR at 1-127.

In the interest of judicial efficiency, we also address employer's argument that the administrative law judge erred in weighing the medical opinions, notwithstanding

---

[9] As noted by the administrative law judge, claimant told Dr. Rasmussen he had "shortness of breath with exertion for [six] months" before the December 16, 2013 examination. Decision and Order at 18; Director's Exhibit 14. Further, claimant told Dr. Zaldivar he "'has had some breathing problems for three or four years prior to Dr. Zaldivar's April 23, 2014" examination. Decision and Order at 18; Director's Exhibit 33. The administrative law judge noted that these reports "would put [c]laimant's breathing issues back to 2010 at the earliest." Decision and Order at 18.

[10] 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), requires the administrative law judge to set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

claimant's usual coal mine employment. The administrative law judge noted that the doctors disagreed as to whether claimant has an exercise-induced oxygen transfer impairment. Decision and Order at 26-27. All the doctors agreed that the December 16, 2013 arterial blood gas study conducted by Dr. Rasmussen evidenced an oxygen transfer impairment with light to moderate exercise, but the April 23, 2014 blood gas study conducted by Dr. Zaldivar showed no impairment at rest or during exercise. Director's Exhibits 14, 16, 33, 36; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2, 9. 10. Drs. Rasmussen and Cohen relied[11] on the December 16, 2013 study to diagnose total disability, whereas Drs. Zaldivar and Basheda relied on the April 23, 2014 study to conclude that claimant was not disabled.[12] *Id.*

We reject employer's argument that the administrative law judge erred in discrediting Dr. Zaldivar's opinion. Dr. Zaldivar testified that he had "no explanation" for "the lower blood gases that Dr. Rasmussen obtained in 2013," but he has noticed that "over the years" there has been a "huge discrepancy" between his testing and the testing obtained

[11] Dr. Rasmussen stated claimant "was exercised on the treadmill for eight minutes and reached a maximum of 2.2 mph at a 15% grade" for the December 16, 2013 blood gas study. Director's Exhibit 33. Claimant's blood was drawn "during the 5th, 7th, and 8th minute of exercise." *Id.* He "exhibited progressive abnormality of his arterial blood gases" as his "pO2 was 77 while he was standing on the treadmill, dropping to 68 during the 5th minute, 63 during the 7th minute, and 61 during the 8th minute of exercise." *Id.* His A-a gradient "went from 12.3 at rest to 20.7 to 24.8 to 34.9 respectively." *Id.* Based on the blood gas testing and the fact that claimant achieved "an oxygen consumption of 16.7 ml/kg/min," Dr. Rasmussen opined that claimant had a moderate and disabling loss of lung function. Director's Exhibits 14, 36. Dr. Cohen agreed with Dr. Rasmussen that claimant's December 16, 2013 blood gas study evidenced an oxygen transfer impairment that would render claimant totally disabled from performing heavy manual labor. Claimant's Exhibit 2 at 15, 21.

[12] Dr. Zaldivar opined that the April 23, 2014 arterial blood gas study indicates claimant "has no limitation to his pulmonary capacity." Employer's Exhibit 9 at 22-23. He explained claimant stopped the exercise portion of the study prematurely because he began hyperventilating, but the measured blood gases were normal. *Id.* at 18-23. Moreover, he noted claimant's pulmonary function testing indicates he has additional "ventilatory reserve to perform more exercise." *Id.* Thus he opined claimant is able to perform heavy manual labor. *Id.* at 34-35. Dr. Basheda opined that claimant could not perform his usual coal mine employment if he was suffering from acute bronchospasms. Employer's Exhibit 10 at 24-25. However, he opined that claimant had no significant respiratory impairment based on the pulmonary function and pulse oximetry testing he conducted. *Id.*

by Dr. Rasmussen.[13] Employer's Exhibit 9 at 27-28. The administrative law judge permissibly found Dr. Zaldivar's opinion unpersuasive because he did not adequately explain "the difference between his test [results] and Dr. Rasmussen's test results, other than" stating he "noticed great differences between their respective results over the years." Decision and Order at 27; *Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997).

Further, Dr. Basheda acknowledged that the December 16, 2013 blood gas study evidenced a mild decrease in pO2. Employer's Exhibit 10 at 20-21. He opined that the difference between this study and the April 23, 2014 study Dr. Zaldivar conducted may be related to claimant's asthma, which can "wax and wane." *Id*. at 25. He acknowledged, however, that if claimant had a "fixed type of pulmonary disease," his oxygen exchange impairment would not "wax and wane." *Id*. The administrative law judge found no support for Dr. Basheda's diagnosis of asthma because he was the only doctor to diagnose the disease and because Drs. Cohen and Sood noted that claimant's pulmonary function studies did not evidence bronchoreversibility consistent with asthma. Decision and Order at 27. Because Dr. Basheda's only explanation for the oxygen exchange impairment evidenced by the December 16, 2013 blood gas study was the waxing and waning associated with asthma, the administrative law judge rationally found his total disability opinion unpersuasive.[14] Decision and Order at 27; *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

We agree with employer, however, that the administrative law judge erred in crediting the opinions of Drs. Rasmussen and Cohen. Employer's Brief at 10-16. Claimant bears the burden of proof to establish that he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Whether a physician's opinion is

[13] Dr. Zaldivar testified that the normal resting diffusion capacity results from the December 16, 2013 pulmonary function study indicate that the exercise blood gas study taken on the same day would be normal. Employer's Exhibit 9 at 27-31. Drs. Rasmussen, Cohen, and Sood opined, however, that normal diffusion capacity testing does not preclude an impairment on arterial blood gas testing. Director's Exhibit 36; Claimant's Exhibits 1, 2. In rejecting Dr. Zaldivar's opinion, the administrative law judge permissibly found persuasive the opinions of Drs. Rasmussen, Cohen, and Sood that "normal diffusion capacity can accompany an oxygen transfer impairment, because the former does not measure [c]laimant's pulmonary capacity while exercising." Decision and Order at 27; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 531-33 (4th Cir. 1998).

[14] Because the administrative law judge provided valid reasons for discounting the opinions of Drs. Zaldivar and Basheda, we need not address employer's remaining arguments regarding the weight she accorded their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

adequately reasoned to support claimant's burden is for the administrative law judge to determine. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. However, the administrative law judge must consider all of the relevant evidence and apply the same level of scrutiny to determining the credibility of the evidence under 20 C.F.R. §718.204(b)(2). 30 U.S.C. §923(b); *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139-40 (1999) (en banc).

Although the administrative law judge found the opinions of Drs. Zaldivar and Basheda unpersuasive because they did not adequately address the December 16, 2013 blood gas study, she did not discuss whether the opinions of Drs. Rasmussen and Cohen suffered from the similar deficiencies. Decision and Order at 26-27. Specifically, she did not address whether these physicians adequately explained the difference between the December 16, 2013 blood gas study they relied on and the April 23, 2014 blood gas study that showed no impairment at rest or during exercise.[15] *Id*. Moreover, she did not adequately explain her reasons for finding that the opinions of Drs. Rasmussen and Cohen finding total disability are well-reasoned.[16] *See Wojtowicz*, 12 BLR at 1-165.

[15] Dr. Rasmussen opined that it was difficult to explain the differences between the December 16, 2013 and April 23, 2014 blood gas studies. Director's Exhibit 36. He noted there is no indication as to when blood was drawn during the April 23, 2014 study Dr. Zaldivar conducted in contrast to his own study. *Id*. Specifically, he highlighted that the April 23, 2014 study took a total of six minutes, the resting blood draw was done at two minutes and thirty-seven seconds and the exercise blood draw was done thirteen minutes later. *Id*. Dr. Zaldivar set forth the manner in which the April 23, 2014 blood gas study was conducted. Employer's Exhibit 9 at 16-20. Both Drs. Cohen and Sood questioned the reliability of the April 23, 2014 blood gas study based on the A-a gradient calculation. Claimant's Exhibits 1 at 9-13, 30-32; 2 at 7-9. Further, Dr. Sood noted that the blood draw for the April 23, 2014 study may have been delayed by twenty seconds, explaining the difference between this study and the December 16, 2013 study. Claimant's Exhibit 2 at 7. Dr. Zaldivar and Basheda addressed the criticisms from Drs. Cohen and Sood. Employer's Exhibits 9 at 23-26; 10 at 23-24. The administrative law judge, on remand, should resolve this conflict in the evidence with respect to the April 23, 2014 blood gas study. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

[16] The administrative law judge also weighed Dr. Sood's opinion. Dr. Sood opined claimant has mild irreversible obstructive lung disease and a significant decline in diffusion capacity based on pulmonary function testing. Claimant's Exhibit 2 at 5. He opined that both cardiopulmonary tests of record evidenced an "abnormal reduced peak oxygen consumption" with differences in "abnormal dead space ventilation." *Id*. at 7. He concluded these impairments constitute a "class II impairment of the whole person" which would prevent claimant from performing the heavy manual labor required of the roof bolter job. *Id*. at 13-14. The administrative law judge did not adequately explain her basis for

Therefore, on remand the administrative law judge should reweigh the medical opinions supporting a finding of total disability. In doing so, the administrative law judge should address the credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their opinions. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441. If she finds the medical opinion evidence establishes total disability, she must then weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198. Further, when addressing all the issues in this case, she must set forth her findings in detail, including the underlying rationale for her decision, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

Because we vacate the administrative law judge's finding of total disability, we also vacate her finding that claimant invoked the Section 411(c)(4) presumption and the award of benefits. 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, employer may challenge the administrative law judge's findings on rebuttal in a future appeal. If the administrative law judge finds that claimant has not established total disability, she must deny benefits based on claimant's failure to establish an essential element of entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

---

finding Dr. Sood's opinion well-reasoned. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

DANIEL T. GRESH
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues that the administrative law judge's weighing of the medical opinion evidence requires remand. I respectfully dissent, however, from the decision to vacate her determination of claimant's usual coal mine employment for two reasons. First, as a matter of law, the nearly three decades claimant labored as a roof bolter throughout his entire career, rather than the nine months makeshift work he performed as a bathhouse attendant at the very end of it, constitutes his "regular" and "substantial" employment for the purposes of determining disability. Second, even if that were not the case, substantial evidence supports the administrative law judge's finding that claimant changed positions, in part, because of a respiratory inability to do the roof bolter job.

A miner's usual coal mine employment is the most recent job he performed regularly and over a substantial period of time, *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982), unless he changed jobs because of a respiratory inability to do his usual coal mine work. *Pifer* v. *Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Daft v. Badger Coal Co.*, 7 BLR 1-124, 1-127 (1984). The determination of coal mine employment will vary on a case-by-case basis, depending upon the individual's employment history. *Brown v. Cedar Coal Co.*, 8 BLR 1-86, 1-87 (1985); *Shortridge*, 4 BLR at 1-539. Notably, "the work performed by claimant at the time he retires is not necessarily his usual coal mine work[,]" particularly where the job is "of short duration" and "not intended to be a permanent position." *Brown*, 8 BLR at 1-87 (two year dispatcher position rather than subsequent three and one-half month stint as general laborer considered claimant's "most recent regular position of substantial duration."). "Further, [usual coal mine work] cannot be 'favored' work; that is, work designed to accommodate an already debilitated miner." *Bowling v. Director, OWCP*, 920 F.2d 342, 344 (6th Cir. 1990).

Though the administrative law judge did not make a determination as to which job constituted claimant's most recent regular and substantial position, remand is not required as "no factual issues remain to be determined" and "[n]o further factual development is necessary." *See generally Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir.

2014). Instead, the already-established facts compel one plausible conclusion: claimant's career-spanning work as a roof bolter was his usual coal mine employment.

Claimant's employment history and reason for taking the light duty bathhouse position make the only alternative patently unreasonable. Indeed, the length of the positions alone is determinative. Claimant worked as a roof bolter for approximately the first twenty-seven and one half years (332 months) of his career and a bathhouse attendant for approximately the last nine months when he no longer physically could go underground. If a difference of under two years and the "short duration" of the second job justified the decision to use the prior position in *Brown*, it defies logic that a difference of over twenty six years and a similarly short duration for the second position somehow does not mandate a similar conclusion here. *Brown*, 8 BLR at 1-87. Moreover, claimant took the bathhouse position for the undisputed reason that he failed a physical and could no longer perform the roof bolter job. Hearing Transcript at 25-26 (testifying he began working as a bathhouse attendant because he could not "pass the physical to go underground" and his employer "gave [him] an easy job."). Ignoring claimant's nearly thirty years of hard labor in favor of a fleeting makeshift position thus would punish him for continuing to work in the only position he could and further encourage employers to transfer miners to similarly "favored" work at the end of their careers to avoid liability. *Bowling*, 920 F.2d at 344.[17]

Independently, substantial evidence supports the administrative law judge's determination that claimant switched positions, in part, because of a respiratory inability to perform the roof bolter position. *Pifer*, 8 BLR at 1-155. Contrary to employer's argument, claimant does not have to prove that a respiratory impairment, standing alone, prevented him from performing his prior job to qualify for the exception. Employer's Reply Brief at 4-5. That inquiry is relevant to determining whether a claimant is unable to perform his usual coal mine work, (and is thus disabled) -- not for the preliminary determination as to what his usual coal mine work is or was. 20 C.F.R. §718.204(b)(1). It follows that not all of the evidence relevant to that second inquiry needs to be considered at the first step -- and hence we need not remand to do so here -- as the majority mistakenly holds. *Id.*

Instead, administrative law judges have wide discretion on a case-by-case basis to determine a miner's usual coal mine employment, including whether the miner changed jobs because of a respiratory inability to perform his previous job. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218-19 (6th Cir. 1996); *Shortridge*, 4 BLR at 1-539. Here, the

[17] The exertional requirements of both positions are not in dispute: the roof bolter position required heavy manual labor; the bathhouse position required light labor. *See supra* n. 6; Decision and Order at 16-17.

administrative law judge acknowledged the vagueness of claimant's testimony on the reason he changed positions and then accurately summarized the medical evidence, highlighting some contemporaneous medical records, in coming to the conclusion claimant left the roof bolting position "in part" because of a respiratory inability to perform it. Decision and Order at 17-18. No more is required. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999) (if a reviewing court can discern what the administrative law judge did and why she did it, the duty of explanation under the APA is satisfied). And while that might not be the only acceptable conclusion on this record, I cannot say, nor has anyone articulated, why it is unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are incredible or patently unreasonable.").

JONATHAN ROLFE
Administrative Appeals Judge